

The Identity Crisis of International Criminal Law

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Abstract

The general narrative of international criminal law (ICL) declares that the system adheres in an exemplary manner to the fundamental principles of a liberal criminal justice system. Recent scholarship has increasingly questioned the adherence of various ICL doctrines to such principles. This article scrutinizes the discourse of ICL – the assumptions and forms of argumentation that are regarded as sound reasoning with appropriate liberal aims. This article argues that ICL, in drawing on national criminal law and international human rights law, absorbed contradictory assumptions and methods of reasoning. The article explores three modes by which the assumptions of human rights liberalism subtly undermine the criminal law liberalism to which the system aspires. These modes include interpretive approaches, substantive and structural conflation, and ideological assumptions. The identity crisis theory helps to explain how a system that strives to serve as a model for liberal criminal justice systems has come to embrace illiberal doctrines that contradict the system's fundamental principles.

Key words

command responsibility; human rights; humanitarian law; international criminal law; interpretation; joint criminal enterprise; legal reasoning; legality; strict construction

I. INTRODUCTION

Over the last fifteen years, thousands of international lawyers have successfully crafted an elaborate and operational system of international criminal law (ICL). This project drew on precepts of criminal law as well as international human rights and humanitarian law, with the last two areas providing essential normative content as well as a familiar framework for international oversight and intervention. This article argues that in drawing on these sources, ICL also absorbed contradictory assumptions and methods of reasoning, which manifest in internal contradictions, such as inadvertent contraventions of ICL's own principles. As the urgency of

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articulating a recognized set of rules recedes, the time is ripe for a deeper and more systematic examination of the tapestry that we have stitched together, so that ICL may develop as a distinct and coherent discipline.

The official narrative, and widespread understanding, is that ICL adheres to fundamental principles of criminal law, and that it does so in an exemplary manner.¹ These fundamental principles distinguish a liberal system of criminal justice from an authoritarian system. An authoritarian system may deal with individuals in any manner in order to pursue its aims, whereas a liberal system embraces restraints on its pursuit of societal aims out of respect for the autonomy of the individuals who may be subject to the system. Thus while the purpose of the criminal law system as a whole may be to protect society, some further deontological, or desert-based, justification is still required for a just application of punishment to a particular individual.² Treating individuals as subjects rather than objects for an object lesson, or as ‘ends’ rather than solely as ‘means’, imposes principled restraints on the infliction of punishment.³

This article will refer to three of these principles (hereafter ‘fundamental principles’), all of which are recognized by ICL. The first is the principle of personal culpability, namely that persons are held responsible only for their own conduct. ICL recognizes as ‘the foundation of criminal responsibility’ that ‘nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated’.⁴ The principle also requires sufficient knowledge and intent in relation to the conduct⁵ that we may find the person ‘personally reproachable’.⁶ A second is the principle of legality (*nullum crimen sine lege*), which requires that definitions not be applied retroactively and that they be strictly construed (*in dubio pro reo*, rule of lenity), in order to provide fair notice to individual actors and to constrain arbitrary exercise of coercive power.⁷ This principle is a ‘solid pillar’ without which ‘no criminalization process can be

1 See, e.g., United Nations Press Office, ‘Rome Statute of the International Criminal Court: Some Questions and Answers’, available at www.un.org/law/icc/statute/iccqanda.htm; T. Meron, ‘Revival of Customary Humanitarian Law’, (2005) 99 AJIL 817, at 821–9; I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’, (2002) 13 EJIL 561, at 567.

2 See, e.g., H. L. A. Hart, *Punishment and Responsibility* (1968), esp. at 3–12 and 74–82.

3 See, e.g., G. Fletcher, *Basic Concepts of Criminal Law* (1998), at 43.

4 *Prosecutor v. Tadić*, Judgement, Case No. IT-94–1-A, Appeals Chamber, 15 July 1999, at para. 186; see also ‘Judgment of the International Military Tribunal (Nuremberg)’ (*Nuremberg judgement*), (1947) 41 AJIL supplement 172, at 251: ‘criminal guilt is personal’.

5 See, e.g., *Prosecutor v. Delalić et al. (Čelebići)*, Judgement, Case No. IT-96–21-T, Trial Chamber II, 16 November 1998, at 424; A. Cassese, *International Criminal Law* (2003), at 136–7; ICC Statute, Arts. 30–33; G. Werle and F. Jessberger, ‘“Unless Otherwise Provided”: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law’, (2005) 3 *Journal of International Criminal Justice* 35.

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

7 ICC Statute, Art. 22; Čelebići, *supra* note 5, paras. 415–418; B. Broomhall, ‘Article 22, Nullum Crimen Sine Lege’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), at 450–1.

accomplished and recognized'.⁸ A third is the principle of 'fair labelling', which requires that the label of the offence should fairly express and signal the wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act.⁹ This article does not argue that ICL ought to adopt certain cherished principles from any national system; instead, it examines the assumptions and reasoning techniques that lead ICL into internal contradictions with its own declared principles.

Despite ICL's claim of exemplary adherence to these fundamental principles, recent scholarship has questioned this adherence in specific areas, most notably the doctrine of 'joint criminal enterprise'.¹⁰ As will be seen in the examples that follow, serious issues about ICL's compliance with its fundamental principles may also be found in many other doctrines, including sweeping modes of liability, expanding definitions of crimes, and reticence towards defences. This is the puzzle that prompts the present inquiry: how is it that a liberal system of criminal justice – one that strives to serve as a model for liberal systems – has come to embrace such illiberal doctrines?

Faced with evidence of frequent departures, one might be tempted to conclude that ICL is indifferent to liberal principles and is simply more harsh and punitive than national criminal law.¹¹ However, such an explanation misses the curious complexity of the phenomenon. Mainstream ICL does not reject fundamental principles, but rather sees itself as fully compliant, which suggests that more subtle distortions are at work. Moreover, ICL is scrupulously generous in the guarantee of procedural rights, and succeeds in upholding them even for the most unsavoury accused.¹² Thus we see a system that strives to respect both procedural rights and principles of substantive fairness, and which succeeds in the former but falls short in the latter. A theory is needed that will account for this curious anomaly.

This article suggests that part of the problem lies in normative assumptions transplanted from human rights and humanitarian law. Insightful glimpses into some specific elements of this phenomenon have previously been offered by George Fletcher

⁸ Čelebići, *supra* note 5, at para. 402.

⁹ See, e.g., *Prosecutor v. Kvočka*, Judgement, Appeals Chamber, Case No. IT-98-30/1-A, 28 February 2005, para. 92, emphasizing the difference between two forms of participation (commission versus accessory), 'both to accurately describe the crime and to fix an appropriate sentence'. See also *R. v. Finta* [1994] 1 SCR 701, at para. 188: 'there are certain crimes where, because of the special nature of the available penalties or of the stigma attached to a conviction, the principles of fundamental justice require a mental blameworthiness or a *mens rea* reflecting the particular nature of that crime. It follows that the question which must be answered is not simply whether the accused is morally innocent, but rather, whether the conduct is sufficiently blameworthy to merit the punishment and stigma that will ensue upon conviction for that particular offence.' See generally A. Ashworth, 'The Elasticity of Mens Rea', in C. F. H. Tapper (ed.), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981); G. Williams, 'Conviction and Fair Labelling', (1983) 42 *Cambridge Law Journal* 85.

¹⁰ See section 2.2.

¹¹ See, e.g., A.T. O'Reilly, 'Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice', (2004–5) 40 *Gonzaga Law Review* 127, at 154.

¹² See, e.g., *Prosecutor v. Milošević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Appeals Chamber, Case No. IT-02-54-AR73.7, 1 November 2004, para. 20.

and Jens David Ohlin¹³ and by Allison Marston Danner and Jenny Martinez.¹⁴ This article builds upon those insights to offer a more holistic account of observable tendencies in ICL discourse.

After decades of inactivity, ICL experienced explosive growth in the mid-1990s. This boom in institution building and norm articulation led to a sudden need for international criminal lawyers. As few such creatures existed, the vacuum was filled – at least at the outset – primarily by international lawyers with training or experience in the related fields of human rights and humanitarian law.¹⁵ Indeed, ICL was perceived and heralded as a major advance in human rights and humanitarian law, offering a valuable remedy and means of enforcement by punishing violators. ICL professionals eagerly adopted the forms and principles of criminal law; however, these were all understood through the lens of the normative assumptions from their native domains of expertise.

These early influences have left a continuing heritage, shaping the areas of myopia in ICL. For example, this theory is compatible with the dichotomy in respect for procedural rights and substantive principles. ICL is scrupulous and generous with due process and procedural rights, since such rights are deeply familiar to and internalized by human rights lawyers. On the other hand, principles of culpability, fair warning, and fair labelling are unknown to human rights and humanitarian law. Human rights and humanitarian law focus more simply on broad and liberal

13 G. Fletcher and J. D. Ohlin, 'Reclaiming Fundamental Principles in the Darfur Case', (2005) 3 *Journal of International Criminal Justice* 539, at 541, have suggested that ICL's weaknesses in respecting legality and culpability are a product of 'an under-theorized shift' from public international law (which focuses on states or groups) to criminal law (which focuses on the individual). However, their arguments somewhat overstate and oversimplify the problem, and the examples that buttressed their argument are problematic. For example, some of the authors' arguments revolve around the ICC definition of genocide. First, the authors argue that the definition fails to reflect that genocide may be perpetrated only by a collective (an ethnic group), which shows disregard for the principle of legality. However, their argument that genocide may only be committed by ethnic groups is legally unsubstantiated and theoretically unsupported (it is based on their 'intuition' and 'common sense'). Thus showing that standard definitions do not contain this novel requirement is not a convincing demonstration of disregard for legality. Second, they argue that the fact that the ICC definition subsumes isolated hate crimes (at 545–8) demonstrates a 'serious conceptual deficiency' in ICL. The authors appear to have overlooked that this very problem was specifically identified and addressed in the ICC Elements of Crimes: *Elements of Crimes, Introduction to Genocide*, Doc. ICC-ASP/1/3. Thus the critique based on ICL's alleged failure to detect this problem seems rather inopportune. The shortcomings of ICL seem to be less stark than Fletcher and Ohlin suggest. Nonetheless, the insight of Fletcher and Ohlin about a transition from international law to criminal law is significant. This article suggests that the shift in focus from *systems* to *individuals* is in fact only one example of the different approaches, consequences, and philosophical underpinnings of these areas of law. Moreover, by considering the transition not only from general international law but more specifically from international human rights and humanitarian law, one discerns an additional range of interpretive, structural, and ideological assumptions in play.

14 A. M. Danner and J. S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', (2005) 93 *California Law Review* 75, at 81–9, have suggested that a human rights approach to interpretation, favouring large and liberal constructions, is inapposite to ICL. This article agrees with that observation and supplements it by pointing out other modes – including substantive, structural, and ideological assumptions – by which human rights liberalism can undermine criminal law liberalism. Sensitivity to these other modes of distortion leads this article to discern additional contradictions with fundamental principles, for example in the doctrine of command responsibility, which was assessed favourably by Danner and Martinez.

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

construction to maximize protection for beneficiaries, and are not accustomed to the special moral restraints which arise when fixing guilt upon an individual actor.

As will be suggested below, the problem is not just unfamiliarity with these special moral restraints, but that the influence of assumptions of human rights and humanitarian law actively works at cross-purposes to fundamental criminal principles. This article will present three of the modes by which this distortion occurs. One mode is the influence of *interpretive approaches* from human rights and humanitarian law, such as victim-focused teleological reasoning, which not only undermines strict construction but also fosters sweeping interpretations that run afoul of culpability and fair labelling. The second mode is *substantive and structural conflation*—that is, the assumption that criminal norms must be coextensive with similar norms in human rights or humanitarian law, overlooking the different structure and consequences of these areas of law, and thus neglecting the special principles necessary for blame and punishment of individuals. A third mode will briefly be outlined, showing how *ideological assumptions* about progress and sovereignty can foster a preference for broader doctrines and a neglect of fundamental principles.

This article does not suggest that human rights and humanitarian law assumptions are the sole cause of departures from fundamental principles. Other influences may well be at play. For example, ICL deals with violations of exceptional magnitude and severity, and studies indicate that the more severe the crime, the greater the perceived pressure to convict and the greater the likelihood of perceiving an accused person as responsible for the crime.¹⁶ Another possible influence is the incentive of judges and professionals in an emerging field to demonstrate the efficacy of their field and to increase their influence and prestige by expanding the scope and role of ICL.¹⁷ Reputational incentives may also have a subtle impact; for example, the judge, practitioner, or scholar who espouses conviction-friendly interpretations can reliably expect to be applauded as progressive and compassionate by esteem-granting communities.¹⁸

Moreover, even in national systems, there are occasional excesses and controversial doctrines that are arguably incompatible with fundamental principles. Current efforts to respond to terrorism and organized crime, for example, have led national systems to adopt some laws that strain liberal principles. Nonetheless, what remains striking about ICL is the prevalence and extravagance of the departures.

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

17 S. Estreicher and P. B. Stephan, 'Foreword: Taking International Law Seriously', (2003) 44 *Virginia Journal of International Law* 1, at 1; M. Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', (2005) 105 *Columbia Law Review* 1751, at 1823; K. Rittich, 'Enchantments of Reason/Coercions of Law', 57 *University of Miami Law Review* 727, at 729; Wessel, *supra* note 15, at 420–1.

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

Furthermore, and much more importantly for present purposes, the discourse is different. When national laws strain principles, there is a vibrant debate and a sense that something has been sacrificed. In ICL there is little such discourse or even awareness of incongruity – instead, participants are applying what they believe to be sound legal methods with appropriately liberal aims.

Thus, even if other factors may be in play, the impact of human rights and humanitarian assumptions remains of particular interest because it offers not only a ‘why’ but also a ‘how’. Reliance on these assumptions and methods of argumentation is not only a cause of departures from fundamental principles, but it also furnishes the analytical steps by which such departures are effected and provides the legal plausibility that allows the departures to pass unnoticed. The object of inquiry of this article is the discourse itself: the assumptions that are made and the arguments that are regarded as sound arguments with appropriate liberal aims, and how these lead to contradictions with the liberal values to which the system supposedly adheres. This article argues that our favoured reasoning methods may contain distortions and hence that we need to *think about the way that we think*.

The identity crisis theory helps to explain why an overwhelmingly liberal-minded profession endorses startlingly illiberal doctrines and developments. In a typical criminal law context, liberal sensitivities focus on constraining the use of the state’s coercive power against individuals. In ICL, however, prosecution and conviction are often conceptualized as the fulfilment of the victims’ human right to a remedy.¹⁹ Such a conceptualization encourages reliance on human rights methodology and norms. This shift in conceptualization also shifts the preoccupation of participants in the system.²⁰ Many traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, are among the most strident pro-prosecution voices, arguing for broad definitions and modes of liability and for narrow defences, in order to secure convictions and thereby fulfil the victim’s right to justice.²¹ Whereas in a national system one may hear that it is preferable to let ten guilty persons go free rather than to convict one innocent person, the ICL literature seems to strike the balance rather differently, replete as it is with fears that defendants might ‘escape

19 See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 of 16 December 2005; J. M. van Dyke, ‘The Fundamental Human Right to Prosecution and Compensation’, (2001) 29 *Denver Journal of International Law and Policy* 77.

