FOREVER TOGETHER OR A HOPE FOR BETTER? LIBERALISM AND INTERNATIONAL CRIMINAL LAW

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I. INTRODUCTION

It is an honour and pleasure to comment on Darryl Robinson's most recent work. Robinson is something of an arbiter in matters of international criminal justice, and his sober reflections are a consistent touchstone for thinking and imagining the field's development and its critiques. Robinson has written an original and thoughtful book, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law*. It is classic Robinson: clear and eloquent, to-the-point, and pragmatic. It tackles some of the most vexing issues facing international criminal law (ICL) whilst effortlessly weaving together cases and capturing the conceptual, theoretical, and legal debates around command responsibility. It represents an essential defence of the rights of the accused and the claims to justice that reside at the core of ICL. Both are far too often neglected in criminal law, but perhaps especially so in the "extraordinary" realm of response to mass atrocities.

Robinson's exposition on deontic thinking offers an important addition to a field that has not sufficiently engaged with the idea—at least as directly as Robinson calls on it to do. His presentation of coherentism is particularly attractive given its rejection of the impossible: finding a moral and theoretical consensus on a subject as prickly and controversial as the moral foundations of (international) criminal law. As put forward by Robinson, coherentism permits us to set aside the Sisyphean task of proving that international criminal justice is worth it by virtue of some catch-all theory or philosophy and instead appreciate that because it can do *some* good *some* of the time in *some* places, it is worth it. The ICL field needs to heed Robinson's insistence that ICL is an imperfect project and that fervent support for prosecutions out of overly normative or utilitarian commitments is misplaced and poses a possible danger to the field, as well as an injustice to victims, survivors, and alleged perpetrators.

In what follows, I invoke Robinson's work as a starting point to have broader discussions about the power and politics of international criminal law and justice. I want to be clear: I do not endeavour to critically engage this work based on a belief that this book should endeavour to cover everything under the penumbra of international criminal justice. Doing so would not take the work on its own terms. At the same time, however, such work *must* be seen not only for what it says but

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also for where it leads us and the additional questions it raises about the foundations of ICL. It seems implausible that one can focus on one area of the proverbial sandbox of international criminal justice without disrupting grains throughout. It likewise seems impractical to write a defence of ICL that is not liberal; ICL is inherently liberal, and no defence of it could be otherwise.[1] Not all will take this book as a defence of ICL, but I do—and a valuable one at that. Further, it strikes me as an impossible task to have a conversation about something as fundamental as criminal law theory or theories of personal culpability while shoehorning issues of the power and politics of ICL that invariably intersect and even uncomfortably confront these foundational issues. The lines between these subjects are more imaginary than real. And while Robinson's work can be read narrowly, it is, in my estimation, about much more than deontic constraints, culpability, and legality. It contains commentary, threads, suggestions, and assumptions that extend far beyond this and which will galvanize in readers' thoughts about the nature and practice of (international) criminal law.

For those wishing to engage with these subjects and to build on Robinson's insights to ask probing questions about the politics of law and crime, Robinson's book is an invitation to ask ourselves: while every manuscript cannot be about every issue, can we study the theories of crime or philosophies of justice in a manner that isolates these conversations from questions of power, or race, or equality? After much reflection, I am of the persuasion that we cannot—or at least should endeavour not to do so. If readers agree, a question of methodology and research design emerges: how do we carve out the space to deep dive into narrow academic spaces in need of exploration while sufficiently acknowledging that those other issues—power, politics, justice, race, identity, etc.—invariably imbue it?

I leave the answer(s) to that question for readers and for another day. Moreover, I want to stress that it is not that Robinson blindly omits these issues—rather, he stresses the limited scope of his work and invites us to think about how his coherentist method might be useful to answer "[o]ther [i]mportant [t]heoretical and [m]oral [q]uestions."[2] I am taking up this invitation and the assumptions that I believe ICL scholarship rests upon to offer thoughts on what a critical and coherentist approach says and does not say. In doing so, I hope that this essay contributes to partly answering the methodological question I raise above as well as other substantive and empirical questions that Robinson's work invites us to interrogate.

