

A COHERENTIST APPROACH TO INCOHERENT LAW? SOME THOUGHTS ON DARRYL ROBINSON'S *JUSTICE IN EXTREME CASES*

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I. INTRODUCTION

Darryl Robinson's book, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law*, makes an important and timely intervention in the scholarship of international criminal justice. The book comes at a time when international criminal law (ICL) is being pulled in many different directions, as Robinson himself acknowledges and cogently maps out. One of the reasons why this body of law is being pulled in so many different directions is that, according to Robinson, ICL actors—from individual lawyers, to courts, to scholars—practice, analyze, and critique aspects of ICL from not only differing philosophical bases but also through differently oriented—and largely unacknowledged—reasoning “tendencies”¹ or “interpretive assumptions.”² In Robinson's view, current ICL practice suffers from a deficit of careful deontic reasoning (i.e., reasoning that carefully attends to certain fundamental deontic constraints of liberal theories of criminal law and punishment).³ Robinson distinguishes deontic reasoning from “source-based” reasoning, which “involves parsing legal instruments and precedents to determine what the legal authorities permit or require” and “teleological” reasoning, which “examines purposes and consequences.”⁴ He argues that often these varying and at-times competing modes of reasoning, especially source-based and teleological reasoning, fail to be engaged simultaneously, leading to incoherence and imbalance in ICL scholarship, doctrine, and, most importantly for Robinson, practice.⁵

Robinson takes on the challenge of proposing a new way to engage in the analysis of ICL, proposing a “coherentist method” whereby, rather than committing to any single overarching fundamental philosophical theory of criminal law and punishment, one seeks to reconcile, to the extent possible, various strands of criminal law theory with the doctrine, practice, and stated utilitarian goals of ICL itself.⁶

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1. DARRYL ROBINSON, *JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW* 26 (2020).

2. *Id.* at 27.

3. *Id.* at 11.

4. *Id.*

5. *See generally id.* at 11–19, 22–55.

6. *See generally id.* at 11–14, 59–118.

Thus, to be a proper coherentist, one must engage in and attempt to reconcile, as far as is possible, (at least) three types of reasoning: deontic, source-based, and teleological.⁷ Robinson characterizes this as a “humanistic, cosmopolitan”⁸ approach, but one which is “open-minded” and “prepared to re-evaluate familiar principles.”⁹ Even more impressively, Robinson essentially gives the reader two books in one, providing a nuanced analysis and critique of various interpretations of command responsibility, an oft-controversial ICL doctrine that attaches liability to commanders who fail to “prevent or punish” international crimes committed by subordinates, while utilizing his proposed coherentist approach.¹⁰

On a fundamental level, I have very few qualms with Robinson’s approach, which is thoughtfully and accessibly laid out. While he does not explicitly claim to do so, from my reading, one of the main benefits of Robinson’s coherentist method is that it allows a wide zone of appreciation, bounded only by what Robinson refers to as “fundamental principles” of criminal law, within which ICL may be constructed in efforts to maximize its utility.¹¹ Thus, we may reach with consequentialist ambitions, but Robinson’s approach will reprimand us when we reach too far, for example, by prosecuting someone when they were not afforded fair notice that their conduct exposed them to criminal liability. This limitation represents one of the “deontic constraints” Robinson identifies, which he views as “rooted in the fair treatment of persons.”¹² Robinson identifies three such constraining principles, which he views as being relatively universal and relatively uncontroversial: basic principles of culpability, legality (or fair warning), and fair labelling.¹³

7. *Id.* at 11.

8. *Id.* at 78.

9. *Id.* at 230.

10. *See id.* at 148–93 (describing command responsibility and the coherentist approach, including the implications of each).

