

# A TALE OF TWO CITIES: REFLECTIONS ON ROBINSON'S TWINNING OF INTERNATIONAL CRIMINAL LAW AND CRIMINAL LAW THEORY

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## I. INTRODUCTION

Darryl Robinson's book project is animated by the conviction that the hitherto siloed debates in international criminal law (ICL) and criminal law theory have much to gain from engaging with each other. And that this encounter is valuable not only for the relatively new field of international criminal law, but also for criminal law theorists who will be compelled to think through long-standing assumptions and constructs by having to confront the extraordinary circumstances of mass atrocity.<sup>1</sup> Further, Robinson is not merely interested in getting international criminal law theory to be more sensitive to "deontic constraints" in the abstract. Rather, he intends his theoretical edifice to be a living, breathing force that results in a more just international criminal law in practice—that is, it can and should be used by judges, litigants, and other stakeholders in international criminal justice to craft coherent and defensible criminal law rules, principles, and doctrines.<sup>2</sup> The project thus draws on and speaks to both positive (doctrinal) international criminal law, as well as scholarly literature in criminal law theory and moral philosophy in an attempt to "develop some of the methodological and conceptual groundwork for the criminal law theory of ICL."<sup>3</sup> Difficult as it is to serve two masters, Robinson only amplifies the challenge he sets for himself by engaging closely with the practice of ICL to demonstrate the pay-off of his thesis in concrete doctrinal terms. For this purpose, he chooses the notoriously complex doctrine of command responsibility, both to illustrate the shortcomings of the current conceptual and normative approaches to the elements of the doctrine and to demonstrate how these approaches might be placed on a theoretically sound and practically workable footing by adopting the "coherentist" framework he develops.<sup>4</sup>

Given the scope of Robinson's project and the range of conversations in which it seeks to intervene, it is perhaps inevitable that scholars and practitioners who work more closely in one or more of these fields would find themselves wanting greater engagement with ideas, concepts, and prescriptions that bear directly upon their own areas of interest. It is in this spirit of inquiry that I wish to highlight three themes

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1. DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 3–4 (2020).

2. *Id.*

3. *Id.* at 12.

4. *See id.* at 13–16 (proposing a "coherentist" approach for criminal law theory in ICL).

that might add detail to the important “early broad brushstrokes on [the ICL] canvas” sketched by the project.<sup>5</sup> Following the varied aspirations of the book project, the first theme relates to domestic criminal law theory, the second concerns the methodological approach developed in the monograph, and the third focuses on the specific doctrinal discussion of command responsibility.

## II. CRIMINAL LAW THEORY *IN EXTREMIS*

Robinson argues that the “encounter between criminal law theory and international criminal law”<sup>6</sup> constitutes a valuable two-way exchange because “[c]ontemporary criminal law theory developed around what is the ‘normal’ case in today’s world: humans inhabiting a relatively orderly society in a Westphalian state . . . . The extreme cases and novel problems of ICL can reveal that seemingly elementary principles contain unnoticed conditions and parameters.”<sup>7</sup> While ICL does indeed claim to make sense of and provide accountability for the evil that is extraordinary, one can query whether contemporary criminal law theory (especially mid-level theory, which Robinson is sympathetic to) does not equally try and grapple with the limits and boundaries of the criminal law *in extremis*.

For instance, many of the ideas that Robinson highlights as implicated by the extreme context of ICL (such as ideas of community, citizenship, state authority, and jurisdiction) have also been of central concern for criminal law theorists preoccupied by the “special case” of terrorism. Indeed, a preliminary question confronted by scholars working on this area is whether terrorism, sharing similar characteristics to ICL crimes on account of its gravity and the alleged inversion of moral norms in the universe within which the perpetrator acts, represents a departure from the everyday business of criminal law. Another question is whether terrorism’s extraordinary character implies that it should be subject to a different set of domestic criminal law rules and assumptions. For instance, the purported distinction between the everyday, conventional criminal law and criminal law *in extremis* is the foundation for the concept of *Feindstrafrecht* (“enemy criminal law”) in German criminal law scholarship.<sup>8</sup> Developed as far back as 1985 by German criminal law theorist Günther Jakobs, the *Feindstrafrecht*, in contrast to the *Bürgerstrafrecht* (citizens’ criminal law), is directed towards dangerous individuals who have demonstrated a serious and persistent disregard for the norms of the criminal law.<sup>9</sup>

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5. *Id.* at 19.