20 Even in a national system, the rhetoric of justice for victims can increase pressure within the system to overlook fairness to the accused: K. Roach, ‘Four Models of the Criminal Process’, (1999) 89 *Journal of Criminal Law and Criminology* 671. What is distinct about ICL is that there is not just an increased sensitivity to victims, but that we import an entire set of legal tools and normative assumptions from international human rights and humanitarian law, and apply them in the belief that they are appropriate legal techniques.

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

conviction' or 'escape accountability' unless inculpatory principles are broadened further and exculpatory principles narrowed.²²

Thus, in ICL, illiberal doctrines do not arrive in a classic authoritarian garb (e.g. that individual rights must be sacrificed to serve state or societal goals). Illiberal doctrines arrive in a liberal garb – that of human rights liberalism – and hence are readily accepted and absorbed into the system. Human rights liberalism and criminal law liberalism both arose to protect individuals from the state – in criminal law to protect the accused and potential accused from the criminal machinery, and in human rights to protect individual victims from various forms of state mistreatment. ICL practitioners apply the familiar and cherished assumptions and techniques of human rights liberalism, hence the extent to which such assumptions corrode criminal law liberalism when applied by a criminal law institution.²³ Thus, confidently maximizing the protection of victims in order to vindicate their rights may culminate in punishing individuals without fair warning, culpability, or fair labelling. In this way, human rights liberalism produces a criminal law system that is increasingly authoritarian in its disregard for constraining principles, and risks using the accused as an object in a didactic exercise rather than respecting autonomy and fairness.

The following sections will look at three modes by which assumptions of human rights liberalism distort ICL discourse: interpretive assumptions (section 2), substantive and structural conflation (section 3), and ideological assumptions (section 4). The article will use the doctrine of command responsibility as a recurring example under all three modes. As the following analysis may at times seem rather critical, some important qualifications are in order.

First, I by no means wish to suggest that ICL jurisprudence is uniformly flawed. The article provides examples to demonstrate tendencies that are common in ICL discourse. I do not suggest that the tendencies amount to an iron rule.²⁴ The observations are offered in the spirit of improving a relatively new discipline. Through

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

23 The traditional liberal position of protecting the individual from the state is altered in two ways in ICL: the victims are not being protected from the state per se but from *other individuals* (the accused or potential accused), and the accused needs protection not from the state but from the *international justice mechanism*. Thus advocates accustomed to championing the rights of the individual against the state now find themselves in the role of the state, a role which requires restraint in a liberal system.

24 Indeed there are some examples of judges taking a stance in favour of liberal principles; see, e.g., *Prosecutor v. Vasiljević*, Trial Chamber, Case No. IT-98-32-T, 29 November 2002, paras. 193–204 (a rather strict stand on the requirement of precision); *Prosecutor v. Simić*, Dissenting Opinion of Judge Lindholm, Trial Chamber, Case No. IT-95-9-T, 17 October 2003, paras. 1–5 (dissenting judge dissociating from JCE doctrine).

critical awareness of these heuristics and distortions, we may consciously determine the values and principles of the system and apply them consistently.

Second, the contradictions identified are a contingent phenomenon and not an immutable fatal flaw in the ICL project. The contradiction of simultaneous allegiance to incompatible liberalisms can be addressed by choosing one or the other or developing ICL's distinct philosophical underpinnings. The doctrinal contradictions can be unearthed and resolved by reforms that bring doctrines and principle into alignment. Indeed, insofar as some distortions arise from the normative assumptions of lawyers experienced in other domains, the phenomenon may already be diminishing somewhat as the composition of the ICL profession changes. While ICL in its earliest stages drew heavily from experts in human rights and humanitarian law,²⁵ there is now more emphasis on criminal law expertise, which may reduce the distortions caused by exogenous heuristics. However, demographics alone are unlikely to resolve the problem completely, given the extent to which assumptions and doctrines from neighbouring fields are already internalized into ICL, and given that ICL continues to draw content from those neighbouring fields. It therefore remains important to understand and expose the two competing liberalisms of ICL and its contradictory assumptions.

Finally, where the article exposes an internal contradiction, it should not be assumed that the author believes that the doctrine is wrong and the articulation of the principle is necessarily correct. The aim of this article is to expose some of ICL's internal contradictions with its own principles, and to examine the reasoning methods and assumptions that foster such contradictions. An evaluation of how best to resolve those contradictions – which would require *inter alia* a philosophical analysis of the merits of particular principles and doctrines – will be part of a much larger research project and will remain for future exploration. What is significant for present purposes is that ICL falls into contradictions with the promises it makes when it articulates its principles.

While ICL draws from human rights and humanitarian law on one hand and criminal law on the other hand, it cannot faithfully comply with the strictures of criminal and non-criminal law. The choice for ICL is either to bring itself into conformity with fundamental liberal principles or to abandon the claim that it conforms to them. Is ICL simply an enforcement arm of human rights and humanitarian law, adopting incarceration of violators as a new remedy available to victims? Or is it a system of criminal justice that respects the philosophical preconditions for the punishment and stigmatization of individuals? If the latter option is chosen,²⁶ then supporters of ICL must critically inspect the assumptions inherited from human rights law and shed those assumptions that do not comply with liberal criminal principles. A variation on, or complement to, this exercise would be to develop specific deontological justifications for particular adaptations of principles of national

²⁵ Wessel, *supra* note 15.

²⁶ The alternative of reconceptualizing ICL as a *sui generis* human rights enforcement regime which only roughly mimics criminal justice as it incarcerates offenders should probably be discarded on the grounds that it would seem contradictory to its own human rights values.

criminal law.²⁷ Whatever route may be chosen, it is hoped that this analysis will contribute to the discipline by (i) exposing the need for such a project, and (ii) engendering critical awareness of the reasoning techniques and assumptions that distort current ICL discourse, thereby fostering more sophisticated theoretical scrutiny of doctrines in future discourse.

2. INTERPRETIVE ASSUMPTIONS

2.1. Victim-focused teleological reasoning

ICL jurisprudence proclaims that it follows particularly stringent standards in interpreting definitions of crimes and inculpatory rules, applying only norms that are ‘clearly’ and ‘beyond doubt’ customary law.²⁸ ICL emphasizes its faithful adherence to the principle of strict construction, which provides that ambiguities are to be resolved in favour of the accused.²⁹ As the ICTY has held,

penal statutes must be strictly construed, this being a general rule which has stood the test of time . . . A criminal statute is one in which the legislature intends to have the final result of inflicting suffering upon, or encroaching upon the liberty of, the individual . . . [T]he intention to do so shall be clearly expressed and without ambiguity. The legislature will not allow such intention to be gathered from doubtful inferences from the words used . . . [I]f the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them.³⁰

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

It would seem that, notwithstanding these proclamations of principle, ICL is heavily influenced by the distinctively ‘liberal’, ‘broad’, ‘progressive’, and ‘dynamic’ approach to interpretation that is a hallmark of human rights law.³¹ While

27 This article emphasizes the need for ICL to examine its inheritance from human rights law if it is to fulfil its aspirations as an exemplary system of liberal criminal justice. Conversely, however, there is also scope to examine the national criminal law assumptions. Adherence to the liberal commitment need not entail mimicking the articulations of principles precisely as found in national laws.

28 See, e.g., *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 4, at para. 662; *Prosecutor v. Blaškić*, Judgement, Appeals Chamber, Case No. IT-95-14-A, 29 July 2004, para. 114; *Čelebići*, *supra* note 5, paras. 415–18.

29 ICC Statute, Art. 22(2).

30 *Čelebići*, *supra* note 5, paras. 408–10.

31 *A v. Australia*, Communication No. 560/1993, Views 3 April 1997, A/52/40 (Vol. II), Annex VI, sect. L (at 125–46) (‘broadly and expansively’). In the inter-American system, see, e.g., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 [1985] IACHR 2, Judge Rodolfo Piza, paras. 6 and 12 (‘necessity of a broad interpretation of the norms that it guarantees and a restrictive interpretation of those that allow them to be limited’); *Bámaca Velásquez Case* – Series C No. 70 [2000] IACHR 7, separate judgment of Judge Sergio García Márquez, para. 3 (‘progressive interpretation’, ‘guiding momentum of international human rights law, which strives to take the real protection of human rights increasingly further’). Similarly, the European Convention on Human Rights is not to be narrowly interpreted having regard to the sovereignty of states, but rather given a broad interpretation to protect rights effectively: Report of the Commission, 1 June 1973, ECHR Series B, No. 16, at 9; *East African Asians v. the United Kingdom*, [1973] ECHR 2 (14 December 1973), paras. 192–195.

purposive interpretation may be found in any area of law, human rights law features a distinctively progressive brand, on the grounds that it aims at increasing the protection of human dignity rather than reciprocal obligations undertaken by states.³² As ICL norms are often drawn from human rights or humanitarian law, practitioners can easily fall back on these familiar interpretive approaches,³³ and indeed ICL discourse frequently bears the fingerprints of the distinct interpretive approach of human rights.

Notwithstanding the general declarations offered by ICL, examination reveals that a technique commonly used in ICL is (i) to adopt a purposive interpretive approach; (ii) to assume that the exclusive object and purpose of an ICL enactment is to maximize victim protection; and (iii) to allow this presumed object and purpose to dominate over other considerations, including if necessary the text itself.³⁴ The principle of strict construction fails to constrain this technique because, as in many national systems, this principle is applied only as a final resort, after other 'canons of construction fail to solve' the question.³⁵ Applying, at a prior stage, a teleological approach that maximizes victim protection means that there is never an ambiguity left for strict construction to resolve,³⁶ because all ambiguities have already been resolved *against* the accused.

As a result, the promise of *in dubio pro reo*, which ICL holds out to accused, and which bolsters ICL's legitimacy, is in reality completely inverted, and the rule faced by the accused is closer to *in dubio contra reo*.³⁷

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- 32 '[S]ince the primary beneficiaries of human rights treaties are not States or governments but human beings, the protection of human rights calls for a more liberal approach than that normally applicable in the case of ambiguous provisions of multilateral treaties': *Keith Cox v. Canada*, Communication No. 539/1993, Views 31 October 1994, A/50/40, Vol. II, Annex X, sect. M, at 105–29 ((1994) *Human Rights Law Journal* 410); CCPR/C/57/1, at 117–47; see also the European and inter-American authorities, *supra* note 31.
- 33 See, e.g., *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, 25 January 2005, para. 494, applying an interpretive approach in which 'the rules on genocide should be construed in such a manner as to give them their maximum legal effects', which seems precisely opposite to strict construction.
- 34 In addition to the examples in this section, see also the partially dissenting opinion of Judge Shahabuddeen in *Prosecutor v. Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, Case No. IT-01-47-AR72, 16 July 2003, in which he argued that strict construction is applied only at the final stage, after other methods have been applied (para. 12); that the provision must first be interpreted by reference to object and purpose (paras. 11, 13, 23); and that the purpose is to ensure that crimes do not go unpunished (para. 24). Where his conclusions did not necessarily sit well with the actual texts, he argued that 'on their true interpretation' (i.e. in the light of object and purpose) the texts were 'not at variance with this conclusion', 'and if they are they do not prevail' (para. 18).
- 35 Čelebići, *supra* note 5, para. 413. For examples from the common law system see G. Williams, *Textbook of Criminal Law* (1983), 12; Note, 'The New Rule of Lenity', (2006) 119 *Harvard Law Review* 2420, at 2435–41; A. P. Simester and W. J. Brookbanks, *Principles of Criminal Law* (2002), at 35–6; *United States v. R.L.C.*, 503 US 291 (1992) at 305–6; *R. v. Hasselwander*, [1993] 2 SCR 398 (Canada).
- 36 W. Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals', in L. C. Vohrah et al. (eds.), *Man's Inhumanity to Man* (2003), at 886, finds that the principle has found 'virtually no place' in tribunal jurisprudence.
- 37 In many legal systems, the term *in dubio pro reo* is used only in relation to determinations of fact, whereas in some other systems the term is used for questions of both fact and law. It is as yet undecided how ICL uses the term – see e.g. *Prosecutor v. Limaj*, Judgment, Appeals Chamber, Case No. IT-03-66-A, 17 September 2007, Declarations of Judge Shahabuddeen and Judge Schomburg. In any event, the underlying principle of resolving doubt in favour of the accused (strict construction) clearly applies. I have used the term *in dubio pro reo* (or *contra reo*) in order to highlight the extent of the departure from venerated principles.

The first step in this process is the invocation of the interpretive method of the Vienna Convention on the Law of Treaties.³⁸ One could object that the Vienna Convention deals with interpretation of obligations undertaken between states rather than criminal prohibitions directed at individuals. Nonetheless, the application of the fairly self-evident factors listed in the Vienna Convention (textual, contextual, and purposive) is not necessarily problematic. The departure from strict construction arises when one presumed expansive purpose is allowed to prevail so decisively over text, context, and other purposes.

For example, the ICTY has often held that the purpose of the Geneva Conventions is to 'ensure the protection of civilians to the maximum extent possible',³⁹ and has used this proposition to prefer a 'less rigorous standard' in interpretation of its provisions.⁴⁰ However, it is doubtful that the Geneva Conventions can credibly be said to reflect such a singular purpose.⁴¹ If the Geneva Conventions had one sole purpose of 'maximizing' the protection of civilians, then they would contain only a single article, forbidding any use of force or violence that could affect civilians. Instead, the Geneva Conventions contain complex provisions, indicating a much more nuanced purpose of promoting civilian protection while balancing military effectiveness and state security.⁴² Thus interpretations that focus only on maximizing humanitarian protection systematically distort the balances struck in the law.

Victim-focused teleology in ICL can become so extended that it bears no relation to the actual text. For example, in *Čelebići* the Appeals Chamber held that

to maintain a distinction between the two legal regimes [international and internal armed conflicts] and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.⁴³

Even if we welcome the regulation of internal conflicts, this particular argument warrants scepticism. The Geneva Conventions contain over 300 articles regulating international armed conflict and only one short article on internal conflicts, which was adopted only after acrimonious debate.⁴⁴ The Conventions criminalize some violations in international conflicts but, pointedly, do not do so in internal conflicts. It strains credibility to suggest that the 'very purpose' of the Conventions logically compels an outcome so deeply contradicted by the actual terms of the Conventions.

38 Art. 31 of the Vienna Convention on the Law of Treaties provides that treaties shall be interpreted in good faith in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty. The latter aspect imports a purposive element.

39 See, e.g., *Prosecutor v. Aleksovski*, Judgement, Appeals Chamber, Case No. IT-95-14/1-A, 24 March 2000 para. 146; *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 4, para. 168.

40 *Prosecutor v. Aleksovski*, *supra* note 39, at para. 146.

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

42 *Ibid.*, at 32; L. C. Green, *The Contemporary Law of Armed Conflict* (2000), at 348.

