STRICT CONSTRUCTION, DEONTICS, AND INTERNATIONAL CRIMINAL LAW

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Here's to starting in the middle! In *Justice in Extreme Cases*, Darryl Robinson advocates interpreting international criminal law (ICL) in light of mid-level[1] deontic principles, meaning "the principled limits of the system's licence to punish, in light of duties owed to the individual."[2] The central deontic principles he identifies are the requirement of personal culpability,[3] legality (*nullum crimen sine lege*),[4] and fair labeling ("label of the offence should fairly express and signal the wrongdoing of the accused").[5] Robinson further embraces a "cosmopolitan coherentist" approach, which involves drawing evidence of these deontic principles from the best available evidence with as global a lens as possible and testing them in the ICL context.[6] This approach, he contends, is superior to the oft-used alternatives of oversimplified teleological arguments[7] or source-based interpretation, at least when divorced from deontic principles,[8] because it is more just in relation to the accused, but also gives

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1. Robinson contrasts mid-level principles with "firm bedrock" or "main comprehensive ethical theories" and argues that mid-level principles are superior to "foundational" ones in guiding interpretation in that they allow for greater "convergence" (people can arrive at the same mid-level principle for different reasons); "they are more specific and concrete than general moral theories, and thus offer more practical guidance in a particular context;" and they foster a more "inclusive, pluralistic conversation." *See* DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 3, 96–100 (2020).

2. *See id.* at 52 ("Deontic analysis engages directly with the principled limits of the system's licence to punish, in light of duties owed to the individual.").

3. *Id.* at 9 ("[P]ersons are held responsible only for their own conduct.").

4. *Id.* ("[T]he principle of legality (*nullum crimen sine lege*, 'no crime without a law') . . . requires that definitions not be applied retroactively and that they be strictly construed (*in dubio pro reo*, 'when in doubt, for the accused,' also known as the rule of lenity), to provide fair notice to individual actors and to constrain arbitrary exercise of coercive power. This principle is a 'solid pillar' without which 'no criminalization process can be accomplished and recognized.'"

5. *Id.* ("[L]abel of the offence should fairly express and signal the wrongdoing of the accused . . . .").

6. *Id.* at 12–14.

7. *See id.* at 30 ("The problem with reductive victim-focused teleological reasoning is that it conflates the 'general justifying aim' of the criminal law system as a whole – which may indeed be a consequentialist aim of protecting society – with the question of whether it is justified to punish a particular individual for a particular crime.").

8. *See id.* at 162 ("[E]ven in source-based analysis, what we see – and what we overlook – is influenced by our sensitivities. If we are mindful of fundamental principles, we are more likely to see the patterns in authorities that are consistent with those principles; if we are not mindful, we may miss those patterns.").

judges the space to convict, when appropriate.[9] As someone who suspects she has been walking around with cosmopolitan deontic coherentist tendencies for some time and not known it, I am quite sold on the approach. Robinson's book reveals an eminently humane view of ICL theory and offers a masterful unraveling of some very stubborn ICL "knots," including the doctrine of command responsibility.[10]

My comments are restricted to Robinson's observations on strict construction, another one of those tough ICL knots and one that I too have attempted, albeit less eloquently than Robinson, to unravel.[11] As Robinson notes, international tribunals have espoused a commitment to strict construction—at the ICC, the Rome Statute explicitly guarantees it[12]—at the same time that they have at times engaged in fairly expansive readings of ICL.[13] This contradiction begs the question of just what strict construction means or should mean in ICL. I very much agree with Robinson that, "[a]s commonly understood, the principle [is] either too toothless or too dispositive."[14] The frequently invoked formula of reducing strict construction to foreseeability (perhaps with the additional gloss of consistency with the "essence of the offence")[15] begs as many questions as it answers. Thus, I share Robinson's sense that "what is also needed is something else: not just a crude tie-breaker rule, but a cluster of more complex considerations . . . . "[16]

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9. *See id.* at 5–7 (discussing the danger of overcorrecting or failing to punish even where deontic principles are satisfied).