6. *Id.* at 3.

7. *Id.* at 14.

8. See Markus D. Dubber, *Citizenship and Penal Law*, 13 *NEW CRIM. L. REV.* 190, 202–04 (2010) (discussing if citizenship should be a factor in determining whether terrorists are judged under a retributive or citizen criminal law approach).

9. Günther Jakobs, *Selbstverständnis der Strafrechtswissenschaft vor den Herausforderungen der Gegenwart (Kommentar)*, in *DIE DEUTSCHE STRAFRECHTSWISSENSCHAFT VOR DER JAHRTAUSENDWENDE 47* (Albin Eser et al. eds., 2000) (Ger.). This was the first detailed exposition of the concept of *Feindstrafrecht*, which Jakobs had initially suggested and been critical of in 1985. See Günther Jakobs, *Kriminalisierung im Vorfeld einer Rechtsgutsverletzung*, 97 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZSTW]* 751 (1985) (Ger.); see also Daniel Ohana, *Trust, Distrust and Reassurance: Diversion and Preventive Orders Through the Prism of*

The security threat posed by these offenders (such as terrorists) explains their treatment under this different body of laws that is characterized by reduced procedural protections, drastic penal measures, and disproportionate sanctions aimed at risk-reduction and prevention of harm.<sup>10</sup> This bifurcation of the criminal law—one directed towards citizens, and the other towards enemies—has proved extremely controversial in European criminal law circles.<sup>11</sup>

The comparison with terrorism is all the more telling given that the lack of its inclusion as a separate crime within the ICC's jurisdiction was a major bone of contention during the Rome Statute negotiations for states such as India.<sup>12</sup> Indeed, the scholarly debate on what exactly constitutes an international crime, and what distinguishes genocide, war crimes, and crimes against humanity from serious domestic and transnational crimes is far from settled.<sup>13</sup> Would it be worthwhile for Robinson, and for ICL, to consider the contours of this debate and what it implies for the distinction drawn between "ordinary" and "extraordinary criminality" and whether this entails different sets of normative commitments and doctrinal postures for domestic and international criminal law?

Similarly, theorists who are predominantly occupied with domestic criminal law have debated whether accounts of citizenship and community developed for "normal" scenarios are valid in cases of extraordinary wrongdoing. For scholars such as Antony Duff, in the "normal" scenario, the criminal law must address all members of the political community equally and hold them to account as citizens whose membership in that community is not in doubt.<sup>14</sup> For a criminal law that is dependent on citizenship as the basis of the community, the recognition of the offender's citizenship entails that the community shoulders the responsibility for reminding and persuading all its members, including the offender, of her legal obligations under the law.<sup>15</sup> It also justifies the community's authority to hold the offender to account for public wrongdoing, paving the way for repairing her civic

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Feindstrafrecht, 73 MOD. L. REV. 721, 724–26 (2010) (explaining the difference between *Feindstrafrecht* and *Bürgerstrafrecht*).

10. Jakobs, *Selbstverständnis der Strafrechtswissenschaft*, *supra* note 9, at 51–52; GÜNTHER JAKOBS, STAATLICHE STRAFE: BEDEUTUNG UND ZWECK 45–46 (2004) (Ger.).

11. Carlos Gómez-Jara Díez, *Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants*, 11 NEW CRIM. L. REV. 529, 532–33 (2008) (and references therein); *see also* Tatjana Hörnle, *Deskriptive und Normative Dimensionen des Begriffs "Feindstrafrecht,"* 153 GOLT DAMMER'S ARCHIV FÜR STRAFRECHT 80 (2006) (Ger.).

12. U.N. GAOR, 50th Sess., 30th mtg. ¶ 54, U.N. Doc. A/C.6/50/SR.30 (Nov. 13, 1995) (summarizing the 30th meeting of the U.N. General Assembly's discussion about the establishment of the International Criminal Court); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, at 86, U.N. Doc. A/CONF.183/13 (Vol. II) (2002) (summarizing India's position on the fourth meeting of the Rome Conference).

13. *Cf.* Kevin Jon Heller, *What Is an International Crime? (A Revisionist History)*, 58 HARV. INT'L L.J. 353, 353–54 (2017) (noting the debate and proffering a positivist definition of international crime as an act unanimously considered criminal by international law).