11. *See, e.g., id.* at 3, 9, 21, 64, 86 (referring to fundamental principles). While not central to Robinson’s claims, I found his account of the potential social functions of ICL, which, in my view, entail both potentially positive *and* negative outcomes, as somewhat one-dimensional, by equating a broader scope and application of ICL liability with a single positive social outcome—that of anti-impunity/deterrence. Yet, as I and others have pointed out, both individual ICL cases and international criminal justice writ large as a global project, may produce a variety of outcomes, some positive, some negative, and some ambiguous. *See, e.g.,* Randle C. DeFalco, *The Uncertain Relationship Between International Criminal Law Accountability and the Rule of Law in Post-Atrocity States: Lessons from Cambodia*, 42 *FORDHAM INT’L L.J.* 1, 1 (2018) (“ICL prosecutions may actually have a mix of positive, nil, and negative effects on the domestic rule of law”); Randle C. DeFalco & Frédéric Mégret, *The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System*, 7 *LONDON REV. INT’L L.* 55 (2019) (pointing out the impacts of failing to understand racism as a structural issue within ICL). Moreover, the goal of anti-impunity is not necessarily a wholly positive outcome, but may implicate ICL (and at times, human rights law), in a problematically narrow punitive-based justice orientation. *See* Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 *CORNELL L. REV.* 1069 (2015) (demonstrating the problem with using ICL to correct human rights violations without analysis of this method’s shortcomings).

12. ROBINSON, *supra* note 1, at 18.

13. *Id.* at 9.

By way of response, I consider whether fundamental principles—even the relatively short list of three such principles utilized by Robinson himself—may be found to conflict, and I offer some preliminary thoughts on how such contradictions might complicate his proposed approach and examples. That is, I consider whether situations could arise wherein there exist two competing interpretations of a rule of ICL, where interpretation A violates fundamental principle one (e.g., culpability), while interpretation B violates fundamental principle two (e.g., fair labelling). I consider how such a situation might complicate or push Robinson’s theory. I do so utilizing Robinson’s own example of command responsibility as a potential scenario involving this conundrum. Through this analysis, I raise the possibility that if a dedicated coherentist takes both the fundamental principles of culpability and fair labelling, as they are defined by Robinson, seriously, this may necessitate a rejection of the law as it is currently constructed.

While I see this outcome as not necessarily creating any fundamental problems for coherentism itself, as a coherentist could seemingly just reject the relevant rule as fundamentally flawed (i.e., *incoherent*) and in need of foundational revision, Robinson seems reluctant to argue that command responsibility is flawed in this way and that the law should be changed. I suggest that this outcome reflects a curious commitment on Robinson’s part to excuse poor drafting and shoddy compliance with fundamental principles by ICL institutions to date, especially the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Court (ICC), which he focuses most closely on. According to Robinson’s own hierarchy of sources, adherence to fundamental deontic principles must necessarily come before source-based or teleological justifications.¹⁴ In this context, my interpretation may stem more so from differing views on the implications of the deontic principle of fair labelling in terms of specifically what culpable conduct an accused can reasonably be held accountable for in the context of command responsibility, along with my personal comfort in imposing even onerous positive duties on commanders. Nonetheless, I believe this issue may arise in other contexts as well.

Along these lines, I consider whether, in such situations, the better solution may be simply pointing out that certain aspects of ICL, *de lege lata*, may be foundationally flawed because they cannot be reasonably interpreted in a way that respects fundamental principles and hence, should be rejected outright by a dedicated coherentist. That is, coherentism might help us to identify what provisions of ICL fall outside the boundaries of fundamental deontic criminal law principles, and hence, must be rejected as misguided deviations based on other considerations. It is this outcome that Robinson seems to work quite hard to avoid. For example, Robinson states, in the context of his detailed discussion of command responsibility, that he “would [seemingly only] endorse” an approach of straining, or even deviating from, the applicable statutes and established precedent “if it were the *only way* of complying with fundamental principles: in that case, canons of construction could allow a strained textual reading and a departure from precedents to avoid violating

14. *Id.* at 60–61.

fundamental principles.”¹⁵ As I explain below, it is here where Robinson and I differ, as I see no reason to work to rescue ICL and its institutions from its shoddy, even incoherent lawmaking practices.