Ultimately, scholars, practitioners, and diplomats alike will gain much from reading Robinson's work, as they have for years now. I have little doubt that those engaged and invested in ICL will treat this treatise as essential reading in debates on the future of the field and the still-fraught subjects of culpability and command responsibility. Given that this is a critical review exercise, what follows is a critique

1. *See* DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 21 (2020) (describing ICL as a liberal system that attempted to provide a model for national liberal systems).

2. *Id.* at 16–18 (outlining some additional questions not addressed within scope of book).

of some elements of Robinson's book and, in particular, its own normative assumptions and commitment to liberalism. It should not, however, take away from the significant contribution that I know this book will make.

II. UP, DOWN, AND BACK TO THE (LIBERAL) STATUS QUO?

There is something slightly tautological about many recent critiques of ICL. It goes something like this: a liberal critique of a liberal enterprise that finds itself defending a liberal vision of an inherently liberal project. I count myself as part of this liberal apologist or, more kindly, problem-solving approach, which seeks not to undermine the liberal foundations of international criminal justice but rather to make it live up to its liberal promises.

In many, if not all, respects, Robinson's work is ontologically liberal. To be clear, I don't think it can be anything but that. One cannot defend a liberal project without recourse to liberal assumptions. Robinson writes that the result of his analysis "is a more careful *liberal* account: a humanistic, open-minded (or reconstructive), cosmopolitan, and coherentist account."[3] While this approach seems increasingly common, it could use some theorization of its own: What genuinely new commitments does it offer? Who is it a response to and who is it aimed at convincing? Can a "new-and-improved," more humanistic, and open-minded liberalism do more to address the collective nature of atrocity or is it invariably focused on the individual? Can it be anything more than a *problem-solving* approach? Can ICL only be better at being *liberal* or being more *liberal* or, to use Robinson's words, can it find the "Goldilocks solution" of being just *liberal* enough?[4] Critics outside this mould, who challenge the very liberal precepts and exportation of ICL are unlikely to find this an adequate and direct response to their critiques. And it is not trying to be one. But for many, it would be impossible not to ask these questions. Perhaps most strikingly, the book does not take *power*, however one defines it, into account despite its centrality to the past, present, and future of ICL. Again, it does not pretend to do so. But the question arises: is it possible to write about what criminal law theory should undergird ICL without implicitly speaking about power?

There is a risk with liberal critiques and defences of ICL in that they (re)produce straw man arguments. Robinson correctly observes that ICL encounters "special contexts" marked by "massively collective action, state criminality and non-legislative forms of law creation."[5] He adds that, as a "crucial caveat – the special contexts do not mean that we are free to discard our underlying deontic commitment to our fellow human beings."[6] The problem here, it seems to me, is that no critique of ICL, liberal or otherwise, makes the claim that we should disregard our

3. *Id.* at 62 (emphasis added).

4. *See* Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 LEIDEN J. INT'L L. 323, 325 (2015) (describing the principle derived from folk tale in which the first solution is wrong in one way and the second is wrong in the opposite way, but the third solution is "just right").

5. ROBINSON, *supra* note 1, at 62.

6. *Id.*

commitment to fellow human beings. The question—and debate—is *how* to most appropriately regard others. Indeed, this is the very gist of transitional justice literature, including that which posits the importance of amnesty laws and forgiveness. It insists not that there should be no commitment to human beings or individuals, but that there is no obvious consensus on what such a commitment looks like.