14. R. A. Duff, *Responsibility, Citizenship, and Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 125, 138–40 (1st ed. 2011).

15. *Id.*

relationships with her fellow citizens.<sup>16</sup> However, as Duff acknowledges, this account comes under pressure when dealing with offenders who:

[E]ngage persistently in crimes of a character and seriousness that deny the basic values on which the civic enterprise depends . . . crimes so persistent that they constitute a criminal career, rather than a series of individual wrongs. Should we insist that such people must still be recognized and treated as full members of the normative community—that such membership is wholly unconditional? Or does there come a point at which we may, or must, say that whilst we still owe them the respect and concern due to any human being, the chance to restore themselves to full citizenship by showing that they can again be trusted, and help in achieving this, we cannot now treat them as full members?<sup>17</sup>

Discussing this dilemma in the context of terrorists, Duff queries whether it may be argued that these are offenders who, by their own conduct, have eschewed their membership of the polity, and who thus have more in common with enemy soldiers than ordinary criminals.<sup>18</sup> Note that enemy soldiers do not lose all or any protection under the law—rather, the criminal law stands displaced by the law of war in their treatment, detention, and eventual punishment.<sup>19</sup>

Would this, and similar attempts to define and redefine ideas about community, citizenship, and state authority when it comes to offenders who “deny the basic values on which the civic enterprise depends,” be helpful for Robinson, and for ICL?

These are just a few instances where contemporary criminal law theory may in fact have quite a lot to say about precisely the kinds of questions that Robinson is concerned with in this monograph.<sup>20</sup> This is not to suggest that ICL has nothing to offer to criminal law theory in return, but rather to urge Robinson to reconsider whether his characterization of contemporary criminal law, as being focused on the “normal” reflects accurately the current state of the field. Indeed, as Robinson himself acknowledges, he does not suggest that “ICL is entirely different from criminal law, or that ICL theory is entirely different from national criminal law theory, or that national criminal law never encounters difficult or extreme cases.”<sup>21</sup> Rather, his aim is to highlight how the new contexts of ICL—such as the absence of a legislature or duress and social roles in the extreme circumstances of mass atrocity—might “help us to reconsider underlying suppositions and clarify ideas in ways that we would not have if we thought only about the normal case (i.e., the normal contexts of domestic criminal law).”<sup>22</sup> One may well respond that (domestic) criminal law theorists have long been aware that while all crimes may share some common features, each crime, defense, and mode of liability is exceptional in its own way. Thus, the distinction between the “normal” and the “extraordinary” may

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16. *Id.* at 139–40.

17. *Id.* at 145.

18. *Id.* at 146–47.

19. *Id.* at 147.

20. See ROBINSON, *supra* note 1, at 14 (explaining that criminal law theory can be beneficial in analysing ICL legal issues and vice versa).

21. *Id.* at 121.

22. *Id.*

not entirely map onto the central preoccupations of domestic versus international criminal law theory.

### III. THE SOCIOLOGY OF INTERNATIONAL CRIMINAL LAW

In order to develop doctrines and principles appropriate to international criminal law, Robinson develops a method which he labels "coherentism." Coherentism, à la Robinson, "seeks to advance understanding by reconciling all of the available clues as far as possible, without demanding demonstration of ultimate bedrock justification, epistemically privileged basic beliefs, or a comprehensive first-order theory."<sup>23</sup> A subscriber to the coherentist method would take "existing mid-level principles (e.g., culpability, legality) as provisional starting points."<sup>24</sup> They would then consider reasoning and arguments from "moral theories, patterns of practice, and considered judgments" to refine, add or eliminate these principles, engaging in a "reflective equilibrium" to achieve analogical, deductive, and deliberative coherence between the principles and our considered judgments.<sup>25</sup> The coherentist approach would also seek "*elegance* and *consilience*," such as favouring a single principle that explains multiple elements of a legal practice over a set of disjointed premises.<sup>26</sup>