After providing a sketch of this initial reaction on the specific topic of command responsibility, I then conclude with some thoughts about how this dynamic of an uncompromising and rigorous application of a coherentist method of analysis could ground a more radical oppositional stance against ICL as a self-proclaimed liberal system of criminal law in whole. I suggest that if one recognizes equality under the law as an additional fundamental principle of criminal law, and while doing so, steps back and engages in a systemic analysis of ICL as a whole (in its substance and practice), a dedicated coherentist may be forced to view ICL itself, in its current manifestation and practice, as a fundamentally flawed *system* of criminal law that cannot be redeemed without radical changes in the jurisdictional reach of ICL institutions as well as in how the law is applied.

II. MIGHT FUNDAMENTAL PRINCIPLES CONTRADICT ONE ANOTHER? IF THEY DO, HOW DO WE REACT?

As an initial matter, I suspect that some reading *Justice in Extreme Cases* will quibble with Robinson’s selection of three proposed exemplar fundamental liberal criminal law principles. This, of course, is always a danger when one deigns to propose any set (or even subset) of universal principles. While I have no major qualms with the specific three principles Robinson proposes (although he differs from me in his view of what “culpability” itself means),¹⁶ I found myself wondering whether it might be possible for situations to exist wherein tensions may arise between even these three fundamental deontic constraints while engaging in a coherentist process of examining a legal puzzle such as command responsibility. That is, what if there are only two reasonably possible interpretations of a legal provision—in this instance, command responsibility—and one interpretation of said provision seems to violate a fundamental principle, yet the main alternative to said rule seems to violate a different fundamental principle?

It would seem that in such a case, a dedicated coherentist would need to argue that the rule itself, *de lege lata*, is unacceptable and to either propose a revised version of the rule that does not offend fundamental principles or propose to have the rule thrown out altogether as unjust. While reading *Justice in Extreme Cases*, this is the conundrum that kept returning to my mind, including during Robinson’s thoughtful exploration of the various possible interpretations of the command responsibility doctrine.

The legal “knot” that Robinson identifies and tries to untie in relation to command responsibility he summarizes as follows: the predominant position (taken by prosecutors and most courts/tribunals): “(i) regards command responsibility as a mode of accessory liability, (ii) rejects the contribution requirement, and yet (iii)

15. *Id.* at 169 (emphasis added).

16. In my view, culpability refers to the blameworthiness of an individual’s conduct in a more general sense that is not coterminous with causality (for example, criminal attempts, etc.).

proclaims compliance with the culpability principle.”¹⁷ Robinson argues that the principle of culpability demands that command responsibility, as a form of accessory liability, be bounded by at least some degree of causal connection to one or more charged international crime(s).¹⁸ As such, he identifies a fundamental contradiction in how command responsibility has been applied thus far, especially when it comes to the “failure to punish” prong of the doctrine, and its attempted application to successor commanders.¹⁹ Both the doctrine and its attempted application create the risk of ignoring the culpability principle by convicting a commander whose failure to prevent or punish crimes of subordinates had no causal role in contributing to such crimes.²⁰

Robinson also dismisses efforts, such as those by Judge Shahabuddeen, to solve the riddle of the “failure to punish” prong of command responsibility by characterizing command responsibility as a separate offence.²¹ He does so in a two-stage analysis.²² While he acknowledges that the “separate offence” approach would solve the culpability problem he identifies when it comes to command responsibility, Robinson concludes that “the option of declaring a new offence of breach of command responsibility is not legally available to the Tribunals.”²³ He reaches this conclusion through an analysis of the ICTY and ICC statutes and relevant jurisprudence, both of which, according to his reading, consistently treat command responsibility as a mode of liability rather than a separate offence.²⁴