Robinson writes that "in contrast to portrayals of criminal law and deontic principles as abstract and inhumane, I respond that criminal law, properly done, has pro-social aims. Its constraining principles are rooted in respect and empathy, grounded in experience, and built on widely shared values."[7] This may be true in a broad sense, but here a problem arises: this apparent empathetic benevolence may be generally apparent but is certainly not true for all people. This raises questions about who gets to decide that it is beneficent and for whom criminal law is respectful or empathic. Robinson adds that "criminal law is an activity carried about by human beings."[8] But, as Robinson also accepts, it is also an activity carried out *against* human beings, and this is central to its purpose.[9] Is ICL rooted in compassion for those against whom it is practiced? Is it compassionate to the families of perpetrators? When it is practiced selectively, is it compassionate to similarly situated victims within the jurisdiction of relevant courts themselves? What is worrying about criminal law in general is that even in the most advanced liberal states, such as Canada or the United States, criminal law is used to subjugate specific classes and groups of people: Indigenous persons and Black persons in these cases, respectively.[10] This is no longer a novel critique of criminal law but an observable and logical by-product of its pursuit and the result of criminal law residing within a context of asymmetrical power relations.[11] Likewise, people see ICL as a project that resides in a landscape of power that produces unjust or unfair results.[12] It reflects, rather than transcends, power relations, resulting in the overcriminalization of certain peoples and regions over others.[13] This fundamentally undermines its

7. *Id.* at 63.

8. *Id.*

9. *See id.* at 69 ("Critics of criminal law (and ICL) sometimes suggest that criminal law (and ICL) seeks to portray violators as the 'other,' dehumanizing them.").

10. *See id.* at 69 n.42 (citing a case relating to bias against Canadian aboriginals in criminal court); *see also* Joseph J. Avery, Comment, *An Uneasy Dance with Data: Racial Bias in Criminal Law*, 93 S. CAL. L. REV. POSTSCRIPT 28, 29 (2019) ("More than 2 million people are incarcerated in the United States, and a disproportionate number of those individuals are African American.").

11. *See* Avery, *supra* note 10, at 29 ("Research has found that prosecutors are less likely to offer black defendants a plea bargain, less likely to reduce their charge offers, and more likely to offer them plea bargains that include prison time. Defendants who are black, young, and male fare especially poorly.").

12. *See* ROBINSON, *supra* note 1, at 8 ("Where we breach a deontic commitment to the individual by understating or neglecting a fundamental principle, we are treating that individual unjustly. Conversely, where we overstate a fundamental principle – that is, when we are too conservative because we construe a principle unsupportably broadly – we sacrifice beneficial impact for no normative reason. It is 'bad policy.' We are failing to fulfill the aim of the system for no countervailing reason.").

13. *Id.* at 69 (explaining the critique of ICL that claims its unequal application and dehumanization of defendants undermines its humanitarian objectives).

liberal, humanist, and deontic credentials. Again, this is not where Robinson takes his analysis, but it is likely to be on the minds of readers who do not see criminal law theory or philosophy as separable from a politics that determines winners and losers.[14]

This leads me to an additional observation often neglected by liberal scholars and proponents (myself included), namely the reality that not all good things go together. "Compassion, empathy, and humanity are important in criminal justice," Robinson writes.[15] This may indeed be true in the abstract or among well-meaning officers of criminal law. But again, in practice, it is only the case for some people.[16] We don't have to look far to see this. Besides Indigenous peoples and America's Black community, criminal justice is not compassionate or empathetic to sex workers, to people who use drugs, or to the poor.[17] A foundational assumption of liberalism is that its focus on the individual in the economic, political, rights-based, and social spheres can create a consistent and coherent good life.[18] But we know that it does not do so for everyone and that it produces contradictions and conflicts.[19] Indigenous communities in Canada and the Acholi community in northern Uganda are but two examples that have made this clear, in criminal law and ICL, respectively.[20] What is needed is for liberalism to be *honest* with itself, its limitations, and with those who live under its umbrella: it fails many of the people most in need of protection.[21] Here, readers might point to the fact that Robinson and others would accept these shortcomings but insist that this is not criminal law "properly done."[22] This invites us to ask for whom is criminal law "properly" done?[23] Surely, many communities subjugated in part by criminal law see it as properly done against them.[24]

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14. *See id.* at 64 ("The first of these topics – the purpose and justification of criminal law – is an enormous topic in its own right. Thus, as explained in Chapter 1, I set it aside for a future work, so that I can focus here on the topic of this book: the deontic constraints of ICL.").