43 *Prosecutor v. Delalić et al. (Čelebići)*, Judgement, Appeals Chamber, Case No. IT-96-21-A, 20 February 2001, para. 172.

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

At times the single-issue teleological method is applied in a manner that, in addition to being objectionable for the reasons above, is also a non sequitur. For example, in interpreting the definition of crimes against humanity and war crimes, the International Criminal Tribunal for the former Yugoslavia (ICTY) has held that the aim of the ICTY Statute is to ‘make all crimes against humanity punishable’⁴⁵ or ‘not to leave unpunished any person guilty of any [war crime]’.⁴⁶ Assuming *arguendo* that these propositions about the Statute’s purpose are correct, they shed no light whatsoever on the actual content of the definitions of crimes against humanity or war crimes. In other words, to assert that the Statute includes ‘all x’ still leaves unanswered the question of what ‘x’ entails – a question that must be answered by examining the text and the legal authorities. Nonetheless, reference to this purpose is often used in defining that content broadly.

Interestingly, in *Tadić* the prosecution attempted to use the ‘Statute includes all x’ technique to argue that there is no motive requirement for crimes against humanity, and the Appeals Chamber rejected the argument because it ‘begs the question . . . whether a crime committed for purely personal reasons is a crime against humanity’.⁴⁷ Yet, a few paragraphs later, the Appeals Chamber employed the very argument it had just held to be fallacious, in the course of its analysis of whether crimes against humanity require a discriminatory animus: ‘As rightly submitted by the Prosecution, the interpretation of Article 5 in the light of its object and purpose bears out the above propositions. The aim of those drafting the Statute was to make all crimes against humanity punishable.’⁴⁸

Turning to command responsibility (which will be used as a recurring example under all three modes), we find that victim-focused teleological reasoning is also prominent in the discourse on command responsibility. (Even the origins of the doctrine lie in victim-focused teleological reasoning; the doctrine was judicially created and applied in post-Second World War war crimes trials despite the absence of a provision in the Nuremberg and Tokyo Charters, after the *Yamashita* decision deduced the doctrine from the need to curb violations of the laws of war.⁴⁹)

45 *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 4, at para. 285.

46 *Prosecutor v. Tadić*, Decision on Defence Motion for Jurisdiction, Appeals Chamber, Case No. IT-94-I-A, 2 October 1995, para. 92; *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 4, paras. 189 and 253.

47 *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 4, para. 253 (emphasis in original). The issue was whether the crimes committed for personal motives cannot constitute crimes against humanity. The Appeals Chamber did in the end agree that motive is irrelevant, basing its conclusion on a review of authorities rather than object and purpose.

48 *Ibid.* The proposition that the Statute aims ‘to make all crimes against humanity punishable’ sheds no light on the question of whether the concept of a crime against humanity inherently requires a discriminatory animus.

49 In *Re Yamashita*, 327 US 1 (1946) (US SC), the majority derived the doctrine from the purpose of the laws of war, namely to protect civilians: ‘It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection’ (at 15). While these consequentialist observations make a compelling case for the *desirability* of a rule, they did not necessarily demonstrate that such a rule was *established* in ICL. The passionate dissents of Justices Murphy and Rutledge argued that the majority, in its pursuit of its teleological aims, had contravened the principles of legality and culpability: ‘In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed

To take a typical example from contemporary literature (and this example is representative rather than intended to single out any author), Greg Vetter offers a simple syllogism that is characteristic of much of ICL discourse.⁵⁰ First, to deter human rights abuses, potential perpetrators must perceive prosecution as a possible consequence of their actions.⁵¹ Second, some features of the command responsibility doctrine in the Rome Statute are 'less strict' than other instruments,⁵² because they set 'an easier standard for the accused to exonerate himself or herself'.⁵³ Therefore, the weaker standard is plainly 'undesirable' because it will not deter to the same extent;⁵⁴ it reduces the efficacy of the ICC because superiors will 'not be as fearful' of being convicted.⁵⁵ The syllogism demonstrates that if we look exclusively at maximizing protection of victims, then analysis of doctrines becomes a simple one-dimensional task of identifying the broadest, and hence best, articulations. What is typically missing from such analyses is introspection on fundamental principles and on whether conviction is appropriate in the circumstances. For example, Vetter demonstrated the concerns with the ICC Statute provisions by showing that persons who were convicted in the Tokyo tribunals might be acquitted under the ICC standard; for example, a superior might be acquitted if crimes were committed by persons not under her authority and control,⁵⁶ or a civilian manager might be exonerated for crimes committed by civilian employees while off duty and without her knowledge.⁵⁷ However, it was not shown that persons *ought* to be convicted in such circumstances; in the two examples given, conviction would seem to be an affront to the principle of personal culpability.⁵⁸

Even the most sophisticated scholars frequently base their analysis exclusively on increasing victim protection, squeezing out reflection on conformity to fundamental principles. While examples abound, I will draw them from two of the most respected leaders in the field, Roger Clark and Mark Osiel. Roger Clark has argued that (i) the laws of war aim to minimize loss of life; (ii) this is best served by a broad view of command responsibility; and, therefore, (iii) a negligence standard is more appropriate than an actual-knowledge standard, to respond to the humanitarian

a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. . . . The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge' (at 28).

50 Vetter, *supra* note 22. The article examined the bifurcation in the Rome Statute, which applies a stricter constructive knowledge standard for military commanders and a more generous standard for civilian superiors. The article concluded that the more generous standard leaves more room for exoneration of the accused and is therefore undesirable.

51 *Ibid.*, at 92.

52 *Ibid.*, at 93 and 103; similarly, Womack, *supra* note 22, at 167–8, concluded that a retributive, desert-based provision is 'undesirable' because commanders 'would not need to be as fearful of prosecution' and hence would monitor subordinates less closely, increasing the likelihood of crimes and thereby 'removing the utility' of the doctrine. This may be true, but leaves unanswered whether such a departure complies with fundamental principles.

53 *Ibid.*, at 120.

54 *Ibid.*, at 94.

55 *Ibid.*, at 103.

56 *Ibid.*, at 126.

57 *Ibid.*, at 127.

58 See section 3.2.

goals of the doctrine.⁵⁹ Mark Osiel has argued of the doctrine that ‘the scope of liability is formally overinclusive, but only in order to make up for severe practical dangers of underinclusiveness’.⁶⁰ Thus ‘the hope is that the threat of serious criminal liability for “mere” negligence will lead even the most reluctant commander (in order to protect himself) to take all reasonable measures to prevent war crimes by subordinates’.⁶¹ The arguments in question do not provide a desert-based account to justify such liability in accordance with the fundamental principles of ICL.

The problem with victim-focused teleological reasoning is that it conflates the ‘general justifying aim’ of the criminal law system as a whole – which may be a utilitarian aim of protecting society – with the question of whether it is justified to punish a particular individual for a particular crime.⁶² George Fletcher has drawn an analogy to a tax regime to demonstrate the problem: while the primary function of an income tax regime is to raise revenue, it does not follow that each decision to allow or disallow a given deduction should be resolved by reference to this overriding goal.⁶³ In a criminal justice system adhering to liberal principles, ‘society has no warrant to treat persons unjustly in its pursuit of utilitarian gains’.⁶⁴ Thus the aim of criminal law may be to protect society from individuals, but the pursuit of that goal is qualified by principled restraints to protect the individual from society.⁶⁵

This article does not suggest that teleological reasoning is per se inappropriate. It simply argues that victim-focused teleological reasoning has engendered contradiction with the fundamental principles that the system claims to uphold. In addition to the obvious contradiction with the principle of strict construction, victim-focused teleological reasoning can foster exuberant interpretations that overlook culpability and fair labelling, as will be seen in the following illustration.

2.2. Interpretive approaches and joint criminal enterprise

The doctrine of ‘joint criminal enterprise’ (JCE) is a judicial innovation which has grown to play a major role in the charges and convictions before the tribunals.⁶⁶ As articulated in tribunal jurisprudence, JCE requires a plurality of persons acting pursuant to a common plan, design, or purpose involving the commission of a crime, and that the accused participate in the common purpose.⁶⁷ The contribution

59 R. Clark, ‘Medina: An Essay on the Principles of Criminal Liability for Homicide’, (1975) 5 *Rutgers-Cambridge Law Journal* 59, at 74–8.

60 M. Osiel, *Obedying Orders: Atrocity, Military Discipline and the Law of War* (2002), at 193.

61 Ibid.

62 Hart, *supra* note 2, at 77–8. The latter question cannot be determined by utilitarian concerns alone, as otherwise there would be no principled limitations on liability. As Hart has shown, utilitarian responses to this objection – for example the disutility if it were learned that the innocent were punished – are contingent on outcomes and fail to capture our abhorrence.

63 G. Fletcher, *Rethinking Criminal Law* (1978), at 419.

64 D. Husak, *Philosophy of Criminal Law* (1987), at 51; Fletcher, *supra* note 63, at 511.

65 Hart, *supra* note 2, at 81.

66 H. van der Wilt, ‘JCE: Possibilities and Limitations’, (2007) 5 *Journal of International Criminal Justice* 91, at 92; N. Piacente, ‘Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy’, (2004) 2 *Journal of International Criminal Justice* 446; Danner and Martinez, *supra* note 14, esp. at 107–9.

67 *Prosecutor v. Vasiljević*, Judgement, Appeals Chamber, Case No. IT-98-32-A, 25 February 2004, at para. 100.

need not entail physical participation in any element of a crime.⁶⁸ The doctrine has three variations, with the ‘basic’ form being comparable with ‘co-perpetration’ or ‘common purpose’ as known in national systems,⁶⁹ while the ‘systemic’ form includes a contribution to a system of ill-treatment, and the ‘extended’ form includes crimes that were not intended but which were foreseeable.⁷⁰

The doctrine was initially welcomed as a valuable tool in securing convictions, but as the doctrine continued to develop through generous judicial interpretation, commentators have begun to question the doctrine’s conformity with fundamental principles.⁷¹ Some have argued that the expansiveness of the doctrine raises a prospect of ‘guilt by association’,⁷² and in some circles JCE has been wryly referred to as ‘just convict everyone’.⁷³ The *process* by which JCE was judicially introduced is problematic in terms of the principle of legality, as will be discussed below; in addition its *substance* is problematic in terms of culpability and fair labelling.

First, a negligible contribution can result in massive criminal liability. The accused need not perform any part of the *actus reus* of any crime;⁷⁴ the accused’s acts need only to contribute to a common design, and this contribution need not be ‘substantial’ nor even ‘significant’.⁷⁵ The rejection of ‘significant’ as a threshold logically entails that an *insignificant* contribution suffices for JCE.

Second, there are no legal limits on the scope of JCE,⁷⁶ so the resulting exposure to liability is vast. Initial justifications of JCE typically drew an analogy to contexts familiar to national law, such as a small group of criminals jointly planning a bank robbery.⁷⁷ As the doctrine has developed, it has been found to apply to atrocities

68 Ibid.; *Prosecutor v. Kvočka*, *supra* note 9, at para. 99; *Prosecutor v. Brđanin*, Judgement, Appeals Chamber, Case No. IT-99-36-A, 3 April 2007, at para. 427.

69 K. Hamdorf, ‘The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime’, (2007) 5 *Journal of International Criminal Justice* 208.

70 *Prosecutor v. Tadić*, *supra* note 4, at paras. 202, 204, 220 and 228; *Prosecutor v. Vasiljević*, *supra* note 67, at paras. 99–101.

71 See, e.g., Danner and Martinez, *supra* note 14; Osiel, *supra* note 17; V. Haan, ‘The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia’, (2005) 5 *International Criminal Law Review* 167; D. Nersessian, ‘Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes’, (2006) 30 *Fletcher Forum of World Affairs* 81; J. D. Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’, (2006) 5 *Journal of International Criminal Justice* 69; K. Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, (2007) 5 *Journal of International Criminal Justice* 159.

72 Danner and Martinez, *supra* note 14; Osiel, *supra* note 17, at 1751.

73 See, e.g., M. E. Badar, ‘Just Convict Everyone! Joint Perpetration from *Tadić* to *Stakic* and Back Again’, (2006) 6 *International Criminal Law Review* 293.

74 *Prosecutor v. Brđanin*, *supra* note 68, at para. 427; *Prosecutor v. Kvočka*, *supra* note 9, at para. 99.

75 *Prosecutor v. Vasiljević*, *supra* note 67, at para. 102; *Prosecutor v. Kvočka*, *supra* note 9, at 97 and 187. In *Prosecutor v. Brđanin*, *supra* note 68, at para. 430, the Appeals Chamber, in defending the JCE doctrine, suggested that the contribution ‘should’ be significant, relying on *Prosecutor v. Kvočka*, *supra* note 9, at 97. However, the quoted passage simply indicates that significance is a *factor* in determining *mens rea*. Any possible ambiguity of that passage is decisively clarified in para. 187 (quoted above), where the Appeals Chamber expressly rejected ‘significance’ as a requirement.

76 Danner and Martinez, *supra* note 14; M. Osiel, ‘Modes of Participation in Mass Atrocities’, (2005) 38 *Cornell International Law Journal* 793.

77 *Prosecutor v. Tadić*, *supra* note 4, at para. 199, n. 243; *Prosecutor v. Kvočka*, Judgement, Trial Chamber, Case No. IT-98-30/1, 2 November 2001, at para. 307.

across an entire region,⁷⁸ or even to a 'nationwide government-organized system',⁷⁹ or a 'vast criminal regime comprising thousands of participants',⁸⁰ in which the persons actually committing crimes are 'structurally or geographically remote from the accused'.⁸¹

Third, compounding these problems, the JCE doctrine deems the accused to have 'committed' the crimes, and indeed deems all members to be 'equally guilty of the crime regardless of the part played by each in its commission'.⁸² Thus the low-level individual making an insignificant contribution becomes liable as a perpetrator of all of the crimes in the JCE.

Fourth, the supposedly stringent requirement of 'common intent' which is claimed to justify such treatment and to make JCE tantamount to perpetration⁸³ has also been eroded through generous judicial interpretation. Decisions have found the common intent requirement to be satisfied by *dolus eventualis*, which means that a person intends a consequence, even if it is not her immediate aim, if she could foresee a substantial possibility of her course of action producing that outcome.⁸⁴ This relaxed requirement undermines the supposedly crucial distinction between contribution-plus-knowledge (required for mere aiding and abetting) and contribution-plus-intent (required for JCE).

The *Kvočka* case held that, under *dolus eventualis*, awareness of contribution to the 'everyday functioning and maintenance' of a system is also sufficient to establish the needed *mens rea*.⁸⁵ Evidence that a person sought to prevent colleagues from mistreating victims, feared the consequences of quitting, or was seen as a 'traitor' because of sympathies for victims, would not detract from 'knowledge' of contribution to 'everyday functioning and maintenance', and hence deemed 'intent', and hence deemed 'commission' of all crimes in the JCE.⁸⁶ In this way, the supposedly stringent intent requirement which justified the harshness of JCE in fact reduces to a knowledge requirement.⁸⁷

78 *Prosecutor v. Brđanin*, *supra* note 68, at para. 422.