While reading this section of *Justice in Extreme Cases*, I expected him to conclude that the doctrine of command responsibility simply needs to be reformulated because, as it is currently formulated, it cannot be reconciled with fundamental principles.²⁵ Yet, this is not the case. Robinson grounds his critique of ICL discourses concerning command responsibility, both at courts and by scholars, in a tendency to ignore deontic constraints and to focus solely on source-based and teleological reasoning.²⁶ Yet, Robinson himself seems curiously attached to finding ways to (re)interpret command responsibility that rescue it from the need to be explicitly changed or reformulated, stating that “[n]on-contributory derelictions can be addressed, if necessary, through legislative amendments [because] in [his] view, this quite narrow problem does not warrant making implausible claims about

17. *Id.* at 158.

18. *Id.* at 149–54.

19. *Id.*

20. *Id.*

21. *See id.* at 163–69 (discussing problems with characterizing command responsibility as separate offence).

22. *See id.* (analyzing problems in characterizing command responsibility as separate offence).

23. *Id.* at 164.

24. *See id.* at 165 (“The Tribunal Statutes (and the ICC Statute) appear to recognize command responsibility as a mode of liability, not as a crime.”).

25. *See id.* at 143–74 (describing courts’ and other scholars’ various characterizations of command responsibility and dismissing each as flawed).

26. *See id.* (critiquing characterizations of command responsibility).

applicable law or breaching the culpability principle.”²⁷

I have no specific expertise in command responsibility and have no qualms with Robinson’s analysis of relevant jurisprudence, although in a general sense, given the lack of coherency in ICL sentencing decisions,²⁸ I would point out that it is often left unclear exactly how a specific accused’s culpability is characterized. What I find curious is that Robinson seems so committed to rescuing command responsibility by finding some version of the doctrine that is “coherent,”²⁹ or, in other words, has grounding in existing law and jurisprudence and does not offend deontic principles of justice.³⁰

This outcome left me wondering why Robinson did not simply argue that command responsibility is a poorly drafted, inadequately thought out, and incoherent doctrine as it stands, and that it needs to be reformulated in order to bring it in line with fundamental principles. Throughout Robinson’s analysis of the doctrine, especially in his discussion of the proposed “separate offence” approach,³¹ Robinson’s prior references to “fair labelling” as a fundamental deontic principle of criminal law³² kept coming to my mind. Yet, this principle is not engaged by Robinson in his analysis of command responsibility, which instead focuses primarily on the culpability principle.³³

While I accept Robinson’s point that command responsibility has, until relatively recently, been treated exclusively as a mode of liability, rather than a substantive ICL offence, this alone does not satisfy a dedicated coherentist who is committed to abiding by fundamental principles. In my view, the language of command responsibility, specifically that of holding an individual criminally responsible for “failing to prevent or punish” an international crime,³⁴ seems best suited as laying out the parameters of a separate offence, one with its own specific actus reus, which is left relatively disconnected from the predicate offence. Moreover, this interpretation seems to much more accurately, and hence fairly, describe the nature of the culpability of a commander charged via the doctrine. I was left thinking, Does not fair labelling demand that the thrust of the sanction against a commander accurately reflect that commander’s actions? While I recognize that this argument may be made in relation to many modes of liability (e.g., aiding and abetting, instigating, and perhaps even ordering), I make this suggestion in the context of command responsibility as a means of raising the possibility that

27. *Id.* at 145.

28. *E.g.*, Margaret M. deGuzman, *Harsh Justice for International Crimes?*, 39 *YALE J. INT’L L.* 1, 7–10 (2014) (discussing the varied range of harshness in ICL sentencing decisions).

29. *See* ROBINSON, *supra* note 1, at 174–76 (advancing Robinson’s own view of how command responsibility should be characterized).

30. *See id.* at 13–14 (describing the coherentist approach to interpretation).

31. For a discussion of the separate offence interpretive approach, *see id.* at 163–65.

32. *See, e.g., id.* at 9 (describing fair labelling as a principle requiring the name of offence to signal wrongdoing of the accused).