15. *Id.* at 67.

16. *See, e.g.*, Avery, *supra* note 10, at 29 (noting disparities in the criminal justice system in the United States).

17. *Id. See also* Jocelyn Eskow, *Prostitution and Sex Work*, 11 GEO. J. GENDER & L. 163, 164 (2010) (discussing disproportionate enforcement of criminal laws against sex workers).

18. *See* Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1309 (2005) ("Truly recognizing the riddle of collective action requires more than just an extension of the dominant discourse of ordinary criminal law, which embraces liberalism's understanding of the individual as the central unit of action and thereby deserving of blame when things go terribly wrong.").

19. *See, e.g.*, Avery, *supra* note 10, at 29.

20. *See* ROBINSON, *supra* note 1, at 69 n.42 (citing a case relating to bias against Canadian Indigenous peoples in criminal court). *See generally Uganda: Situation in Uganda*, INT'L CRIM. CT., https://www.icc-cpi.int/Uganda (last visited Oct. 22, 2020) (describing alleged war crimes and crimes against humanity committed in Uganda since the Rome Statute entered into force).

21. *See* ROBINSON, *supra* note 1, at 76–78 (explaining the risk of limiting justice for both defendants and victims by over-emphasizing individual guilt in liberal ICL theory).

22. *See id.* at 63 (claiming that international criminal law, when applied correctly, has a pro-social aim).

23. *See id.* ("[C]riminal law, properly done, has pro-social aims.").

24. *See* Drumbl, *supra* note 18, at 1310 (referencing the collective guilt felt in states that have

There is another issue here: many people do not have problems with the theoretical underpinnings of criminal law *per se* but do take offense to its application to the international context.[25] This gets lost when one translates criminal law into the international; criminal law gets embedded in a violently asymmetrical world where it cannot be abstracted from power.[26] Once more, Robinson expressly leaves this subject for others to consider, but his argument that a coherentist approach would be fruitful in thinking through these issues will inspire readers of his work to ask how.[27]

In his theoretical assessment of liberalism (and coherentism), Robinson does a lot of work to bring the reader back to the status quo, namely that the liberal (and perhaps cosmopolitan, depending on how it is defined) premises of ICL and justice should be affirmed.[28] To be sure, the word liberalism does receive sustained attention and it is not rigorously defined, nor does Robinson seek to directly justify ICL. But Robinson seeks to combine liberal and critical insights in a way that he hopes "will be convincing both to 'liberal' theorists and to those who have critiqued liberal accounts."[29] This is another invitation for the cohort of liberals and critics of liberalism to engage with the book not only on the area of deontic constraints or culpability but also with what Robinson's work tells us—explicitly and implicitly—about the nature and justifications of (international) criminal law.

But again, it would be hard to justify a defence of criminal law or ICL that was not grounded in liberal assumptions or in some ways a justification of the system of ICL itself. To the best of my knowledge, such an endeavour has never been attempted. Somewhat problematically, given critiques of this premise (even those from liberal scholars), is the view—inherent in many liberal defences—that the liberal foundations of ICL are the most 'coherent' and virtually self-evident.[30] This may be true of ICL but does not seem self-evident with respect to responses to mass atrocities.[31] But this seems to be the ultimate conclusion. According to Robinson, coherentism allows us to eschew certainty in favour of drawing on whatever clues are available and then drawing reasonable hypotheses from them to reconcile those very clues.[32] The end result of engaging in such a process, it seems to me, is a re-

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been subject to ICL).

25. *See id.* at 1304 (arguing that an imperfect criminal justice system, when applied internationally, retains its flaws and imperfections).