79 *Prosecutor v. Ruwamakuba*, Decision on Interlocutory Appeal, Appeals Chamber, Case No. ICTR-98-44-AR72.4, 22 October 2004, at para. 25. See also *Prosecutor v. Karemera*, Decision on Jurisdictional Appeals, Appeals Chamber, Case No. ICTR-98-44-AR72.5, 12 April 2006, at paras. 11–18, holding that JCE may be of 'vast scope'.

80 *Prosecutor v. Kvočka*, *supra* note 77, at para. 307.

81 *Prosecutor v. Karemera*, *supra* note 79, at paras. 11–18. Haan, *supra* note 71, at 195–6, argues that while JCE was 'originally designed for cases where persons actually – and not only hypothetically – reach a common understanding to pursue a common criminal plan', it has been 'silently adjusted' to fit the cases before the tribunals, and now encompasses far-flung individuals who are not linked through agreements but through hierarchical structures.

82 *Prosecutor v. Vasiljević*, *supra* note 67, at para. 111. See also, e.g., *Prosecutor v. Stakić*, Judgement, Trial Chamber, Case No. IT-97-24, 31 July 2006, at para. 435; *Prosecutor v. Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, Case No. IT-99-37-AR72, 21 May 2003, para. 20.

83 *Prosecutor v. Tadić*, *supra* note 4, at para. 229; *Prosecutor v. Brđanin*, *supra* note 68, at 429; *Prosecutor v. Vasiljević*, *supra* note 67, at para. 102. 'Aiding and abetting' is an accessory form of liability, whereas 'JCE' is equated with perpetration of the offence.

84 See, e.g., *Prosecutor v. Stakić*, Judgement, Appeals Chamber, Case No. IT-97-24-A, 3 February 2007, at para. 97.

85 *Prosecutor v. Kvočka*, *supra* note 9, at paras. 105–106.

86 *Ibid.*, at paras. 103, 224, 242–245. The Appeals Chamber found that such factors may have shown a lack of enthusiasm but do not affect knowledge and hence intent. The arguments might be sound in relation to general intent but are alarming in a doctrine where massive liability hinges entirely on intent.

87 Ironically, as a result, JCE, which carries graver culpability than 'aiding and abetting', is more inclusive and easier to prove than aiding and abetting. Aiding and abetting requires a *substantial* contribution whereas JCE

An additional concern is that extended JCE is used to circumvent the special intent requirements that delineate particularly serious crimes. For example, as the Appeals Chamber has affirmed, ‘genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established.’⁸⁸ Nonetheless, in *Brđanin*, the Appeals Chamber held that a person can be convicted for ‘committing’ genocide via extended JCE, which requires only that it was *foreseeable* that others might commit genocide as a result of the common plan.⁸⁹ The Appeals Chamber held that JCE ‘is no different from other forms of criminal liability which do not require proof of intent to commit a crime’, such as aiding and abetting.⁹⁰ This argument overlooks that aiding and abetting makes a person an *accessory*, whereas JCE is a form of *committing* the crime. As a result, a person who was involved in a JCE to carry out unlawful deportations becomes a *génocidaire* if other participants start to commit genocide.⁹¹ The person still faces the stigma of a conviction for committing genocide, while having satisfied neither the *actus reus* nor the hitherto indispensable *mens rea* for genocide (in fact not even *awareness* of genocidal acts is required).

One might argue that prosecutorial discretion will avoid the most egregious abuses of the doctrine. However, use of over-broad doctrines with sanguine reliance on prosecutorial or judicial discretion to avoid abuses is inconsistent with the principles of legality and fair warning:⁹² ‘discretion is not a reliable substitute for getting the rule right in the first place’.⁹³ One might also argue that the problem of assigning equal culpability to different levels of participation can be ‘adequately dealt with at the sentencing stage’.⁹⁴ However, such a solution contravenes fair labelling by lumping together radically different levels of blameworthiness under one label.⁹⁵ More importantly, it contradicts the principle of culpability to convict a person for committing thousands of murders and then take into account at the sentencing stage that he did not really do any such thing.

includes insignificant contributions. Moreover, under extended JCE, not even knowledge is required. This internal incoherence raises further questions about JCE.

88 *Prosecutor v. Krstić*, Judgement, Appeals Chamber, Case No. IT-98-33-A, 19 April 2004, para. 131. See also e.g. Genocide Convention, Art. 2; ICTY Statute, Art. 4(2).

89 *Prosecutor v. Brđanin*, Decision on Interlocutory Appeal, Appeals Chamber, Case No. IT-99-36-A, 19 March 2004, at paras. 5–10. In *Prosecutor v. Karemera*, *supra* note 79, at paras. 11–18, the ICTR Appeals Chamber held that such liability holds even where crimes are committed by persons ‘structurally or geographically remote from the accused’.

90 *Brđanin*, *supra* note 89, at 7. See also *Prosecutor v. Milošević*, Decision on Motion for Acquittal, Trial Chamber, Case No. IT-54-02-T, 16 June 2004, at para. 291.

91 *Prosecutor v. Brđanin*, *supra* note 68.

92 *United States v. Reese*, 92 US 214 (1875), at 221: ‘It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained, and who should be set at large.’

93 Husak, *supra* note 64, at 138. Robinson warns that ‘[t]he criminal law theorist suffers a moral defect when he unnecessarily defers to administrative or judicial discretion to make the criminal law just’: P. Robinson, *Criminal Law Defences*, Vol. 1 (1984), ix. In the context of ICL, Kissinger, a critic of the project, is correct to argue that ‘[a]ny universal system should contain principles not only to punish the wicked but to constrain the righteous’: *supra* note 18, at 88.

94 *Prosecutor v. Brđanin*, *supra* note 68, at 432.

95 On such reasoning one could replace all international crimes and forms of liability with one finding of ‘felony’: Ohlin, *supra* note 71, at 87.

To summarize, JCE contradicts fundamental principles in several ways. A low-level individual making an insignificant and reluctant contribution can be deemed to be a ‘perpetrator’ of thousands of murders. It contradicts personal culpability to convict a person for ‘committing’ crimes when he or she satisfies neither the objective nor subjective elements of the offence.⁹⁶ The absence of correlation between the wrongdoing and the resulting stigma violates the principle of fair labelling.⁹⁷ Use of extended JCE to circumvent the special intent requirement of genocide is a further contravention of personal culpability and fair labelling, since the person is fixed with the enormous stigma of a conviction for committing genocide without satisfying any of the elements warranting that stigma.⁹⁸

The puzzle is, how did international tribunals composed of eminent jurists, and staffed by committed lawyers, come to embrace doctrines that are increasingly widely regarded as plainly contradictory to the fundamental principles proclaimed by the system itself? The jurisprudence does not present JCE as a necessary exception to fundamental principles, but rather as fully consistent with them. The doctrine came about through a series of analytical steps, each of which must have seemed convincing to the participants at the time.

To examine the methods of reasoning, we start with the *Tadić* case, which first developed the doctrine,⁹⁹ where we find that JCE was born out of victim-focused teleology, and specifically from the ‘Statute includes all x’ technique. In *Tadić* there was a particular charge for which the evidence did not support a conviction for commission or for aiding and abetting under Article 7(1). After acknowledging that Article 7(1) ‘sets out the parameters of personal criminal responsibility under the Statute’, and that it referred only to persons who ‘planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime’, the Appeals Chamber nonetheless held:

An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those ‘responsible for serious violations of international humanitarian law’ committed in the former Yugoslavia (Article 1) . . . Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically

96 Ambos, *supra* note 71, at 169; S. Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ (2004) 2 *Journal of International Criminal Justice* 606, at 611.

97 Fletcher and Ohlin, *supra* note 13, at 548–50; Ambos, *supra* note 71, esp. at 173.

98 See, e.g., Nersessian, *supra* note 71; A. Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, (2007) 5 *Journal of International Criminal Justice* 109, at 121; W. Schabas, *Genocide in International Law: The Crime of Crimes* (2000), at 305, 312; Danner and Martinez, *supra* note 14, at 151; G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), at 264–5. Conversely, E. van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’, (2007) 5 *Journal of International Criminal Justice* 184, concludes that JCE-III convictions for genocide are justifiable; however, this conclusion is predicated on the premise that JCE-III is a derivative form of liability. This premise is incorrect, since tribunal jurisprudence insists that JCE-III constitutes ‘commission’ of the offence, and indeed it must so insist because otherwise there is clearly no basis in the Statute (see above) – which would then lead to a breach of the principle of legality.

99 *Prosecutor v. Tadić*, *supra* note 4.

perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there.¹⁰⁰

Yet the text of the Statute did stop there.¹⁰¹ The method of reasoning, while fully consistent with the *effet utile* doctrine of areas such as human rights law, is disconcerting in a criminal law context. Normally in criminal law one determines whether an accused is criminally responsible by applying the applicable statute to the acts of the accused. The *Tadić* approach empowers the judges to read in additional terms to fulfil the imperative of ‘ensuring that no person responsible for serious violations goes unpunished’, which in turn assumes that judges are able to determine that persons are ‘responsible’ independently of the terms of the Statute. By developing the JCE doctrine to cover the situation at hand, the Appeals Chamber was able to replace an acquittal with a conviction for ‘commission’.¹⁰²

Using this interpretive method, the judges read in a ground of liability vastly broader than any appearing in the list. The approach falls remarkably far from the declared approach of strict construction, reliance on unambiguous terms, and rejection of doubtful inferences.

The same victim-focused teleological reasoning was pursued in subsequent cases as, issue by issue, chambers opted for the more progressive option. Thus decisions held that no agreement between participants is needed,¹⁰³ that a person’s contribution need not be significant,¹⁰⁴ that the physical perpetrators need not be part of the JCE,¹⁰⁵ that *dolus eventualis* suffices for the crucial mental element,¹⁰⁶ that the doctrine is not limited in scale and may include participants remote from each other,¹⁰⁷ and that JCE-III can be used to circumvent the special intent required for conviction for ‘committing’ genocide.¹⁰⁸ Through reliance on such reasoning techniques, a system that prides itself on its compliance with fundamental principles wound up amalgamating all of the most sweeping features of various national laws into a single all-encompassing doctrine divorced from culpability and fair labelling.

¹⁰⁰ Ibid., at paras. 189–190 (emphasis in original).

¹⁰¹ The chamber also argued that the JCE doctrine was implicit in the term ‘committed’. However, the glaring incongruity between the plain meaning of the term ‘committed’ and the JCE doctrine is so great that judges themselves occasionally forget this claim and lapse into describing ‘commission’ as requiring physical commission; see, e.g., *Prosecutor v. Vasiljević*, *supra* note 24, para. 62: ‘The Accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where it is proved that he personally physically perpetrated the criminal act in question or personally omitted to do something in violation of international humanitarian law.’

¹⁰² *Prosecutor v. Tadić*, *supra* note 4, paras. 178–184 and 23–34. The charge concerned the death of five men, where it was unknown who actually killed them. However, the accused had been involved in operations that rounded up the men, so the inference could be drawn that someone in that group had killed the men, and that Tadić shared in the common criminal intent.

¹⁰³ *Prosecutor v. Krnojelac*, Judgement, Appeals Chamber, Case No. IT-97-25-A, 17 September 2003, para. 97; *Prosecutor v. Kvočka*, *supra* note 9, para. 415.

¹⁰⁴ *Prosecutor v. Kvočka*, *supra* note 9, para. 187.

¹⁰⁵ Although the language in *Tadić* suggested that physical perpetrators must be part of the JCE, it was held that they need not be in *Prosecutor v. Brđanin*, *supra* note 68, para. 410.

¹⁰⁶ *Prosecutor v. Kvočka*, *supra* note 9, paras. 105–106.

¹⁰⁷ *Prosecutor v. Brđanin*, *supra* note 68, paras. 422–423.

¹⁰⁸ *Prosecutor v. Brđanin*, *supra* note 89, paras. 5–10.

2.3. Victim-focused teleological reasoning aggravated by utopian aspirations

The problem of victim-focused teleological reasoning is aggravated where ICL also becomes imbued with utopian aspirations.¹⁰⁹ For example, whereas national criminal law seeks to *manage* crime – by reducing or at least visibly responding to crimes – ICL appears to aim, more ambitiously, to *end* the crimes. For example, the UN Security Council resolutions creating the ICTY and ICTR refer to the determination ‘to put an end to such crimes’ and express confidence that the creation of tribunals ‘would enable this aim to be achieved and would contribute to the restoration and maintenance of peace’.¹¹⁰ This more urgent aspiration arguably creates greater pressure to be ruthless in the articulation of draconian norms.

The problem may be compounded further still by the grave disparity between the utopian aspirations and the dystopian realities faced by ICL. In other words, the severity and scale of the crimes and the extreme difficulty of securing arrests means that, once an accused is at trial, the desire is stronger to make a clear object lesson, and to serve the didactic function of ICL, in the desperate hope of trying to have a preventive impact in such chaotic situations. At times it seems that ICL seeks to offset its weakness on the ground through more draconian rules, or in other words, to overcompensate for *material weakness* through *normative harshness*.¹¹¹

To take an example from the literature, Professor Sherrie Russell-Brown starts from the ‘foundational precept . . . that the continuing commission of gender crimes in war must end’.¹¹² It is perhaps unsurprising that from a foundational precept of *ending* such crimes, she concludes that the already problematic doctrine of command responsibility must be rendered harsher still: ‘it is unacceptable to allow commanders to escape criminal responsibility for their subordinates’ gender crimes on the basis that the commanders lacked “knowledge”’.¹¹³ As will be discussed below,¹¹⁴ the doctrine already raises principled concerns in that a person may be convicted for a serious international crime without the commission, participation, contribution, or subjective *mens rea* that would normally be required for such crimes. The proposal to abolish the *mens rea* requirement altogether would doubtless facilitate convictions, but it would deviate even further from the principle of culpability. Thus admirable but utopian objectives such as eliminating crimes, which no criminal law system can achieve, are likely to generate calls for harsher and harsher rules, and thus promote a tendency away from principled restraints.

¹⁰⁹ See, e.g., J. R. Morss, ‘Saving Human Rights from Its Friends: A Critique of the Imaginary Justice of Costas Douzinas’, (2003) 27 *Melbourne University Law Review* 889, at 899 (‘the future-oriented and utopian character of human rights aspirations’); see also e.g. J. W. Nickel, ‘Are Human Rights Utopian?’ (1982) 11 *Philosophy and Public Affairs* 246; C. Douzinas, ‘Human Rights and Postmodern Utopia’, (2000) 11 *Law and Critique* 219.

¹¹⁰ See, e.g., UN Security Council Resolution 827 (1993), Preamble, paras. 5 and 6; UN Security Council Resolution 955 (1994), paras. 6 and 7.

¹¹¹ In a similar vein, Tallgren has argued that, given the enormity of crimes and the improbability of punishment, a purely utilitarian theory would require punishment so severe that the system would face difficulties in making the treatment compatible with its generally enlightened ideas: Tallgren, *supra* note 1, at 576. Wessel argues that, when confronted with such severe crimes, ‘the “imperious immediacy of interest” in conviction can exclude considerations of more systemic consequences’. Wessel, *supra* note 15, at 441.