Notwithstanding these organizing principles, at least in the guise in which it is developed in the book project, one is left wondering whether the coherentist method is itself coherent. Robinson openly acknowledges that those who seek absolute certainty or infallibility will not be persuaded by the coherentist approach.<sup>27</sup> On his formulation, the method is not intended as a mechanical algorithmic device that spews out the one true solution once it is fed the series of relevant inputs.<sup>28</sup> Indeed, there is no automatic hierarchy between the various clues for reasoning (moral theories, positive law, and considered judgments) or necessary prioritization between the sources (principles derived from national law, from within ICL, and moral theories) and considered judgments.<sup>29</sup> One must simply acknowledge the possibility of multiple plausible solutions and resolve the contradictions with as much care and thoughtfulness as one can.<sup>30</sup> Importantly though, he does not consider this lack of certitude in coherentism as a failing to be remedied, but rather its strength when compared to its main rival, foundationalism, which he considers unobtainable and thus unsound.<sup>31</sup> In other words, for a supporter of coherentism, uncertainty is not a bug but a feature which will not generate definitive answers but rather "*working hypotheses* about fundamental principles."<sup>32</sup>

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23. *Id.* at 101.

24. *Id.* at 105.

25. *Id.*

26. *Id.* at 105–106.

27. *See id.* at 103 (describing coherentist methodology as inherently destined to produce fallible results).

28. *Id.* at 104.

29. *Id.* at 111–12.

30. *Id.* at 116.

31. *Id.* at 101–02, 111–12.

32. *Id.* at 116.

The coherentist approach is vaguely reminiscent of the “crucible” approach to treaty interpretation endorsed in the Vienna Convention on the Law of Treaties (and adopted in ICL) where “[a]ll various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.”<sup>33</sup> And, like the oft-criticized crucible method, it seems to leave everything up to the discretion of the individual decision-maker, both in terms of weighting and balancing. This approach would be problematic even in the context of a reasonably cohesive epistemic community of scholars, lawyers, activists, and judges who share a common set of beliefs and practices. The concerns are only magnified in the context of ICL, which arguably lacks such a community.<sup>34</sup>

ICL, as commentators have noted—and as Robinson has himself previously argued and reiterates in this monograph—has a composite identity that borrows from human rights law, criminal law, international humanitarian law, and transitional justice.<sup>35</sup> This identity is reflected in the sources of ICL, the make-up and composition of the practitioners and scholars of ICL (including judges), and the doctrines and principles that have made their way into ICL instruments.<sup>36</sup> Indeed, some of the expansive and victim-focused reasoning of the ad hoc tribunals in developing the definitions of crimes and modes of liability has sought to be explained by the qualifications, training, and expertise of the early practitioners of ICL, who hailed primarily from an international law and/or human rights background and when there were no ICL specialists to speak of.<sup>37</sup> Fast forward a few decades, and it would be difficult to find a field of international law that has generated a cottage industry of experts as quickly as ICL (some would even argue that ICL has already reached a point of oversaturation).<sup>38</sup> However, this field of experts remains deeply fractured in terms of their legal and normative assumptions, methodological approaches, and views on the aims and purposes of the ICL enterprise.<sup>39</sup>

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33. *Reports of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session*, [1966] 2 Y.B. INT'L L. COMM'N. 169, 219–20, U.N. DOC. A/CN.4/SER.A/1966/ADD.L.

34. ROBINSON, *supra* note 1, at 12–15.

35. *Id.* at 22; Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 925–33 (2008). On the hybrid identity of international criminal law, see also ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 18–19 (1st ed. 2003) (describing the bases of ICL in human rights law and national criminal law); Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543, 550–51 (2010) (recounting the origin of ICL from international human rights law, international humanitarian law, and domestic criminal law).

36. ROBINSON, *supra* note 1, at 22–23.

37. See, e.g., Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 78 (2005) (highlighting the influence of normative commitments and assumptions of human rights law and transitional justice in shaping modes of liability at ad hoc tribunals).

38. ROBINSON, *supra* note 1, at 4–5.

39. See, e.g., Jens David Ohlin, *Peace, Security, and Prosecutorial Discretion*, in 48 THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 185, 192 (2009) (describing the ICC as not merely a criminal court but also a “security court,” which exercises diplomatic functions

With a long and distinguished career in ICL academia, policy-making, and practice, Robinson is of course aware of these divides. Indeed, they are reflected in his skepticism of a “‘correct’ foundational moral theory” that may be adhered to by some, but easily rejected by others, leading to a failure to find any common ground and make progress on articulating fundamental principles of ICL.<sup>40</sup> This may very well be one reason—perhaps even *the* reason—he urges us to “embrace the contingency, fallibility, and humanity of the conversation.”<sup>41</sup> A conversation, however, still needs a common language and in the absence of common and agreed upon starting points, guiding posts, and even ultimate goals and aspirations, one wonders whether the conversation that the coherentist method is intended to facilitate will end up being conducted in an “Ivory Tower of Babel.”