26. *See* ROBINSON, *supra* note 1, at 61 ("Others have pointed out that the assumptions and principles of ordinary criminal law may not even be applicable or appropriate in the context of international crimes and thus should not be extended automatically to the international plane.").

27. *See id.* at 16 ("There are numerous other important questions criminal law theory could ask about ICL, and I believe a coherentist method would be a fruitful approach to such questions . . . .").

28. *See id.* at 13 ("I argue that many of the best insights of both the liberal critique and the critique of the liberal critique can be absorbed and reconciled in a humanistic and cosmopolitan account of fundamental principles.").

29. *Id.* at 71.

30. *See id.* at 12–14 (mentioning the liberal backdrop to modern ICL discourse).

31. *See id.* at 76 ("Because ICL can involve much larger groups of perpetrators, coordinating in diverse ways, we may need to specify more thoughtfully the outer limits of complicity doctrines. But it is premature to say that criminal law is unable to do so.").

32. *Id.* at 20.

iteration of ICL as a defensibly liberal enterprise. We have thus come full circle: the fundamentally liberal project of ICL has been challenged and criticized only to have a new theoretical and conceptual framework reaffirm it as one most aptly and coherently understood as a liberal project.[33] The question that seems to go unanswered is: could it ever be otherwise?

ICL is inescapably liberal and so any defense of it must be inescapably liberal too.[34] But the question that arises is: if liberalism is the best we have as a defense of ICL, why does it require so much work to make that clear? Why is it necessary to borrow from other philosophical and political traditions—coherentism and deontic reasoning in Robinson's account—to once again affirm the legitimate dominancy of liberalism? If the necessity or benevolence of liberalism as the underlying premise of ICL was so self-evident, then why would such work even be necessary?

Coherentism too seems like a loaded term suggesting that only certain approaches are *coherent* and that a re-iteration of criminal justice as a fundamentally and largely unproblematically liberal exercise is the most coherent approach available. Readers may disagree and point to the fact that this point is not explicitly made by Robinson in the book.[35] But it is the impression that I was left with, and it has some parallels to the development of realism as a school of thought in international relations, which suggested, incidentally in opposition to liberalism, that it offered the *real* way to comprehend state relations.[36]

It is not clear that there is such a thing as a liberalism in a "minimalist" sense that embodies mere "respect for the individual."[37] Indeed, it is not clear that such an individual-based outlook is necessarily liberal (non-liberal philosophies may also *respect* the individual). Much more flows from liberalism's attention to the individual: a privileging of autonomy, of privacy, of free and individual choice and decision making, etc.[38] Even without critiquing this approach, it is easy to see that it privileges certain moral, political, social, and criminological methods and goals over others.[39]

This is not to say that I believe that a liberal defence of ICL is wrong. On the contrary, it is virtually impossible to imagine ICL being anything other than liberal—and no scholar has posited such a vision to date. As Robinson rightly puts forward: "The reason is that, once one chooses to employ criminal law and thereby to blame, punish, and stigmatize individuals for crimes, one has no choice but to

33. *See id.* at 111 (explaining that the coherentist approach does not seek certainty but instead pulls information from all available arguments to create a new decision-making system).

34. *See id.* at 21 (describing ICL as a liberal system that attempted to provide a model for national liberal systems).

35. *See generally id.*

36. *See* Drumbl, *supra* note 18, at 1326–27 (contrasting a realist approach with a pro-ICL approach).

37. ROBINSON, *supra* note 1, at 64.

38. *See id.* at 21 ("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.").