¹¹² Russell-Brown, *supra* note 22, at 158.

¹¹³ *Ibid.*

¹¹⁴ Section 3.2.

To take an example from the case law, consider the *Erdemović* case.¹¹⁵ In *Erdemović*, the majority concluded that duress may never be raised as a defence in relation to killing of civilians.¹¹⁶ The decision has been criticized by some commentators for lacking sensitivity to fundamental principles,¹¹⁷ departing from previous ICL pronouncements on the role of moral choice,¹¹⁸ and disregarding the fact that the only way for Erdemović to be innocent was to be dead.¹¹⁹ What is of interest for present purposes, however, is not whether the decision was correct or incorrect, but, rather, how the majority framed the issue and hence sidestepped the deontological discussion.

Neither the Statute nor customary law resolved the availability of a duress defence, and examination of national legal systems revealed that civil law and common law systems took different approaches. Such a clear stalemate in the sources of law presented an archetypal opportunity to apply the principle of lenity which ICL purports to follow, and to adopt the interpretation favourable to the accused.

Instead, however, the majority opted to fill the gap by reasoning teleologically from the mandate granted by the Security Council, which was to “halt and effectively redress” the widespread and flagrant violations of international humanitarian law occurring in the territory of the former Yugoslavia and to contribute thereby to the restoration and maintenance of peace’.¹²⁰ By focusing on this onerous responsibility of ‘halting’ violations, the majority could only favour sending a strong message:

We would assert an absolute moral postulate which is clear and unmistakable for the implementation of international humanitarian law . . .¹²¹ We do so having regard to our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined.¹²²

¹¹⁵ *Prosecutor v. Erdemović*, Judgement, Appeals Chamber, Case No. IT-96-22-A, 7 October 1997. Erdemović, a young Croatian, had enlisted in a non-combat unit of the Bosnian army which was not known for committing crimes. One day his unit was sent to a farm, where they were informed on arrival that they were to shoot Muslim civilians. Erdemović vehemently objected to his commander, and was told: ‘If you are sorry for them, stand up, line up with them and we will kill you too’. Faced with the harsh alternative of losing his life for no gain in saved lives, and concerned for his wife and infant son, Erdemović complied. For reasons of conscience, he reported his own crime and pleaded guilty; the case against him was based on his own confession.

¹¹⁶ *Ibid.*, at para. 19. Judges Cassese and Stephens dissented.

¹¹⁷ R. E. Brooks, ‘Law in the Heart of Darkness: Atrocity and Duress’, (2003) *Virginia Journal of International Law* 861; I. R. Wall, ‘Duress, International Criminal Law and Literature’, (2006) 4 *Journal of International Criminal Justice* 724; A. Fichtelberg, ‘Liberal Values in International Criminal Law: A Critique of *Erdemović*’, (2008) 6 *Journal of International Criminal Justice* 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.

¹¹⁸ See, e.g., *Einsatzgruppen* case, *supra* note 6, at 470: ‘there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns’. See also *Nuremberg* judgment, *supra* note 4, at 251 (moral choice test).

¹¹⁹ Brooks, *supra* note 117, at 868.

¹²⁰ *Prosecutor v. Erdemović*, Separate Opinion of Judges McDonald and Vohrah, para. 75. The majority held that where there is ambiguity or uncertainty, a policy-directed choice can be made (para. 78), to serve the ‘broader normative purposes’ of ICL, which means ‘the protection of the weak and vulnerable’ (para. 75).

¹²¹ *Ibid.*, at 84. Similarly, Judge Li, concurring on this point, held that (i) the aim of humanitarian law is to protect innocent civilians; (ii) admitting duress would encourage subordinates to kill instead of deterring them; (iii) therefore, such an ‘anti-human policy’ cannot be adopted. *Prosecutor v. Erdemović*, Separate and Partially Dissenting Opinion of Judge Li, para. 8.

¹²² *Prosecutor v. Erdemović*, *supra* note 115, at 88.

The adopted aim of ‘halting’ crimes was one which only the harshest measures could hope to satisfy. Hence the chamber focused on the need to send a clear message, but overlooked whether the system’s principles allowed it to use Dražen Erdemović to send that message. In other words, the majority focused not on what Erdemović did but rather on what others might do in the future.¹²³ It was through this process of reasoning that a system which claims that it only deals with the ‘worst of the worst’, the ‘persons most responsible’ for the most serious crimes, was transformed into a ‘criminal law that could be obeyed only by exceptional individuals’.¹²⁴

In conclusion, the cognitive dissonance arising from ICL’s simultaneous allegiance to human rights liberalism and criminal law liberalism, and hence two contradictory interpretive approaches, reveals itself in curious ways. For example, at the same time that the ICTY insists that it scrupulously applies only rules that are ‘beyond any doubt customary international law’,¹²⁵ it also takes credit for having ‘expanded the boundaries of international humanitarian and international criminal law’.¹²⁶ Whichever interpretive approach one may prefer, one must recognize that this is an overt contradiction: the Tribunal cannot both apply the law strictly as it was *and* expand it. Such contradictions are the products of the conflicting normative assumptions simultaneously inhabiting ICL. While criminal law principles forbid the judicial expansion of norms, human rights and humanitarian law assumptions lead us to embrace and to celebrate that very expansion. Contradictorily, we both *laud* and *deny* the expansions – a product of the two incompatible liberalisms at the heart of ICL.

3. SUBSTANTIVE AND STRUCTURAL CONFLATION

3.1. Substantive and structural conflation in ICL discourse

The assumptions of human rights and humanitarian lawyers can also distort ICL reasoning through substantive and structural conflation. Many of the prohibitions of ICL are drawn from, and similar to, prohibitions in human rights and humanitarian law. Faced with familiar-looking provisions, ICL practitioners often assume that the ICL norms are coextensive with their human rights or humanitarian law counterparts, and uncritically transplant concepts and jurisprudence from other domains to flesh out their content. Such assumptions overlook the fact that these bodies of law have different purposes and consequences and thus entail different philosophical commitments.

Human rights law and humanitarian law apply to collective entities – states or parties to conflict. They focus on systems, seeking to improve the practices of states (or parties to conflict) in order to advance protection of and respect for identified beneficiaries. The remedies in each area of law are roughly comparable

¹²³ Fichtelberg, *supra* note 117, at 4.

¹²⁴ Tallgren, *supra* note 1, at 573.

¹²⁵ See, e.g., *Prosecutor v. Tadić*, *supra* note 4, para. 662; *Prosecutor v. Blaškić*, *supra* note 28, at para. 114; *Čelebići*, *supra* note 5, at paras. 415–418.

¹²⁶ ‘Bringing Justice to the Former Yugoslavia: The Tribunal’s Core Achievements’, www.un.org/icty/glance-e/index.htm.

to civil remedies, such as a cessation of the conduct, an apology, an undertaking of non-repetition, and possibly compensation or other efforts to restore the *status quo ante*.¹²⁷

The primary focus of ICL, on the other hand, is on the culpability of individuals. Furthermore, while many or most of its prohibitions are rooted in human rights or humanitarian law, and are intended to reinforce those rules, the scope of ICL is much narrower: it addresses only the most serious crimes of concern to the international community as a whole.¹²⁸ Moreover, ICL is enforced through a particularly robust method – the arrest, stigmatization, punishment, and imprisonment of individual human beings found responsible for crimes. As a result, ICL features several additional restraining principles that are unknown in other legal domains, such as fair warning, culpability, and fair labelling.

Two closely related features are at work: (i) an assumption that the norms must have the same substantive content when transplanting them from other domains, and (ii) reliance on structural assumptions from human rights and humanitarian law when reasoning about the norms (for example, focusing on improving systems rather than on culpability of individuals). Substantive conflation is arguably a product of structural assumptions, since the structural assumptions blind participants to the changed context and hence the need for fresh scrutiny if rules are to be applied to individuals rather than to systems.

There are two variations of this substantive and structural conflation. The crude form is the assumption that, because a prohibition is recognized in human rights or humanitarian law, it therefore must be (or ought to be) criminalized in ICL as well.¹²⁹ Such arguments tend to overlook questions of legality and personal culpability and whether criminal law is the appropriate tool to deal with the problem.¹³⁰

127 Moreover, as has previously been observed by Danner and Martinez, human rights law uses comparatively gentle methods of enforcement or persuasion, addresses broad social phenomena, and includes aspirational norms; Danner and Martinez, *supra* note 14, at 86–9.

128 ICC Statute, Art. 1.

129 See, e.g., E. Davidson, 'Economic Oppression as an International Wrong and a Crime against Humanity', (2005) 23 *Netherlands Quarterly of Human Rights* 173, arguing for the use of crimes against humanity to punish those responsible for IMF structural adjustment programmes, UN-mandated economic sanctions, failure to offer humanitarian assistance, and for 'gross negligence in eradicating extreme poverty'. One may agree as to the need to prevent the imposition of economic suffering, and even that such decisions violate economic and social rights. However, the author fails to demonstrate that criminal law is an appropriate or permissible manner in which to bring about UN or IMF reform or to encourage greater generosity. Similarly M. Møllman, 'Who Can Be Held Responsible for the Consequences of Aid and Loan Conditionalities: The Global Gag Rule in Peru and Its Criminal Consequences', Michigan State University's Women and International Development Program, Working Paper #29, 2004, at 12 (available at www.isp.msu.edu/wid/), describes the hardships imposed by the US policy of not contributing to organizations that condone abortion and argues for criminalization. Møllman persuasively demonstrates that the US policy is unwise and deplorable, and probably a violation of health and autonomy rights, but it does not follow, however, that one can criminalize the choices of the United States as to to whom it gives its money, nor is it clear how to localize personal guilt. A more modest form is the commonly seen suggestion that 'there is widespread recognition that every violation of the law of war is a war crime': see, e.g., J. J. Paust, 'Content and Contours of Genocide, Crimes against Humanity, and War Crimes', in S. Yee and W. Tieya, *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001). However, given that the laws of war contain detailed regulations concerning, for example, waterproofing of identity cards, it is implausible to claim that every violation of the law of war constitutes a war crime.

130 See discussion, *ibid*.

The more subtle, and more interesting, variation occurs with respect to those norms that are indisputably recognized as criminalized in ICL, and which are drawn from human rights law or humanitarian law. Where an ICL prohibition is drawn from another area of law, it is understandable to assume that the norms have the same scope as they have in their original domain. Through the resulting unreflective transplantation or mimicry of human rights or humanitarian law norms, norms are absorbed into criminal law without awareness that they may be novel to criminal law and hence without scrutiny as to whether they comply with the fundamental principles peculiar to criminal law.

As an illustration, consider Common Article 3 to the Geneva Conventions, which requires that, before any sentencing of protected persons, a party must provide a trial affording 'all indispensable judicial guarantees'.¹³¹ A significant number of guarantees have been identified as 'indispensable'.¹³² Assume that a judge has made a ruling that an accused was too disruptive to remain in the courtroom, but in hindsight the judge is found to have applied the standard erroneously. It would follow that (i) the error breached the guarantee of the right to be present; (ii) the breach, although it may be minor and inadvertent, is nonetheless a breach; (iii) a breach of even one guarantee constitutes a failure to provide 'all' guarantees; and therefore (iv) the error would violate Common Article 3 and hence quite rightly require an appropriate *humanitarian law* remedy, which might include a reform, a new trial, an apology, or compensation.¹³³

Common Article 3 is recognized in ICL as a fundamental provision of IHL, such that its violation also gives rise to individual criminal responsibility for war crimes.¹³⁴ However, if an identical standard were applied in ICL, as authorities assume,¹³⁵ then by the same chain of reasoning as above it would follow that the breach of even one guarantee not only violates Common Article 3 but also constitutes a war crime. On a literal application of the provision and established ICL principles, both the *actus reus* and *mens rea* would easily be established.¹³⁶ Thus the judge would be liable to imprisonment as a war criminal, since he or she sentenced a protected person without a trial respecting *all* guarantees.

However, even in the most advanced legal systems of the world, trial judges are frequently found to have breached a right, and new trials are granted; we do not imprison the erring judge. Thus, although Common Article 3 has been incorporated directly into ICL, it surely requires some form of translation so that

¹³¹ Common Art. 3 to the Geneva Conventions.

¹³² See, e.g., W. Fenrick, 'Article 8, War Crimes', in Triffterer, *supra* note 7, at 184; Y. Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 861–90.

¹³³ See, e.g., AP I, Arts. 89–91 on remedies.

¹³⁴ ICC Statute, Art. 8(2)(c); ICTR Statute Art. 4; Special Court for Sierra Leone Statute, Art. 3; *Prosecutor v. Tadić*, *supra* note 46, at para. 134.

¹³⁵ Common Art. 3 is recognized as so fundamental that 'violations of . . . Common Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute': see, e.g., *Prosecutor v. Blaškić*, Judgement, Trial Chamber, Case No. IT-95-14-T, 3 March 2000, para. 176.

¹³⁶ ICC Statute, Art. 30. The judge's failure to realize that he was depriving a person of a right would provide no excuse, since 'a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility': ICC Statute, Art. 32(2).

it is correctly focused on criminally blameworthy conduct rather than judicial errors.

Examples of assumptions of coextensiveness which fail to reflect on the need to translate norms to satisfy criminal law principles are readily found in ICL discourse; we shall take one example from literature and one example from jurisprudence.

For an example from literature, a thoughtful scholar in a leading commentary on the ICC Statute has voiced concern about a *mens rea* requirement inserted into the ICC Elements of Crimes for the crime of enforced disappearance.¹³⁷ The Elements indicate that a person denying the fact of detentions also commits enforced disappearance, but require that the person have awareness of such detentions.¹³⁸ This objection appears to be a typical illustration of a conflation with human rights. In human rights law, the knowledge of the individual denying the detention is irrelevant, because the focus is on the system as a whole and its impact on the victim. In ICL, however, the focus is on the criminal culpability of the accused individual. If, for example, a bureaucrat fails to acknowledge a detention when he or she in fact has no awareness of such detentions, then the conduct amounts to truth-telling rather than a crime. Thus assumptions that norms from other domains should be replicated exactly as found can lead to overlooking fundamental principles of criminal liability.

For an example from case law, we may turn to our recurring example of the command responsibility doctrine.

3.2. Illustration: command responsibility and conflation

Whereas the JCE doctrine has begun to attract criticism for transgressing fundamental principles, the command responsibility doctrine has received a much warmer reception. For example, Danner and Martinez, after leading the charge against JCE for its deviations from fundamental principles, concluded that ‘in contrast to JCE, command responsibility doctrine does not call for significant doctrinal reform’.¹³⁹ Similarly, Mark Osiel, while condemning JCE as too inclusive, found in contrast that it was ‘too hard to find people liable under command responsibility’.¹⁴⁰ However, while command responsibility may not transgress principles as flamboyantly as JCE, the doctrine does raise its own questions in terms of culpability and fair labelling.¹⁴¹

The command responsibility doctrine imposes liability where (i) there is a superior–subordinate relationship; (ii) the superior knew or had reason to know that a subordinate was about to commit crimes or had done so; and (iii) the

¹³⁷ L. N. Sadat, *The ICC and the Transformation of International Law: Justice for the New Millennium* (2002), at 140–1.