33. *See id.* at 140 (outlining how early characterizations of command responsibility contradict culpability principle).

34. *See, e.g., id.* at 175 (discussing the principle of the failure to punish branch of command responsibility).

fundamental principles may conflict. Moreover, along these same lines, Robinson's otherwise convincing point that the "failure to punish" branch of command responsibility is less problematic if one recognizes the reality that the vast majority of situations in which international crimes are committed are in series, rather than as isolated incidents,³⁵ does not, in my view, fully bring the doctrine into conformance with fundamental principles of fair labelling.

As an initial matter, Robinson does not engage with the principle of fair labelling in discussing the doctrine of command responsibility; instead, he starts his analysis from what seems to be a position that, if at all possible, the doctrine of command responsibility needs to be rescued from its incoherent interpretation thus far.³⁶ I found it hard to square this argument with the fact that what is being punished is wholly the acts of the commander, and that the mode of liability itself has no explicit limitation requiring any degree of causality.³⁷ Moreover, one could envision scenarios where the utilitarian goals of ICL are undermined by such an interpretation. If I understand Robinson's view correctly, he would require some finding of causal connection between a commander's failure to prevent or punish and the commission of the charged crime.³⁸ He acknowledges that this result might, in limited circumstances, create scenarios wherein commanders may fail to punish subordinates for a past crime while avoiding ICL liability, so long as that failure does not contribute to the commission of further crimes.³⁹ Yet, if we are to take the culpability principle, and specifically its causal demands, seriously, is it not possible for a commander to repeatedly fail to punish subordinates without any demonstrable causal connection to future crimes? Robinson seems to assume not,⁴⁰ but I am not so sure.

One could imagine a scenario, for example, wherein multiple units report to a single commander and do not communicate with one another. If these various units independently, and without communicating with one another, committed various international crimes, would Robinson's interpretation mean that the relevant commander would not become liable until such time as a causal linkage could be connected between the commander's failure to punish a past crime and the commission of a subsequent crime? What if the commander simply does not care if units under her command commit atrocity crimes, yet conforms to her minimum duties to prevent such crimes? This scenario seems to create the theoretical possibility that the commander is not liable for the first crime by each independent unit under her command, and even possibly future crimes, absent some showing that her failure to punish had some causal effect on subsequent crimes (or that eventually she failed in her duties to prevent those crimes). This pattern could theoretically continue indefinitely, until such time as it could be proven that a specific instance of

35. *See, e.g., id.* at 154 (arguing that failure to punish can contribute to a series of crimes and that international crimes are typically part of a series).

36. *See id.* at 139–41 (outlining Robinson's position on interpreting command responsibility).

37. *See, e.g., id.* at 163–69 (describing how tribunals punish command responsibility).

38. *See id.* at 174–75 (describing Robinson's view of command responsibility).

39. *Id.* at 175.

40. *See id.* at 154 ("[T]he 'failure to punish' branch can indeed be reconciled with a requirement of causal contribution.").

failing to punish contributed in some way to a subsequent crime.

Admittedly, the above-described scenario seems factually unlikely, and the inference of some degree of causal connection between the commander's failure to prevent or punish seems to be establishable in most cases. But does accessory liability even seem to be a fair way of labelling the culpability of the commander in these scenarios? To my mind, it is not, for two reasons. First, when commanders are convicted via command responsibility, I conceptualize their culpability as being grounded in their actions of failing to prevent or punish, and the core of said culpability to be largely detached from the ultimate crime. Their culpability is in the risk they create, which is quite significant, but often hard to forecast, especially as it relates to what crimes subordinates will ultimately commit. If a commander fails to restrain the troops under her command, they may commit any array of hard-to-predict offences. They may be emboldened to enrich themselves through pillage. They may commit acts of sexual and gender-based violence. They may simply elect to kill a large number of civilians. They may even have genocidal motivations. As such, I have always interpreted convictions for command responsibility as being grounded in the accused commanders' identified failures to prevent and/or punish their subordinates, rather than for somehow participating in the crime committed by their subordinates.