Relatedly, applying the coherentist method (coherently) might prove even more challenging if Robinson were to adopt a more capacious conception of ICL. Robinson is careful to define and limit the scope of his enquiry at the very outset of the project:

In this book, “international criminal law” refers to the law for the investigation and prosecution of persons responsible for genocide, crimes against humanity, and war crimes, as well with attendant principles such as command responsibility, superior orders, and so on. This law was developed and applied primarily by international criminal tribunals and courts, but also by domestic courts.<sup>42</sup>

However, ICL—especially in the recent decade—is equally the preserve of institutions other than international criminal tribunals and domestic courts. Important norms and principles of ICL have been developed and championed outside international/hybrid tribunals, including by courts of general jurisdiction such as the ICJ, specialized human rights courts like the European Court of Human Rights and Inter-American Court of Human Rights, and non-judicial mechanisms such as Commissions of Inquiry.<sup>43</sup> What sorts of considered judgments, moral reasoning, and legal principles are likely to be assumed and applied by practitioners, scholars, and judges in these fora? Will they need to be reconciled with those developed by international criminal courts?

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designed to promote regional peace and security).

40. ROBINSON, *supra* note 1, at 95–96.

41. *Id.* at 104.

42. *Id.* at 3 n.1.

43. See, e.g., Giulia Pinzauti, *The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of Kononov v. Latvia*, 6 J. INT'L CRIM. JUST. 1043, 1043–45 (2008) (stating that the European Court of Human Rights has the inherent jurisdiction to incidentally apply provisions pertaining to international criminal law); KJ Keith, *The International Court of Justice and Criminal Justice*, 59 INT'L & COMPAR. L.Q. 895, 895–98 (2010) (arguing that the ICJ has contributed to the development of fundamental principles of criminal law); Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 1–5 (2013) (asserting that the Inter-American Court of Human Rights has targeted national prosecution of gross, state-sponsored crimes); Christine Schwöbel-Patel, *Commissions of Inquiry: Courting International Criminal Courts and Tribunals*, in COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS 145, 145–46 (Christian Henderson ed., 2017) (providing that commissions of inquiry are implicated within and increasingly part of international criminal itself).

#### IV. REFORMING COMMAND RESPONSIBILITY

Moving from the general to the specific, Robinson devotes a considerable proportion of the monograph to illustrating the value of his coherentist method by excavating the scholarly debates and jurisprudential developments surrounding the various elements of command responsibility, or more specifically, the responsibility of *military* commanders, with a postscript on civilian commanders.<sup>44</sup> This survey is meant to both emphasize the perils of the failure to engage in deontic analysis—resulting in unjust doctrines on the one hand, and overcorrection and excessively constrained applications on the other—and highlight the promise of deontic reasoning to generate novel doctrinal insights and prescriptions.<sup>45</sup>

Arguably, the element that has proved most controversial in these conversations is the *mens rea* of negligence for liability as a military commander.<sup>46</sup> While the test endorsed by the ad hoc tribunals is one of “had reason to know” (HRTK), the ICC provides a “should have known” (SHK) standard for liability.<sup>47</sup> Under the Rome Statute, this mental element is also what distinguishes military from civilian superiors (who must meet a higher mental element of consciously disregarding information).<sup>48</sup> It is thus worth examining if the coherentist method indeed assists in untangling and making sense of the nature, limits, and justification for command responsibility. And it is not entirely clear that it does, at least not in order to reach the conclusions that Robinson does upon applying this method.