¹³⁸ Elements of Crimes, Doc. ICC-ASP/1/3, Art. 7(1)(i).

¹³⁹ Danner and Martinez, *supra* note 14, at 151.

¹⁴⁰ Osiel, *supra* note 76, at 793.

¹⁴¹ While the majority of the literature simply reports the doctrinal developments or proposes further expansion, there are some critical articles: Damaska, *supra* note 15; O'Reilly, *supra* note 11; Nersessian, *supra* note 71.

superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁴²

The command responsibility doctrine allows conviction for a serious international crime committed by another person, on the basis of an omission, a 'had reason to know' standard, and without any causal contribution to or impact on the crime. The doctrine entails several significant shortcuts in imputing liability, which, under a liberal system of criminal justice committed to fundamental principles, would require careful attention and justification.¹⁴³ In the absence of a distinct crime of 'breach of command responsibility',¹⁴⁴ command responsibility can only be justified as a mode of liability, based on personal culpability and fair labelling, if it is to avoid accusations of 'vicarious liability'¹⁴⁵ and incompatibility with the principle of culpability.¹⁴⁶

This article will focus on the problem of causal contribution. While some concerns have been raised about the omission standard¹⁴⁷ and the 'had reason to know' *mens rea* standard,¹⁴⁸ this article will assume that principled justifications of these features may be possible (although it remains significant that principled justifications have never been offered or considered necessary in ICL).

The problem of causal contribution arises where command responsibility is based solely on a 'failure to punish' after the fact, rather than any 'failure to prevent'. Under Tribunal jurisprudence on command responsibility, a person may be convicted for an international crime based solely on a failure to punish another person for the crime, even if no fault or failing of the commander contributed to the crime, and even if the failure to punish did not contribute to any subsequent crime. It is obvious from an efficacy perspective that the threat of labelling the commander as a *génocidaire* may strengthen the incentive to punish diligently. But does it accord with the fundamental principles that ICL proclaims?

The principle of culpability has been declared the 'foundation of criminal responsibility' in Tribunal jurisprudence,¹⁴⁹ which found it to be 'firmly established' that 'for the accused to be criminally culpable his conduct must have been proved,

¹⁴² *Prosecutor v. Kordić and Čerkez*, Judgement, Appeals Chamber, Case No. IT-95-14/2-A, 17 December 2004, at para. 839.

¹⁴³ See, e.g., P. Robinson, 'Imputed Criminal Liability', (1984) 93 *Yale Law Journal* 609.

¹⁴⁴ Such an approach was adopted for example in Canada and in Germany: see Crimes against Humanity and War Crimes Act, S.C. 2000, c. 24, ss. 5 and 7 (Canada); Code of Crimes under International Law (Gesetz zur Einführung des Völkerstrafgesetzbuch), *Federal Law Gazette of the Federal Republic of Germany* (Bundesgesetzblatt), I 2002, at 2254 ff. (Germany). Statutes of international tribunals list command responsibility along with the modes of liability, rather than as a separate offence.

¹⁴⁵ See, e.g., Damaska, *supra* note 15, at 456.

¹⁴⁶ 'It is not a point to be disputed but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases; they must each answer for their own acts and stand or fall by their own behaviour.' *R. v. Huggins* (1730) 2 Str 883, at 888; 93 ER 915, at 917 (UK); A. P. Simester and G. R. Sullivan, *Criminal Law Theory and Doctrine* (2003), at 194; G. Fletcher, 'Complicity', (1996) 30 *Israel Law Review* 140, at 144.

¹⁴⁷ See, e.g., O'Reilly, *supra* note 11, at 128 and 147–9.

¹⁴⁸ A. Ching, 'Evolution of the Command Responsibility Doctrine in Light of the *Čelebići* Decision of the International Criminal Tribunal for the Former Yugoslavia', (1999–2000) 25 *North Carolina Journal of International Law and Commercial Regulation* 167, at 204. See also Nersessian, *supra* note 71, at 94; Damaska, *supra* note 15, at 464.

¹⁴⁹ *Prosecutor v. Tadić*, *supra* note 4.

beyond a reasonable doubt, to have contributed to, or have had an effect on, the commission of the crime'.¹⁵⁰ Every other form of liability in Tribunal jurisprudence requires a 'contribution' to the crime for which the person is charged.¹⁵¹ This comports with the 'central role' of causal contribution in the principle of culpability.¹⁵² Similarly, Dressler argues that causal contribution is 'the instrument we employ to ensure that responsibility is personal'.¹⁵³ Husak discards 'punishment of a person for a result to which he did not contribute in any way' as a 'monstrosity', raising it only as a hypothetical example of a 'most flagrant violation of the causal principle'.¹⁵⁴ Most writings on the topic confirm the centrality of causation.¹⁵⁵

The command responsibility doctrine does not comply with this principle, since a person may be convicted for an international crime without contributing to the crime or having any effect on it. Even if we agree that failure to punish crimes is worthy of criminalization, it is simply inaccurate to label such a failure as 'genocide'.

The main line of defence within ICL discourse is to *deny* that the doctrine holds the commander responsible for the underlying crimes. For example, Judge Shahabuddeen has argued that 'reading the provision reasonably, it could not have been designed to make the superior a party'.¹⁵⁶ In a similar vein, the Appeals Chamber declared in *Krnjelac* that '[i]t cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control'.¹⁵⁷ Commentators have faithfully echoed this assertion.¹⁵⁸ At first glance, these assertions seem reassuring: if, for example, the commander were convicted not for genocide but for 'failure to exercise control', then he would be convicted

150 *Prosecutor v. Kayishema*, Judgement and Sentence, Trial Chamber, Case No. ICTR-95-1-T, 21 May 1999, at para. 199. See also *Prosecutor v. Orić*, Judgement, Trial Chamber II, Case No. IT-03-68-T, 30 June 2006, at para. 280: 'Rendering a substantial contribution to the commission of a crime is a feature which is common to all forms of participation.' It suffices that such contribution 'make performance of the crime possible or at least easier' or further or at least facilitate the crimes (*Prosecutor v. Orić*, para. 282) or 'enable operations to run more smoothly or without disruption' (*Prosecutor v. Kvočka*, *supra* note 9, para. 309).

151 See, e.g., *Prosecutor v. Kordić and Čerkez*, *supra* note 142, at para. 26 (planning); para. 27 (instigation); *Prosecutor v. Strugar*, Judgement, Trial Chamber, Case No. IT-01-42-T, 31 January 2005, at para. 332 (ordering); *Prosecutor v. Blaškić*, *supra* note 28, para. 45 (aiding and abetting). Even the problematic JCE requires a contribution; see section 2.2.

152 The 'central place assumed by the principle of causation in criminal law' was acknowledged even in *Čelebići*, *supra* note 5, at para. 398, but was then neglected without qualms on the grounds that past cases and instruments seemed not to require it.

153 J. Dressler, 'Re-assessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem', (1985) 37 *Hastings Law Journal* 91, at 103. Dressler argues that causation helps to ensure that those who are legally blameworthy get their retributively deserved punishment (at 107).

154 Husak, *supra* note 64, at 16.

155 Simester and Sullivan, *supra* note 146, at 194, note that conviction for a crime to which one has not contributed and for which one is not at fault would be problematic, especially in the context of stigmatic crimes. Ashworth, *supra* note 9, at 415, argues that it is required at least that the accomplice's conduct 'might have helped' or 'might have made a difference'. See also H. L. A. Hart and T. Honore, *Causation in the Law* (1985), at 125; S. Kadish, *Blame and Punishment* (1987), at 162.

156 *Prosecutor v. Hadžihasanović*, *supra* note 34 (Partial Dissenting Opinion of Judge Shahabuddeen), para. 32.

157 *Prosecutor v. Krnjelac*, *supra* note 103, para. 171. See also *Prosecutor v. Aleksovski*, Trial Chamber, Case No. IT-95-14/1-T, 25 June 1999, para 72: 'superior responsibility . . . must not be seen as responsibility for the act of another person'.

158 For example Mettraux, *supra* note 98, at 297; Fox, *supra* note 22, at 491. The position is doubted, however, in C. Greenwood, 'Command Responsibility and the *Hadžihasanović* Decision', (2004) 2 *Journal of International Criminal Justice* 598, at 608.

for his own misconduct, removing the 'fair labelling' or culpability problems as well as need to justify command responsibility as a mode of liability for the acts of others.

Unfortunately, however, a cursory review of the Tribunal statutes and practice shows unmistakably that the commanders *are* in fact charged with, and convicted for, the war crimes or crimes against humanity committed by subordinates.¹⁵⁹ Indeed, the tribunals have no jurisdiction over any crime of 'failure to exercise control'. They only have jurisdiction over genocide, crimes against humanity, and war crimes, and those are the crimes of which they find people guilty and enter convictions.¹⁶⁰ For example, despite the assertions in *Krnjelac* that the accused was charged with failure to exercise control and not the underlying crimes, Krnjelac was charged with and, through command responsibility, convicted for, numerous war crimes and crimes against humanity of torture, murder, and persecution, and he was sentenced for those crimes.¹⁶¹ The *label* attached to the charges, convictions, and sentence expressed to the world that he bore responsibility for war crimes and crimes against humanity. The tribunals are imposing such labels, for crimes bearing enormous stigma, in contravention of the principle of culpability recognized by the system, which requires a causal contribution to the crime for which one is convicted.

If the doctrine were to conform to the principle of culpability, liability for international crimes based on a failure to punish would require that the failings of the commander 'contributed to, or . . . had an effect on' crimes.¹⁶² In the absence of any such contribution, to convict a person for genocide, crimes against humanity, or war crimes, and to impose the stigma that such crimes bear, contradicts the principle of culpability which ICL claims to respect.

While the difficulties with command responsibility are more subtle than those arising in JCE, it appears that the command responsibility doctrine also departs from

159 Indeed, the dissonance between these assertions and the actual practice is so great that even the cases and commentators insisting that superiors are not held responsible for the subordinate's crimes cannot help but contradict themselves. See, e.g., *Prosecutor v. Aleksovski*, *supra* note 157, para. 67: 'A superior is held responsible for the acts of his subordinates if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes'; or see Mettraux, *supra* note 98, at 300: the commander is 'held responsible for the crimes committed by his subordinates'. Put in their best light, the assertions that superiors are not held responsible for the crimes of subordinates might be seeking to refute claims that commanders are held *strictly liable* for all acts of subordinates (vicarious liability), by affirming that liability is rooted in personal fault (the breach of duty). However, fundamental principles require not only faulty conduct but also culpability *for the crime for which the person is convicted* (in this case, genocide, crimes against humanity, or war crimes).

160 See, e.g., ICTY Statute, Arts. 2–5; ICTR Statute, Arts. 2–4. Moreover, the Statutes list command responsibility as a mode of liability and not as a crime in its own right (Arts. 7(3) and 6(3) respectively).

161 *Prosecutor v. Krnjelac*, *supra* note 103, Part VI, Disposition. In fact, not only do the tribunals convict the commander for the underlying crime, but they consider command responsibility as an aggravating factor, warranting a harsher sentence: see, e.g., *Prosecutor v. Blaškić*, *supra* note 135, at para. 790.

162 *Prosecutor v. Kayishema*, *supra* note 150, at para. 199. For example, advance knowledge of non-punishment could facilitate crimes, or a failure to punish ongoing crimes could remove the disincentives to subsequent crimes, or could even be seen as a signal of tolerance or encouragement. In such cases, the commander's failure can be causally linked to the crimes, so that he or she may be considered as sharing in liability for them. A causation requirement is also advocated in Cassese, *supra* note 5, at 206–7; and O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 of the Rome Statute?' (2002) 15 LJIL 179.

the principles that ICL proclaims. Again, it is curious that this stark deviation has gone largely unnoticed in jurisprudence.¹⁶³

This article suggests that the inadvertent contradiction between doctrine and principle was produced in part by conflation between the *humanitarian law* procedural duties of commanders and the distinct question of assigning *criminal* liability for the acts of another.¹⁶⁴

Additional Protocol I to the Geneva Conventions (AP I) highlights the important distinction between the commander's procedural duty under humanitarian law and the commander's personal criminal liability.¹⁶⁵ Article 87 of AP I imposes, as a matter of humanitarian law, a general duty on commanders to prevent breaches by their subordinates, to report breaches to competent authorities and to initiate disciplinary or penal actions against violations.¹⁶⁶ This general duty – enforceable by international law remedies¹⁶⁷ – is supplemented by a narrower, criminal provision, in Article 86(2):

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

Two features of Article 86(2) must be highlighted. First, whereas Article 87(3) includes the reporting of past crimes ('had committed'), the penal provision of Article 86(2) refers only to ongoing or imminent crimes ('was committing or about to commit'), thus requiring contemporaneity – and hence a possibility of influencing the subordinate's behaviour – for criminal liability. Second, the reference to 'penal responsibility' does not specify whether the superior must be punished for the underlying crime or for a different penal offence, such as dereliction of duty in the failure to supervise.

¹⁶³ Indeed, as will be discussed *infra*, on occasions when defence lawyers argued for causal contribution as a requirement, their arguments were quite easily (and at times derisively) dismissed as failing to understand command responsibility or even as seeking to frustrate the doctrine.

¹⁶⁴ While humanitarian law quite reasonably imposes a duty to punish past violations, this is not the same as saying that the commander is *guilty* of the past crimes; criminal law requires consideration of additional principles before personal guilt may be assigned.

¹⁶⁵ Protocol Additional to the Geneva Convention of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977. One may query why the Additional Protocols appear to have avoided the conflation problem. It will be argued *infra* (section 4) that those responsible for articulating rules have less incentive to consider fundamental principles when drafting rules for enemies or strangers, whereas inclusive and deliberative processes, which proceed from an initial position more closely approximating a 'veil of ignorance', tend to produce more sensitivity to fundamental principles.

¹⁶⁶ AP I, Art. 87. Art. 87(3) provides, 'The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.'

¹⁶⁷ Such remedies are applied against the state or the party to the conflict, and include the payment of reparations (Art. 91), and exposure to fact-finding (Art. 90) and to Security Council action (Art. 89). States are internationally liable for breaches by their commanders (Art. 91).

These differences reflect structural differences between criminal law and humanitarian law. The humanitarian law procedural duty quite reasonably does not require any causal contribution by the commander to the crimes. The purpose of the humanitarian law provision is to promote compliance of subordinates with humanitarian law by requiring a system of prevention and repression.¹⁶⁸ If a commander fails to punish a past crime, his government may be held liable for his breach of the rule.¹⁶⁹ However, this is not the same as asserting that the commander is personally guilty of the subordinate's crime; such an assertion requires consideration of fundamental principles.