Secondly, and perhaps more troubling for a dedicated coherentist, is the problem I refer to as that of the "different subsequent crime." By this, I refer to a situation wherein a commander fails to punish a certain international crime committed by subordinates, who, at least somewhat emboldened by this lack of reprimand, commit one or more subsequent crimes. An example of such a scenario could be a situation wherein a military unit commits the war crime of pillage while carrying out military operations, the unit's commander fails to punish those involved in the acts of pillage, and members of the same unit then proceed to engage in mass killing and acts of sexual and gender-based violence. In this scenario, what should we charge the commander with? The commander failed to punish the war crime of pillage, but, assuming that her subordinates did not know that she would not punish them in advance, she may not be responsible for such failure until such time as her inaction emboldened her subordinates to commit subsequent crimes. Is she to be held responsible for pillage? Or for the much more serious crimes of murder, extermination, rape, and various other crimes? From my reading of Robinson's analysis, this conundrum is not addressed.

On another note, I am perhaps less comfortable with excusing any failures of commanders to punish subordinates than Robinson. While in a general sense, I view criminal sanction as a rather clumsy and quite often deeply flawed means of exercising social control, I have no qualms placing affirmative burdens, even relatively onerous ones, on commanders, especially military ones. History has taught us that the commission of international crimes—especially war crimes—amid armed conflict are far from a rarity. Instead, they are a regular occurrence, including commission of such crimes by well-funded and highly trained militaries, such as that of the United States.⁴¹ I have no qualms criminally sanctioning military commanders

41. See Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and*

who fail to take every action possible to prevent/punish international crimes by subordinates. If this requirement makes the waging of war near-impossible without turning most commanders into criminals, so be it. Given that many military commanders exercise a great deal of discretion in terms of relevant military regulations⁴² in deciding when to charge subordinates with crimes—and the fact that commanders are oft-incentivized to not bring charges in order to engender the loyalty and dedication of the troops under their command by being seen to protect them⁴³—I am troubled by the possibility that commanders get at least one free pass to fail to punish subordinates for committing international crimes.

Regardless of whether my specific analysis of command responsibility is acceptable, I use it to raise two general points. First, a dedicated coherentist may run into situations where fundamental principles require that we throw out *both or all* existing interpretations of a provision of ICL. Thus, despite a professed commitment to traditional liberal criminal law principles, coherentism might force dedicated adherents to take more radical positions. Moreover, while a coherentist may work quite hard to reconcile deontic, source-based, and teleological analyses, in the end, fundamental deontic principles must prevail when reconciling all three logics is not feasible. Second, and along these lines, it seems to me that Robinson may commit an error he convincingly points out that many others commit: that of starting from a position that treats doctrinal (or “source-based”) analysis above other forms of analysis in his efforts to save command responsibility as it is currently formulated by tweaking it, rather than calling for its foundational reformation into a separate offense, or in some other manner that respects the principles of legality, culpability, and fair labelling.

III. MIGHT A COHERENTIST SYSTEMIC ANALYSIS FIND THE CURRENT ICL REGIME INDEFENSIBLE?

The specific analysis above discussing Robinson’s example of command responsibility, I believe, raises some much broader and more foundational questions about the legitimacy of ICL itself as a putative criminal law regime. I found myself wondering what the outcome might be if one were to recognize a single additional fundamental principle: that of equal treatment under the law, while engaging in a coherentist analysis of ICL as a system, rather than focusing on a particular provision of the law.⁴⁴ Indeed, this is a direction that Robinson views as worthwhile.⁴⁵ While Robinson at times references H. L. A. Hart’s distinction between the legitimacy of

International Law, 30 MICH. J. INT’L L. 251, 275–86 (2009) (describing war crimes committed by the United States).