39. *See id.* at 24 (explaining the conflict between protecting individual defendants from state power versus prosecuting international criminals in order to provide justice for victims).

grapple with individual agency, choice, and desert."[40] In other words, if one accepts criminal law as a worthy endeavour, we are left with no choice but to defend it on liberal grounds.[41] Moreover, and crucially, liberalism may be the only political philosophy and project that offers sufficient space for self-critique, to expose itself, to be honest about who it leaves out, and to attempt to revise itself to better consider the vulnerabilities and suffering that it causes.[42] To abuse Winston Churchill's famous quote, "Democracy is the worst form of government except for all the other forms that have been tried from time to time . . . ."[43]

III. THE NEO-COLONIAL CRITIQUE?

Thoughtfully pushing back on the backlash against liberal ICL as merely a Western imposition is undoubtedly an important endeavour. Robinson contributes substantially to this effort. This is particularly valuable as criticism of ICL is often selective, contradictory, and self-serving. As Robinson writes, "unsubstantiated cultural *ad hominem* arguments are not sufficient reason to close down the debate."[44] Many observers, scholars, and interested political actors raise red herrings or other opportunistic arguments that need to be debunked.[45]

It is certainly valuable to defend the International Criminal Court (ICC) from unwarranted external attack, from internal in-fighting, and from itself. Robinson notes that "the reflex narrative among many commentators is to ascribe every failed case at the ICC to faulty investigations by the Office of the Prosecutor [OTP]."[46] This is indeed a common refrain and has been proffered not just by commentators, but by experts reviewing the Court.[47] Many others—including ICC investigators themselves—have admonished the OTP's practices. While it is not the focus of his analysis, missing in Robinson's brief conversation about critique and counter-critique is the bread-and-butter of OTP practices: investigations. For this, we have to look elsewhere. Of course, this book comes in the wake of the acquittals of Jean-Pierre Bemba and Laurent Gbagbo, which have led many to fret about the state of the ICC and, in particular, for proponents of the Court to issue scathing critiques of the legal standards applied by the judges.[48] Yet, while the ICC may or may not be

40. *Id.* at 74 (emphasis omitted).

41. *Id.*

42. *See id.* at 108 ("My point is that coherentist methods can require radical changes in our beliefs and practices. The continual effort to reconcile our principles, theories, judgements, and practices can lead to the discovery of previously unnoticed latent conflicts.").

43. Winston Churchill, Address at the House of Commons (Nov. 11, 1947).

44. ROBINSON, *supra* note 1, at 82.

45 . *See id.* (noting that certain arguments against ICL principles lack sufficient substantiation).

46. *Id.* at 6.

47. *See, e.g.*, Fatou Bensouda, *Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation*, INT'L CRIM. CT., at 4 (Nov. 26, 2019), https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf (outlining the criticisms of OTP processes that allegedly led to failures in prosecutions).

48. *See, e.g.*, Darryl Robinson, *The Other Poisoned Chalice: Unprecedented Evidentiary Standards in the Gbagbo Case? (Part 1)*, EJIL:TALK! (Nov. 5, 2019), https://www.ejiltalk.org/the-other-poisoned-chalice-unprecedented-evidentiary-standards-in-the-gbagbo-case-part-1/ (noting

emerging as an "acquittal machine," research suggests that many shortcomings have as much to do with selection and investigation practices within the OTP as they do with legal standards.[49] The OTP's investigation techniques are where the "sausage is made" and require greater scrutiny.

Criminal law may not be as Western as many suggest, and as Robinson argues.[50] Other cultures adopted systems of criminal law in various forms prior to colonization.[51] Perhaps there is even something fundamentally human about seeking retribution for certain harms. Curiously, however, none of the cases that Robinson cites as evidence that retributive criminal justice is nothing new are from states or communities that lead in the critique of ICL as a colonial experiment by the powerful against the weak.[52]

More to the point, if liberal criminal law is so widely practiced, it begs the question: why has there been such a sophisticated critique of (international) criminal law in the first place from states and communities? Why has it not been *more* persuasive? What of the concomitant arguments from communities (and not just states) that espouse approaches to mass atrocities *not* focused on either retribution or the individual—such as truth commissions, memorialization, traditional justice mechanisms, reparations, and reconciliation programming, etc.? What of those who genuinely, and not as a red herring, insist that peace must be prioritized over justice as a means to deliver a *just* end: the cessation of political violence and mass atrocity? Again, answers to these questions are not pursued in Robinson's book, and he apologizes for that in Part I.[53] But readers interested in these queries will find bits and bobs in Robinson's work, his theoretical account, and the very assumptions of (international) criminal law that invite us to ask them.