Nonetheless, ICL discourse – both jurisprudence and literature – frequently assumes the coextensiveness of the humanitarian law norm and the criminal law norm, without reflecting on the different structures and consequences and hence the different principles in play.¹⁷⁰

For example, the drafters of the ICTY and ICTR Statutes blithely combined Article 86(2) and Article 87(3) into a single criminal provision encompassing both pending crimes and past crimes, and both failure to prevent and failure to punish.¹⁷¹ In doing so, they overlooked the differences between the criminal and non-criminal provisions and insouciantly overwrote the causal contribution requirement.

Rather than detecting the problem, tribunal jurisprudence has followed this same pattern of blurring the humanitarian law procedural duty and personal criminal liability. In *Blaškić*, defence counsel argued that some contribution to the crimes is necessary for liability, and hence failure to punish by itself is not sufficient for liability under international law; the failure must encourage or facilitate future crimes.¹⁷² To refute the defence argument, the Appeals Chamber relied on Article 87(3) of the Protocol, noting that it imposes a duty to punish persons responsible for *past* crimes.¹⁷³ The Chamber pointed out that 'disciplinary or penal action can only be initiated *after* a violation is discovered', and hence it found the defence argument 'illogical'.¹⁷⁴ The Chamber's argument overlooks, however, that Article 87(3) deals with the procedural duty of *humanitarian* law, not the assignment of

¹⁶⁸ Sandoz et al., *supra* note 132, at 1018.

¹⁶⁹ API, Art. 91.

¹⁷⁰ Such conflation may also be found in the *Yamashita* decision (*supra* note 49), which not only illustrates victim-focused teleological reasoning (as discussed in section 2) but also illustrates conflation between criminal law and humanitarian law, as it derived the command responsibility principle from the purposes of the laws of war. The majority decision converted a humanitarian law duty into a criminal law norm, and because of its assertion that it was simply applying existing law, it did not engage in reflection on compliance with fundamental principles. As Justice Murphy argued in dissent, the majority approach overlooked the difference between civil claims and 'charging an individual with a crime against the laws of war' (*ibid.*, at 36–7).

¹⁷¹ ICTY Statute, Art. 7(3), ICTR Statute, Art. 6(3). The report of the drafters indicates no intention to change the law: Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), at para. 56; the premise was to apply only rules 'rules . . . which are beyond any doubt part of customary law' (para. 34).

¹⁷² *Prosecutor v. Blaškić*, *supra* note 28, paras. 73 and 78. A similar argument (relying on the principle of culpability rather than the principle of legality) was also easily rejected in *Čelebići*, *supra* note 5, at paras. 396 ff. After a half-sentence acknowledgement of 'the central place assumed by the principle of causation in criminal law', the trial chamber rejected a causation requirement on doctrinal grounds (absence of precedent requiring it) without considering fundamental principles.

¹⁷³ *Prosecutor v. Blaškić*, *supra* note 28, para. 83.

¹⁷⁴ *Ibid.* (emphasis in original).

personal *criminal* liability. Indeed, Additional Protocol I specifically separated the broad humanitarian law duty from the narrower criminal law provision in Article 86(2). If anything, the elaborate separation of the provisions in Additional Protocol I should have given rise to an *a contrario* interpretation, or at least triggered reflection on whether the separation might have a principled basis.

Similarly, tribunal jurisprudence has assumed that the ‘should have known’ mental standard must have the same meaning in ICL as it does in humanitarian law, without inquiring whether the principle of personal culpability requires a different standard in criminal law.¹⁷⁵ This tendency to conflate may also be seen in literature, where it is frequently assumed that any differences in scope between the humanitarian procedural duty and the imposition of criminal liability are obviously ‘gaps’, ‘lacunae’, or ‘steps backward’ which will ‘allow atrocities to go unpunished’.¹⁷⁶

By conflating the humanitarian and the criminal norm, the tribunals appear to have unwittingly expanded the criminal prohibition. Ignoring the differences between Articles 86(2) and 87(3), the jurisprudence has effectively grafted criminal liability onto the broader humanitarian law duty, without considering whether criminal law warrants a narrower ambit. Further compounding the problem, the jurisprudence not only criminalizes the full scope of what was previously a humanitarian law duty, but it also declares the commander responsible for the underlying crimes, which carry severe stigma, without considering whether the commander’s dereliction contributed in any way to the commission of such crimes. Because of conflation, judges, drafters, and commentators proceed in complacent confidence that they are simply following precedents, missing the fact that the ‘precedents’ are from different areas of law with different structures. As a result, broader norms are absorbed into ICL without triggering any alarm bells as to the need to scrutinize the proposed norm for compliance with fundamental principles.

175 For example, in *Čelebići*, the Prosecution argued that ‘the Statute’s language of “knew or had reason to know” must be construed as having the same meaning as the applicable standard under existing humanitarian law, including Protocol I’: *Čelebići*, *supra* note 5, para. 382. Although the Chamber ultimately had a narrower reading of the ‘had reason to know’ standard than did the prosecution, it based its reading on Additional Protocol I and hence did accept the assumption that the meaning is the same as in humanitarian law. The Chamber did not review whether fundamental principles of criminal law require a different standard (*mens rea*) than humanitarian law (paras. 390–393).

176 See, e.g., Fox, *supra* note 22, at 443, arguing that an interpretation not encompassing all of Art. 87(3) would be ‘erroneous’, ‘illogical’, and ‘contradicted by the plain language of the Protocol’ (at 466), and would mean a ‘gap [that will] allow certain atrocities to go unpunished’ (at 444) and ‘a troubling drift toward allowing impunity’ (at 494). See also Mettraux, *supra* note 98, at 301 (‘gaping hole’, ‘highly questionable from a legal and practical point of view’). Similarly, van Schaack argues that the causal requirement in the ICC Statute (which as argued in section 2.2 is essential for compliance with the principle of culpability) is a ‘step backward’ that ‘significantly truncates’ the doctrine, and the resulting ‘lacuna’ or ‘loop-hole’ ‘sends a message’ that it is acceptable not to punish: B. van Schaack, ‘Command Responsibility: A Step Backwards’, *On the Record – International Criminal Court*, Issue 13 (Part 2), 17 July 1998, available at www.advocacynet.org/resource/369#Command_Responsibility:_A_Step_Backwards. Paust, *supra* note 129, at 305, sees the causal contribution requirement as a ‘problem’ and hopes that a creative interpretation, in the light of ‘customary international law’ can fill in such ‘needless limitations’.

4. IDEOLOGICAL ASSUMPTIONS (SOVEREIGNTY AND PROGRESS)

Finally, in addition to interpretive assumptions and conflation of norms, the ideological assumptions of human rights and humanitarian law may also influence ICL reasoning and undermine compliance with fundamental principles. Consider, for example, the narratives about progress and sovereignty in human rights law.

In a human rights instrument there is a fairly straightforward inverse relationship between the obligations undertaken and the freedom of action retained by the state. The more sovereign freedom of action retained, the narrower the human rights obligations. As a result, human rights and humanitarian law discourse routinely casts sovereignty in elemental opposition to normative progress. Sovereignty is the 'traditional enemy',¹⁷⁷ the 'stumbling block in the advance of civil rights',¹⁷⁸ the irksome vestige of 'divine right' 'which human rights law is still in the process of extirpating'.¹⁷⁹ Sovereignty is the obstacle raised by short-sighted lawyers, diplomats, and bureaucrats,¹⁸⁰ and a constant threat to the project of international law.¹⁸¹ This inverse relationship underlies the progress narrative of human rights, wherein a darker age of 'sacrosanct and unassailable' sovereignty has recently 'suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights'.¹⁸²

The same assumptions about the interplay with sovereignty are replicated in ICL. Sovereignty is a 'contradiction' to human rights and justice¹⁸³ and an 'enduring obstacle' in advancing ICL;¹⁸⁴ the 'movement for global justice has been a struggle against sovereignty',¹⁸⁵ such that human rights and justice must 'trump' state sovereignty,¹⁸⁶ since for sovereignty to prevail would be a 'travesty of law and

¹⁷⁷ G. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2006), at 624.

¹⁷⁸ *Ibid.*, at 176 (emphasis omitted).

¹⁷⁹ *Ibid.*, at 2.

¹⁸⁰ 'Sovereignty appears in the arguments of lawyers, the commitments of diplomats and the reassurances of international bureaucrats as a barrier to the over-ambitious extension of ICL'. G. Simpson, 'Politics, Sovereignty, Remembrance', in D. McGoldrick, P. Rowe, and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), at 53.

¹⁸¹ '[W]henver state sovereignty explodes onto the scene, it may demolish the very bricks and mortar on which the Law of Nations Is Built': A. Cassese, 'Current Trends towards Criminal Prosecution', in N. Passas (ed.), *International Crimes* (2003), at 587.

¹⁸² See, e.g., *Prosecutor v. Tadić*, *supra* note 46, at para. 55.

¹⁸³ 'The contradiction between the principle of national sovereignty and the universal nature of human rights reaches its apogee faced with crimes against humanity. Humanitarian law – and universal conscience – dictate that these crimes must not go unpunished. But State sovereignty subjects this demand for justice to the contingencies of political choices': R. Badinter, 'International Criminal Justice: From Darkness to Light', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), at 1932.

¹⁸⁴ 'Throughout the twentieth century, state sovereignty has provided one of the most enduring obstacles for advancing ICL': S. C. Roach, *Politicizing the ICC: The Convergence of Ethics, Politics and Law* (2006), at 19.

¹⁸⁵ Robertson, *supra* note 177, at xxx.

¹⁸⁶ '[The ICC is] the primary reference for those who believe that borders, state sovereignty and political expediency cannot shield the perpetrators of massive human rights violations from prosecution. . . . It is widely acknowledged that the moral commitment to protect the most fundamental human rights at a global scale trumps state sovereignty and the legal pillars that sustained classic international law'. P. C. Diaz, 'The ICC in Northern Uganda: Peace First, Justice Later', (2005) 2 *Eyes on the ICC* 17.

a betrayal of the human need for justice'.¹⁸⁷ As Robert Cryer wryly observes, '[w]hen sovereignty appears in [ICL] scholarship, it commonly comes clothed in hat and cape. A whiff of sulphur permeates the air.'¹⁸⁸

The common narrative on sovereignty in human rights and in ICL is probably in large part correct, and at least in some part overstated.¹⁸⁹ What is crucial for present purposes is that the importation of these perspectives routinely overlooks a significant difference between human rights or humanitarian law and ICL. In human rights or humanitarian law, where the treaties limit state behaviour, it is usually accurate to ascribe limitations in instruments to states' wishes to preserve sovereignty. Thus, in human rights discourse, the progress of 'liberal forces' generally means broader norms and hence more protection of individuals from the state; by contrast, a narrowing of a norm means a gain for sovereignty and hence a setback for human rights.

In ICL, however, there is an additional variable in play: the instruments circumscribe not only state freedom of action, but also *individual* autonomy. Thus limitations appearing in an instrument defining ICL liability might of course be attributable to preservation of sovereignty, but they also might reflect conformity to a fundamental principle. Nonetheless, in ICL it is common to overlook this important shift and to make the same assumption as in human rights discourse: to ascribe the limitation to 'sovereignty' or 'compromise', the usual business of short-sighted states failing to reflect the full potential of human rights because they cling to outdated notions.¹⁹⁰ Such reasoning fosters a knee-jerk rejection of provisions that may have complied with the principle of legality or culpability, thereby introducing another systemic bias against fundamental principles. Conversely, such reasoning fosters an uncritical reception of expansive interpretations as a victory of humanitarianism over sovereignty, without inquiry into fundamental principles.¹⁹¹

187 'It would be a travesty of law and a betrayal of the human need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights': *Prosecutor v. Tadić*, *supra* note 46, at para. 58.

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

189 See, e.g., Mégret, *supra* note 188, at 1261 and 1279–80, referring to these 'clichés' about sovereignty that both 'buttress and undermine the human rights programme', but which overlook sovereignty's 'emancipatory potential' and its role in self-determination.

190 For examples see Fox, *supra* note 22, at 480 (requirement of causal contribution is one of the 'weaknesses and limitations' of the Rome Statute), overlooking the possible significance of the culpability principle. Boot, *supra* note 21, at 606 and 640 (interpretation of war crimes narrower than *Tadić* and not including political groups in genocide 'manifestly show to what extent States have sought to protect their sovereignty, which prevailed over human rights concerns'), overlooking the possibility that states felt constrained by the current state of the law (principle of legality). For further examples drawing from a variety of authors and issues, see G. Mettraux, 'Crimes against Humanity in the Jurisprudence of the ICTY and ICTR', (2002) 43 (1) *Harvard International Law Journal* 237, at 279 (summarily dismissing a codification of crimes against humanity on the grounds that it was a 'highly political affair'); A. Pellet, 'Applicable Law', in Cassese et al., *supra* note 183, at 1056 ('pretext'); D. Hunt, 'High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges', (2004) 2 *Journal of International Criminal Justice* 56, at 57–8, 68 and 70 ('compromise and expediency'; 'powers of judges were strongly curtailed to assuage the fears... that the court could infringe upon sovereignty'; Sadat, *supra* note 137, at 152 and 267 ('compromises'); Bassiouni, *supra* note 22, at 202 ('mostly for political reasons'), each of which fails to contemplate fundamental principles (such as the principle of legality) as a possible consideration.

191 See, e.g., Boot, *supra* note 21, at 434: 'By expanding the protection of specifically mentioned groups to all permanent and stable groups in the definition of genocide, as well as expanding the boundaries of "racial

Scholars such as Robert Cryer have convincingly demonstrated that states tend to take a wider view of definitions of crimes and principles when they are imposing them on others than when their own officials and nationals may be scrutinized.¹⁹² While such double standards certainly warrant reproach, there still remains an unanswered (and generally unposed) question of whether the broader or narrower version of the doctrine is the more appropriate one. Confronted with such discrepancies, ICL discourse routinely adopts the same assumption as would human rights liberalism, namely that the broader norm must be the truer, better articulation, and that the narrower must be a retrenchment caused by compromise and self-interest.¹⁹³

Given the additional variable of individual autonomy, however, the reality is rather more subtle. Many conservative aspects of codification efforts may doubtless be traced to unprincipled self-interest. However, it is also possible that a deliberative codification process involving diverse participants may identify legitimate issues of principle. Self-interest may even play a productive role: participants have more incentive to engage in thoughtful examination of principles than if they were applying rules only to others. Potential exposure is likely to sharpen one's sensitivity to fairness. Conversely, judges in tribunals articulating rules to apply to 'the other' – that is, vanquished foes or marginalized groups – do not have the same direct incentive to scrutinize compliance with fundamental principles (and, indeed, they may have strong incentives to articulate expansive norms).¹⁹⁴

The ideological assumptions imported from human rights discourse obscure these dynamics, and can blind ICL participants to the origin of some doctrines in punitive victors' justice.¹⁹⁵ Ironically, then, ICL practitioners can embrace the most illiberal doctrines as the most 'progressive' and reflexively reject more modern codifications as a betrayal of the Nuremberg standard,¹⁹⁶ without considering compliance with fundamental principles.

The operation of this assumption may be illustrated with two examples, one from literature and one from jurisprudence.