Robinson canvasses the various arguments against criminal negligence to conclude that “most legal systems and most of the scholarly literature, backed by convincing normative arguments as outlined here, supports the analysis and intuition that criminal negligence is a suitable basis for criminal liability,” and that “the clues overwhelmingly support criminal negligence as a basis for personal culpability.”<sup>49</sup> This statement requires both more evidential support and nuanced analysis. To begin with, much turns on the framing of the quandary: is the question “is criminal liability based on negligence justified by most legal systems, scholarly writing, and normative arguments” or “is criminal liability *for serious crimes* (which is the subject matter of ICL) based on negligence justified by most legal systems, scholarly writing, and normative arguments,” or even further “is *accessorial* criminal liability *for serious crimes* based on negligence justified by most legal systems, scholarly writing, and normative arguments?” Note that the literature and arguments referenced by Robinson do not distinguish between these three propositions.<sup>50</sup> If anything, on Robinson’s own careful recounting, the majority of the literature and jurisprudence that deals specifically with the last question expresses discomfort with

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44. ROBINSON, *supra* note 1, at 141.

45. *Id.* at 139.

46. *Id.* at 195.

47. *Id.*

48. Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

49. ROBINSON, *supra* note 1, at 209.

50. *Id.*



negligence.<sup>51</sup> Additionally, the scholarly writing he references in support of negligence preceding this observation, is overwhelmingly by jurists discussing negligence liability of *principal* parties to “ordinary” crimes in the context of domestic criminal law.<sup>52</sup> For example, some of the scholars who normatively favour negligence as a sufficient basis for criminal culpability, do so with the caveat that:

[T]he general question whether negligence is the proper minimum standard of culpability is meaningless, given the various ways that elements of crimes, defenses, and corresponding culpability terms can be rearranged. The question has some meaning as applied to a crime with only a single culpability term. Otherwise, however, it is of much more limited significance, because criminal offenses are defined and structured in a somewhat arbitrary way, and this can misleadingly either exaggerate or understate the relevance of defendant's culpability or state of mind.<sup>53</sup>

Robinson himself emphasizes the importance of maintaining the distinction between secondary and principal responsibility. As he states, “[c]ommand responsibility is a mode of accessory liability and should be evaluated accordingly,” and that “it is not problematic, or even unusual, that an accessory does not satisfy the *dolus specialis*, or ‘special intent,’ required for the principal’s crime.”<sup>54</sup> The reverse proposition—that we might require a higher mental state than negligence to compensate for the lesser contribution of accessories to the objective elements of the crime—may be equally true. This does not mean that the normative case for negligence liability and the SHK standard for the *accessorial* command responsibility of military superiors for *international crimes* is automatically defunct. But it does suggest that the case does not necessarily flow from an application of the coherentist method.

Moreover, Robinson’s version of the concept of criminal negligence may not in fact be classified as negligence at least in some legal systems. In comparing the *mens rea* standards of criminal negligence and subjective foresight, Robinson argues that not only is the former sufficiently equivalent to the latter but that in fact, the commander who is criminally negligent may be *more* blameworthy than one who foresees the risk of crimes but decides to run the risk anyways.<sup>55</sup> However, his definition of criminal negligence<sup>56</sup> looks less like its classic common law counterpart but rather “wilful blindness,” or “deliberate ignorance,” which potentially qualifies as knowledge in some legal systems. While there are some differences between and within common law jurisdictions as to all the elements that are required to satisfy the wilful blindness standard, the basic underlying test is that the defendant is wilfully ignorant when he “has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in

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51. *See id.* at 206 (“Tribunal jurisprudence (and some ICL literature) expresses discomfort with negligence as a basis for liability.”).

52. *See id.* at 210–13 (discussing the mental state requirement for accessory liability).

53. Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 397–98 (1994).

54. ROBINSON, *supra* note 1, at 209.

55. *Id.* at 218.

56. *Id.* at 216–17.

ignorance.”<sup>57</sup> Indeed, wilful blindness (amounting to knowledge) has even been colloquially referred to as the “ostrich defence,” the very metaphor that Robinson uses to argue for the liability of the commander who “contrary to this duty [of vigilance], buries her head in the sand.”<sup>58</sup> And, like Robinson’s criminal negligence, it has been justified using the “equal culpability” thesis.<sup>59</sup>

Robinson may respond that under his conception of negligence, the commander would be liable even if he had no reason to be suspicious about potential crimes in the first place. Rather, his concern is with the “negligently ignorant commander, who cares so little about the danger to civilians that she does not bother with *even the first step* of monitoring.”<sup>60</sup> This distinction, while a fine one, seems rather artificial in the context of armed conflict and the sorts of circumstances in which international crimes takes place. As Robinson eloquently argues, his standard for negligence is not a call for a “duty to know everything” but rather the requirement that the commander “exercise diligence to stay apprised, to the extent that can be expected in the circumstances.”<sup>61</sup> Given the common knowledge—even amongst lay persons, and certainly amongst those trained for combat—that the commission of crimes is an ever present risk of warfare and training soldiers is the (legitimate) use of violence,<sup>62</sup> a “commander who contrives her own ignorance by creating a system that keeps her in the dark about subordinate crimes”<sup>63</sup> is likely to at least partly be motivated by the suspicion that crimes may occur, rather than by sheer thoughtlessness.