Liberalism is homogenizing when many people(s) may still desire a respect for greater pluralism.[54] It seeks a singular, universal account of humanity when others insist on the existence of humanit*ies*.[55] It endeavours to posit an account "that takes in the full richness of human life, including its social dimensions, and seek principles that reflect widely-shared human concerns."[56] Others, however, insist that such an account will always come at the expense of the complexity of human life in all of its

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that some judgments of the ICC imposed "unsound demands" regarding evidentiary standards).

49. ROBINSON, *supra* note 1, at 6.

50. *Id.* at 79.

51. *Id.* at 79–81.

52. *Compare id.* (discussing the history of retributive criminal justice in countries such as Egypt and China), *with id.* at 17 n. 47 (noting that a majority of the countries spurring on the analysis of ICL as a colonial experiment are in Africa).

53. *Id.* at 16–17.

54. *See, e.g.*, Drumbl, *supra* note 18, at 1303 n.24 (arguing that the ICC incorporates elements from the common and civil law traditions of Europe but not from the legal cultures of states where atrocities occur).

55. *See* ROBINSON, *supra* note 1, at 70 (noting that scholars warn about the dangers of extending doctrines into the transnational plane without considering implications of differently functioning societies).

56. *Id.* at 74.

dimensions and, in particular, at the expense of the most vulnerable.[57]

Robinson rightly argues that "[w]hat ICL does is add a mechanism in addition to those other existing mechanisms, which have historically proven inadequate in preventing mass atrocities."[58] But liberalism and ICL are *also* extremely inadequate at preventing mass atrocities or even addressing them. One need only look at the number of ICC cases to understand these limitations.[59] Not only are there few prosecutions, but few domestic trials are galvanized by ICC action.[60] There is also a serious risk that the ICC entrenches, or at least makes it easier to ignore, one-sided justice by legitimizing those sides of conflicts that it chooses not to investigate or prosecute.[61]

Moreover, and given this reality, there is little concrete evidence that ICL can effectively address the social and political nature of collective violence—or that reimagining its criminal law foundations and constraints would help in this endeavour. There is undeniably something fundamentally collective and social about political violence that is only barely captured in the framework of liberal criminal law and rights protection.[62] If there is a way to reimagine ICL as being able to tackle this fact, then scholars of the field should spell it out and tribunals should heed their advice. It may still be—and in my view is—defensible as an endeavor, but not by pretending it coherently or persuasively addresses the collective nature of mass violence and atrocity.

While many—including Robinson—point to the critique of the geographic distribution of ICC investigations,[63] what is perhaps more difficult to understand in any given situation before the Court is the selection of cases *within* situations. What does deontic reasoning—"normative reasoning that focuses on our duties and obligations to others"[64]—tell us about the selection of cases in, say, northern Uganda, where to date, only five Lord's Resistance Army (LRA) commanders have been targeted for ICC prosecution?[65] What might it tell us about Libya, where the Court has focused only on members of the Gaddafi regime,[66] leaving out perpetrators of atrocities that it has accepted should be held accountable, such as those responsible for the ethnic cleansing of Tawergha?

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57. *See id.* at 69 (acknowledging that some forms of broadly applied criminal law will punish disempowered people without sufficiently considering their unique circumstances).

58. *See id.* at 75 (alternation in original) (emphasis omitted).

59. *See* Robinson, *supra* note 4, at 332 (acknowledging the daunting complexities of the case selection process of the ICC).

60. *See, e.g.*, *id.* (noting the politization hypothesis embedded within ICC interactions with domestic legal systems).

61. *Id.* at 335.