42. See Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 8 TULSA J. COMPAR. & INT’L L. 1 (2001) (discussing the history of the command responsibility doctrine and its importance in holding military leaders responsible due to their expansive discretion).

43. Sepinwall, *supra* note 41, at 281–86.

44. To be clear, Robinson explicitly states that he is *not* undertaking such a systemic analysis, but does raise the possibility that it could be undertaken in the future. I very much hope that he does. ROBINSON, *supra* note 1, at 17.

45. *Id.*

punishing an individual and the justification of a system as a whole,⁴⁶ elsewhere he states that a coherentist methodology would be “appropriate and helpful for [various] general questions” of ICL.⁴⁷ While Robinson understandably sets these questions aside for future research that I very much hope he carries out, even in this first, more modest foray, Robinson notes that the deontic restraints he deals with are designed to protect individuals, and that “if a system aspires to be a system of justice, it should not lightly dismiss a principle on the ground that it is ‘merely’ a principle of justice.”⁴⁸

Along these lines, I could not help but wonder what the result would be for a coherentist if they were to engage in such a systematic analysis of ICL while recognizing the principle of relatively fair or equal treatment among and between those subject to the law as a fundamental deontic principle. I have the sense that in such a scenario, Robinson’s theory could transform from the scalpel he seems to conceptualize it as, into a wrecking ball. That is, if we are to accept the principle that individuals subject to the law, especially criminal laws, deserve to be treated more or less equally, as a fundamental principle of legality and criminal law, I have difficulty seeing how a coherentist cannot come quite quickly to the conclusion that ICL is, on the whole, a system that flagrantly violates this fundamental principle on multiple levels.

First, ICL, by its own terms purports to apply to everyone, everywhere, all the time and regardless of local laws, customs, or the like. This sentiment is evident in legal constructs such as the responsibility to protect, universal jurisdiction, and the lofty rhetoric of the preamble of the ICC’s Rome Statute. It is also evident in the dramatic language used by ICL institutions and actors to describe the importance of their work, underscoring that the crimes being addressed concern all of humankind, not just those directly affected. I have the sense that, given that especially powerful actors—both individuals and states—are able to essentially opt out of being subject to ICL, this creates a fundamental tension with a basic principle of legality and criminal law.

In my view, if one also begins to think through the *temporal* impunity of states and individuals who have materially benefitted, and continue to materially benefit, from processes of accumulating wealth and power through the commission of acts now characterizable as international crimes (conducting wars of aggression, annexing territory, committing genocide, various crimes against humanity and war crimes, and the like), then the foundations of ICL become even shakier. How is a coherentist to reconcile the fact that the states primarily responsible for creating ICL (and selectively enforcing it), were largely formed and/or enriched themselves through the very acts they now outlaw? I look forward to seeing how Robinson and others utilizing his impressive coherentist approach grapple with such fundamental questions in the future.

46. *Id.* at 8.

47. *Id.* at 17.

48. *Id.* at 12 n.29.

IV. CONCLUSION: AN IMPORTANT CONTRIBUTION THAT WILL KEEP GIVING

Overall, *Justice in Extreme Cases* is an impressive and thoughtful addition to the literature on ICL, providing a rigorous methodology for unpacking the riddles and complexities of this still-evolving body of law and identifying its shortcomings. While Robinson's initial attempts employ his proposed methodology to specific, thorny controversies, such as that of command responsibility, I am confident that his carefully outlined methodology will continue to lead both him and others to new and important insights, including those leading to much-needed reforms. Indeed, as I have explained in this reaction essay, I believe the coherentist process of analysis Robinson lays out may lead to much more fundamental challenges to ICL and its institutions than even Robinson himself envisioned when creating it. This possibility underscores the importance of his contribution, as one of the most valuable aspects of new methodologies is their ability to bring us to new and unexpected destinations. Only time will tell what these destinations will be for ICL as coherentism adds more adherents in and beyond the academy.