While Robinson can hardly be accused of not wading into the doctrinal weeds, both in his perceptive criticism of the current state of the scholarly and practice controversies surrounding the elements of command responsibility and in his prescriptions for reform, perhaps one reason why his dissection of the mens rea standards for military commanders is not entirely persuasive is the noticeably brief discussion of the responsibility of civilian superiors.<sup>64</sup> Robinson is at pains to clarify that he does not, at this stage, attempt to provide answers to the latter, but nevertheless suggests that his account may not be applicable to civilian superiors.<sup>65</sup> Noting factual differences in the positions of the civilian and military commanders, he briefly concludes that “[a]t this time, it seems to me quite plausible that the SHK test is justifiable for persons effectively acting as military commanders, whereas a

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57. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157 (2d ed. 1961).

58. ROBINSON, *supra* note 1, at 216.

59. Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 53–58 (1994) (arguing for a restricted version of the thesis). See generally ALEXANDER SARCH, CRIMINALLY IGNORANT: WHY THE LAW PRETENDS THAT WE KNOW WHAT WE DON’T (2019) (discussing the equal culpability thesis at length).

60. ROBINSON, *supra* note 1, at 198.

61. *Id.* at 202.

62. *Id.* at 215.

63. *Id.* at 204.

64. *Id.* at 221–22.

65. *Id.*

subjective test may be appropriate for other superiors.”<sup>66</sup> This, to my mind, is a missed opportunity for sharpening the contours of his reformulated negligence standard and exploring the limits of its application using deontic analysis.

The omission is doubly surprising given that the Rome Statute explicitly distinguishes between liability standards for civilian and military superiors and that this distinction turns on the heightened mens rea requirement for the former.<sup>67</sup> This is an approach that has attracted criticism as a “tragic watering down of liability for the self-serving reasons of protecting political leaders.”<sup>68</sup> Reflecting on the reasoning behind the ICL community’s disapproval of the ostensibly over-demanding standard for civil superiors may be a helpful application of the coherentist method for winning over skeptics of negligence as the appropriate mens rea for military commanders. Given the already detailed treatment of the elements of command responsibility in the monograph, one might wonder if this may not be overkill. However, since, for Robinson, what distinguishes the substantive reach of command responsibility from all other modes of liability is its mental element,<sup>69</sup> it is above all this element that holds the most promise to showcase the potential of coherentism.

## V. CONCLUSION

None of these reflections are intended to downplay the importance of Robinson’s project, the significance of which he is inclined to understate as “an initial foray” and “early contribution in an ongoing broader conversation” on the principles and constraints on international criminal law as a field that aspires to theoretical rigor, doctrinal coherence, and practical efficacy. Like the monograph—though on a far more modest scale—these comments are intended to lay the groundwork for a fruitful exchange on a project that deserves attention and is to be applauded for its ambition and its sensibility. Amongst its many rich insights is the emphasis on criminal law theory, not as a set of merely technical, abstract principles, but as an enterprise that takes the human condition—including its frailties—seriously. Robinson’s book, like most of his work, partakes of this deeply humanistic spirit that marries reason with empathy, an attitude that those of us who keep faith in the promise of ICL would do well to inculcate.

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66. *Id.* at 222.

67. Rome Statute, *supra* note 48, art. 28.

68. ROBINSON, *supra* note 1, at 222 (citing Greg Vetter, *Command Responsibility of Non-military Superiors in the International Criminal Court*, 25 YALE J. INT’L L. 89 (2000); Emily Langston, *The Superior Responsibility Doctrine in International Law: Historical Continuities, Innovation and Criminality – Can East Timor’s Special Panels Bring Militia Leaders to Justice?*, 4 INT’L CRIM. L. REV. 141, 159–61 (2004)).

69. *Id.* at 148.