62. *See* ROBINSON, *supra* note 1, at 76 ("It is true that collective action may figure more routinely and on a larger scale in ICL cases, making it an even more central problem.").

63. *Id.* at 18.

64. *Id.* at 11.

65. *Situation in Uganda*, INT'L CRIM. CT., https://www.icc-cpi.int/uganda (last visited Sept. 11, 2020).

66. *Situation in Libya*, INT'L CRIM. CT., https://www.icc-cpi.int/libya (last visited June 21, 2020).

More generally, what can be said from this analysis of the reality that self-referrals lead to the targeting of rebels and non-state actors, and Security Council referrals focus the OTP myopically on government figures?[67] What, if any, deontic or coherentist defense exists of such slanted practices? As some have suggested, should the ICC in fact *embrace* partial justice?[68] Would that be in line with deontic principles? Would that be coherent? Is this all it can achieve? Should it continue to deny that it can only offer selective justice in order to preserve its legitimacy? How can this be defended from a liberal humanistic view? This is not to beleaguer the point or take away from Robinson's analysis or his decision to focus on culpability, but if the answer is that deontic reasoning has nothing to say about this, what does this tell us about the limitations of a form of reasoning that should be at the core of ICL and which is focused on obligations to others? Which *others*?

This also brings me to a point about contradiction. With respect to command responsibility and presumably more broadly, Robinson writes "that ICL should avoid *self-contradiction* – that is, promising compliance with certain principles and then contravening them."[69] The question is whether this is even possible given the above. If it is not—and I would posit that no such system can be without a degree of incoherence—then the question becomes not how to do away with contradiction, but what we do with it.

Finally, and interestingly, whilst not making it explicitly clear, Robinson may be proposing (some of) the potential tools to combat the inherent unfairness of contemporary ICL and justice. Could, for example, his theories of negligence in ICL[70] be brought to bear on more powerful states who often create conditions of atrocity by inaction or who provide the means and methods for other parties to commit atrocities? It seems an obvious blind spot in the construction of ICL that needs redress. One need only recall the victims and survivors of the August 2020 explosions in Beirut to understand that reimagining negligence as an element of ICL could have dramatic and positive consequences. Moreover, in the dialogue that Robinson proposes between criminal law and ICL, what can be learned from the uneven landscape of domestic criminal law in Western states, latent racism, inherent bias, etc. that could be brought to bear to avoid amplifying such scourges internationally?[71] Again, one might draw on recent experiences—including the Black Lives Matter and Indigenous Lives Matter movements—to think through how the inequalities reproduced in criminal law can be avoided in the production of ICL.

IV. WHAT ARE THE STAKES?

Perhaps one question that is often assumed rather than explicitly covered in

67. Robinson, *supra* note 4, at 327–28.

68. *See, e.g.*, *id.* at 336 ("This points to another seeming tension, between *appearing* impartial and *being* impartial, especially in so far as 'appearing impartial' is commonly but superficially associated with prosecuting all groups.").

69. ROBINSON, *supra* note 1, at 57.

70. *See id.* at 140 ("[A] criminal negligence standard actually maps *better* onto personal culpability than the tests devised by the Tribunals.").

71. *See generally* Avery, *supra* note 10.

recent work on ICL is: what is truly at stake? As with the recent work of others in ICL, I struggled at times to understand whether Robinson's book was a defense of ICL, a critique of critiques, an attempted reimagination of the foundational justifications of the ICL project, an exposition defending a particular doctrine regarding command responsibility, or all of the above. Moreover, while the book appears to adopt a non-foundational approach,[72] it does so through a liberal vantage point,[73] seemingly making it foundationally liberal. Is it perhaps that liberalism itself is under attack and requires new and creative defences? Looking around the world, this seems evident. If it is worth defending, this liberalism needs a sophisticated defence. Robinson's work and the questions it raises are an important contribution in this regard.

72. ROBINSON, *supra* note 1, at 85.

73. *Id.* at 74.