As a first example, the Nuremberg and Tokyo Charters and the ICTY and ICTR Statutes, which were unidirectionally applied, included broad, open-ended definitions of crimes, with formulae such as 'shall include but not be limited to', leaving

groups", the Tribunals also tend to let humanitarian gains prevail over arguments of State sovereignty.' This leaves the question of whether humanitarianism and sovereignty are the only factors in play.

192 R. Cryer, *Prosecuting International Crimes* (2005).

193 See examples at note 190.

194 Such incentives may include the wish to send deterrent messages, to demonstrate righteousness (especially insofar as tribunals may be a salve for failure to make a more robust intervention), and the reputational incentives mentioned above, section 1.

195 Damaska, *supra* note 15, at 489 observes that 'the builders of current [ICL] take a rather uncritical stance' toward Nuremberg and related jurisprudence, as 'they stop deferentially before each decision as if it were a station in a pilgrimage'.

196 See, e.g., Paust, *supra* note 129, at 240, arguing that definitions of crimes against humanity subsequent to the Nuremberg definition 'are severely limited in their reach, and do not reflect customary international law as evidenced in earlier instruments'. However, as the definition of crimes against humanity in Nuremberg was excessively vague and open-ended and delineated no thresholds at all – indeed almost any crime could constitute a crime against humanity under that 'definition' – the principles of fair warning and legality cry out for clarification of the concept.

extensive room for judges to expand the definitions of crimes.¹⁹⁷ The creators of the Rome Statute, who could not know whether the provisions would be applied to their foes, to strangers, to friends, or to themselves, opted for a complete codification with a closed list of defined crimes. As a matter of fundamental principle, codification is generally welcomed as valuable or even essential in a modern liberal system of criminal justice in order to provide fair warning to individuals.¹⁹⁸ However, Alain Pellet, a highly respected scholar, and David Hunt, a highly respected judge, reacted with grave concern that states have 'sought to codify the law' to be applied by the judges, which in their view demonstrates a 'deep suspicion' and 'unfortunate mistrust for the judges'.¹⁹⁹ Their analyses approach the issue entirely in terms of the benefits of expansive norms, a benefit which is perceived to be frustrated by governmental myopia and compromise. Hunt's concern is that codification will 'preclude significantly the necessary judicial development of the law', and he attributes such provisions to 'fear', 'political compromise', and 'diplomatic expediency'.²⁰⁰ Pellet assumes that the cause was 'ceding to American pressure' and 'not trusting the judges' and the result is that 'the authors of the State have limited the chances of making the Court an efficient instrument in the struggle against the crimes it is supposed to repress'.²⁰¹ These illustrations show how even the leading minds in the field can assume that the broadest approach is automatically the best, and can attribute a narrower approach to myopic sovereignty-driven concerns, a heuristic which bypasses reflection on fundamental principles. Such analysis neglects the fact that open-ended criminal norms originated in victors' justice and fails to ask whether that is a pattern we wish to replicate – is an illustrative, open-ended list of crimes really the benchmark to which ICL should aspire? In this way, liberal (human-rightist, internationalist) assumptions can promote illiberal (criminal law) doctrines and condemn liberal (criminal law) doctrines.

To take an example from jurisprudence, we may return to our recurring theme of command responsibility. In the Nuremberg and Tokyo trials, where rules were being applied to vanquished foes, command responsibility was loosely defined and did not expressly require a causal contribution.²⁰² When a US court applied command responsibility to its own forces in Vietnam, the doctrine was tightly defined, requiring *inter alia* a causal contribution for personal liability.²⁰³ In the negotiation of Additional Protocol I, states were in a position more akin to a 'veil of ignorance', as they did not know whether they would be the beneficiaries, relying on AP I provision for protection, or the accused; in this more neutral situation they required

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

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

199 See Hunt, *supra* note 190, esp. at 56–9; see Pellet, *supra* note 190, esp. at 1056.

200 Hunt, *supra* note 190, at 56–9.

201 Pellet, *supra* note 190, at 1058.

202 See *Yamashita*, *supra* note 49, and *Trial of Wilhelm List and Others (The Hostages Case)*, (1949) 8 *Law Reports of Trials of War Crimes* 1.

203 *U.S. v. Medina*, CM 427162 (ACMR, 1971) 8.

causal contribution.²⁰⁴ The drafters of the ICTY and ICTR Statutes, applying rules unidirectionally to others, insouciantly effaced the requirement of causal contribution by blending the criminal and non-criminal provisions of AP I.²⁰⁵ The drafters of the ICC Statute, once again in a position somewhat akin to the ‘veil of ignorance’, reinstated causal contribution.²⁰⁶

Again the double standard is objectionable, but it leaves two possibilities: (i) causation is not required by fundamental principles, and thus the narrower provisions reflect self-interested self-protection by states, or (ii) causation is required by principles, and thus it is the broader provisions that are problematic. As was argued above, fundamental principles appear to require that a person causally contributed to crimes if he or she is to be convicted for those crimes.²⁰⁷

Nonetheless, the assumptions about progress and sovereignty foster a simplistic heuristic whereby ICL participants perceive only the first possibility and reflexively condemn the narrower provision without analysis. For example, Judge Hunt, in a partially dissenting opinion, was confronted with the Rome Statute’s requirement of causal contribution for command responsibility and the fact that tribunal jurisprudence accords the Rome Statute ‘significant legal value’.²⁰⁸ The reinstatement of causal contribution in the Rome Statute could have offered a clue that fundamental principles are at stake, and an opportunity to discover contradictions between tribunal jurisprudence and fundamental principles. Instead, Judge Hunt simply observed that the Statute provision was the result of ‘negotiation and compromise’, as was ‘patent . . . from the vast differences between . . . those provisions and existing instruments such as the Statutes of the ad hoc Tribunals’, and hence he dismissed the Statute provision as ‘of very limited value’.²⁰⁹ Among the suppressed premises in this argument are that ‘negotiation and compromise’ invalidate an outcome, and that departure from the broader (selective justice) instrument shows that the narrower (consensus) instrument is incorrect – an incorrectness attributable, of course, to the negotiation and compromise. Missing from this analysis is any reflection on fundamental principles, and whether a deliberative process as opposed to a unilateral imposition might have fostered sensitivity to principles. Similarly, several scholars have not hesitated to dismiss the causal requirement in the Rome Statute provision as a tragic concession to self-interest and, satisfied with this as a complete explanation, have failed to contemplate the possibility of a principled basis.²¹⁰

204 API, Art. 86(2); compare API, Art. 87.

205 ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3).

206 ICC Statute, Art. 28.

207 See *supra*, section 3.2. If correct, then this appears to be one of the examples where rule articulators suddenly developed a refined appreciation for fundamental principles of justice when their own nationals and officials are subject to the norm, as opposed to foes or strangers.

208 *Prosecutor v. Hadžihasanović*, *supra* note 34, Separate and Partially Dissenting Opinion of Judge David Hunt, paras. 29–30. As a simultaneous statement by 120 states, the Rome Statute offers significant evidence of customary law: *Prosecutor v. Furundžija*, Judgement, Trial Chamber, Case No. IT-95-17/1, 10 December 1998, at para. 227.

209 *Prosecutor v. Hadžihasanović*, *supra* note 34, Separate and Partially Dissenting Opinion of Judge David Hunt, paras. 30–32.

210 See, e.g., Van Schaack, *supra* note 176 (‘step backward’); Vetter, *supra* note 22 (‘weakness’); Paust, *supra* note 129 (‘needless limitation’); Fox, *supra* note 22 (‘gap’, ‘troubling drift toward allowing impunity’).

Thus assumptions about progress and sovereignty can lead ICL participants to look with suspicion upon the processes most likely to generate liberal doctrines and reflexively to favour broad but illiberal doctrines born in selective justice, without considering the fundamental principles that truly define what is progressive or regressive. Moreover, these easy conclusions lead ICL participants to overlook clues and to miss opportunities to detect contradictions between ICL jurisprudence and fundamental principles.

5. CONCLUSION

While ICL proclaims its exemplary adherence to fundamental principles of a liberal criminal justice system, serious departures occur in all areas, including definitions of crimes, principles of liability, and defences. This article points to an ‘identity crisis’ as part of the explanation: while ICL is a criminal law discipline, its norms and its practitioners draw a deep intellectual inheritance from human rights and humanitarian law. Interpretive, substantive, structural, and ideological assumptions of human rights and humanitarian law have been absorbed into ICL discourse, distorting methods of reasoning and undermining compliance with fundamental principles. Examples of such assumptions and modes of reasoning permeate both the jurisprudence and the literature.

First, human rights and humanitarian interpretive techniques are replicated in ICL, fostering broad, victim-focused, dynamic interpretations, a tendency which not only conflicts with the principle of legality but also encourages exuberant interpretations that contravene culpability and fair labelling.

Second, ICL judges, practitioners, and scholars also conflate substantive norms of ICL with those of human rights and humanitarian law, by importing the familiar content from those domains with the confidence that they are simply following precedent, while overlooking the fact that those ‘precedents’ come from non-criminal domains with structures that focus on improving systems rather than on individual culpability.

Third, ideological assumptions about sovereignty and progress, drawn from human rights and humanitarian law, can lead ICL practitioners to assume that the broadest norms are the most progressive, and that any narrowing must be due to self-interested sovereignty. The easy conclusions generated by assumptions about sovereignty can forestall important inquiries into compliance with fundamental principles.

The article does not suggest that the ‘identity crisis’ completely accounts for the deviations from fundamental principles.²¹¹ Nonetheless, the influence of normative assumptions is of particular importance because it is not only a *cause* of departures but also the *method*: these assumptions furnish the analytical steps by which departures are effected and provide the legal plausibility that lets such failings go unnoticed. The focus of this article is on the discourse, the structures of argument

²¹¹ See *supra*, section 1.

and reasoning employed in ICL, that are assumed to be sound, legitimate, and even liberal, and yet lead to contradictions with the liberal values declared by the system.

The present inquiry has sought to expose the assumptions and reasoning techniques that lead to contradictions with the fundamental principles that the system itself proclaims. A philosophical evaluation of the merits of compliance with fundamental principles would form part of a larger project. Arguments for compliance could of course be rooted in deontological imperatives of treating persons as responsible agents as opposed to objects,²¹² or in consequentialist considerations of preserving legitimacy or advancing efficacy.²¹³ What is important for the present inquiry is that ICL declares itself to be an exemplary system of liberal criminal justice. If ICL is to realize this declared aspiration, it will be necessary to subject its doctrines to searing scrutiny and to shed the inapposite relics, habits, and intellectual inheritance of its 'parent' domains of human rights, humanitarian law, and criminal law. Only in this way can ICL work out its own identity as a coherent discipline.

The choice for ICL is either to comply with the fundamental principles or to abandon the claim of compliance. More starkly, the choice is between 'a system of justice' and the 'administrative elimination of wrongdoers by command of those in power'.²¹⁴ However, this seemingly stark and binary choice masks a major intellectual project for ICL. Presumably, ICL will not abandon liberal principles (which are based in respect for human dignity) in order to advance a human rights agenda, as this would create contradictions with its own values. Conversely, however, compliance with principles does not necessarily consign ICL to mimicking the principles exactly as they are known in national law.²¹⁵ This article has emphasized the need to

²¹² See, e.g., Fletcher, *supra* note 3, at 43–57 ('subject v. object'); Husak, *supra* note 64 ('means v. ends'). L. Fuller, *The Morality of Law* (1964), 162, argues that 'every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent'. Damaska, *supra* note 15, at 456, emphasizes the internal contradiction with the humanitarian aims of ICL, asking whether it is proper for ICL, 'given its humanistic orientation, to disspread widespread culpability – restricting principles of municipal law – principles that are themselves inspired by humanistic concerns'.

²¹³ Consequentialist arguments can also be advanced in favour of adhering to liberal principles that circumscribe retribution. For example, P. Robinson and J. Darley, 'The Utility of Desert', (1997) 91 *Northwestern University Law Review* 453, argue that obedience to law depends in large part on internalization of norms and the pressure of social networks (as opposed to calculation of risks), and that criminal law can serve as a yardstick for both of these processes, insofar as it is perceived as credible and authoritative. However, its credibility depends on general compliance with community perceptions of just desert. In this way, there may be utilitarian value in complying with retributive principles, and conversely the marginal benefits of harsher laws may be outweighed by cost in terms of reducing credibility and hence influence in crime control.

²¹⁴ *Prosecutor v. Norman*, Child Recruitment Decision, Appeals Chamber, Dissenting opinion of Justice Robertson, Case No. SCSL-2004-14-AR72(E), 31 May 2004, at para. 14.

²¹⁵ Some scholars have suggested steps in such a direction, noting for example that the paradigm of individual culpability may be altered in contexts where atrocities are not a product of individual deviance but rather of compliance with deviant societal norms. However, even these revised theories do not absolve the need to grapple with principled limits on the punishment of autonomous individuals. See, e.g., M. Reisman, 'Legal Responses to Genocide and Other Massive Violations of Human Rights', (1996) 59 *Law and Contemporary Problems* 75, at 77. Special challenges of organizational behaviour and diffusion of responsibility, the meaning of 'fair warning' in a decentralized criminalization system, or the need to tap into non-Western cultural traditions could conceivably be elements of a revamped and tailored theoretical justification. For some related material see, e.g., D. Luban, A. Strudler, and D. Wasserman, 'Moral Responsibility in the Age of Bureaucracy', (1992) 90 *Michigan Law Review* 2348, on diffusion of responsibility in organizational structures; M. Drumb,

be critical of the human rights/humanitarian law inheritance; however, there is also scope – while retaining fidelity to the fundamental liberal commitment of treating persons as ends and not solely as means – to re-examine the specific articulations of those fundamental principles as found in national law.

The project that emerges is not only to discover contradictions and the pathologies that lead to them, but to develop a more refined account of the fundamental principles appropriate for ICL. Contradictions between doctrines and principles may be resolved by correcting the doctrine, refining the principles, or both. Indeed, the special contexts of ICL may pose philosophical questions not previously considered in traditional liberal criminal theory, and hence help us to unearth new insights into the fundamental principles. Thus the project is to discover not only how liberal criminal theory may illuminate ICL, but how ICL may illuminate liberal criminal theory.

Whatever avenue is chosen in responding to the contradictions in ICL (adaptation of doctrines or principles or both), it will be an advance to have an open and principled debate rather than obscuring the contradictions, or promising *x* but doing *y*. It is hoped that the current article will engender critical awareness of (i) the contradictions in ICL, and (ii) the assumptions and distortions common in ICL reasoning, and thereby help to foster a more sophisticated and principled discourse.

'Toward a Criminology of International Crime', (2003) 19 *Ohio State Journal on Dispute Resolution* 263; M. Drumbl, *Atrocity, Punishment and International Law* (2007); Cassese, *supra* note 5, at 135–6; Damaska, *supra* note 15, at 457 and 475–8; Osiel, *supra* note 17; G. Fletcher, 'Collective Guilt and Collective Punishment', (2004) 5 *Theoretical Inquiries in Law*, available at www.bepress.com/til/default/vol5/iss1/art6, esp. at 168–9 and 173–4; L. Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice', (2005) 26 *Michigan Journal of International Law* 1013.