10. *See id.* at 194–223 (applying his methodology and concluding that, to hold someone criminally responsible under command responsibility, the defendant must have made a causal contribution, but that aggravating the risk suffices as such a causal contribution, and that a mens rea of negligence suffices).

11. I am lumping strict construction in with the bar on expanding crime definitions by analogy and the rule of lenity because I believe that they boil down to the same thing in the ICL context. *See* Caroline Davidson, *How to Read International Criminal Law: Strict Construction and the Rome Statue of the International Criminal Court*, 91 ST. JOHN'S L. REV. 37, 37–42 (2017) (noting that each of these three principles is located in Article 22 of the Rome Statute).

12. *See* Rome Statute of the International Criminal Court art. 22, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute] ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.").

13. ROBINSON, *supra* note 1, at 28.

14. *Id.* at 131 (alteration in original).

15. Mohamed Shahabuddeen, Does the Principle of Legality Stand in the Way of Progressive Development of Law?, 2 J. INT'L CRIM. JUST. 1007, 1017 (2004); *see* 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, 544–47 (2010) ("[T]he principle of strict construction is satisfied when a judicial interpretation, while not strictly in conformity with the wording of a criminal prohibition or relevant case law, is nonetheless reasonably foreseeable . . . and is consistent with the essence of an offence."); LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 173–74 (2016); *see also* Leila Nadya Sadat & Jarrod M. Jolly, Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot, 27 LEIDEN J. INT'L L. 755, 763 (2014) (proposing that interpretations of criminal provisions need only be reasonably foreseeable).

16. ROBINSON, *supra* note 1, at 132; *see also* Davidson, *supra* note 11, at 41 (arguing that a more meaningful strict construction guarantee would look to the principles behind the canon and assess their applicability and meaning in the ICL context).

To determine what belongs in this "cluster of more complex considerations," it makes sense to try to understand the principles that undergird strict construction and to examine their relevance to ICL and ICL institutions. As I argued in a previous article exploring strict construction at the ICC, the traditional rationales for the doctrine, which are imperfect even in the domestic context, apply with differing force in the context of ICL.[17] The two prevailing rationales for strict construction in national regimes are notice and separation of powers (lawmaking is for legislatures not judges).[18] Other justifications seen in domestic jurisdictions, and in particular in U.S. scholarly literature on the rule of lenity, related to the separation of powers argument include preventing arbitrary law enforcement, promoting democratic accountability, and eliciting legislative preference.[19]

Although the separation of powers argument and its corollaries[20] are far messier with international tribunals like the ICC, as it is likely that states intended to delegate at least some lawmaking power to judges for efficiency and political reasons and it is far from clear that a robust ongoing legislative lawmaking option exists,[21] the notice argument (at heart, a deontic argument about the duties owed the accused) may in fact be stronger in ICL than with ordinary crimes. It is easy to dismiss the notice rationale with the argument that international crimes tend to be so serious that nobody could reasonably think what they are doing is legal,[22] but this argument may be overstated. Not all international crimes may be so obviously criminal to all, as

17. Davidson, *supra* note 11, at 42.

18. I mainly explored scholarly literature, statutes, and cases from the U.S., the U.K., France, and Germany, and the European Court of Human Rights, so a more cosmopolitan approach, as encouraged by Robinson, would ideally canvass a broader array of legal systems.

19. *See* Davidson, *supra* note 11, at 56–68.

20. A related justification for strict construction or lenity is that it helps to elicit legislative preference. As Einer Elhauge argues, in the United States, "an overly narrow interpretation is far more likely to be corrected by statutory interpretation because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and can more readily get on the legislative agenda." Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2194 (2002). The preference-eliciting argument plays out very differently in international courts than in domestic jurisdictions. It is far from clear that at the ICC, for example, a narrow interpretation from the judges will elicit a "legislative" correction. States are aware of the possibility that norms be applied against their own officials or soldiers and thus may favor the narrow interpretation. Moreover, the Assembly of States Parties is not a true legislative body and there is little reason to believe that any legislative reasoning it engaged in would be superior to judicial reasoning. *See* Davidson, *supra* note 11, at 64–65.

21. Davidson, *supra* note 11, at 63; *see also* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 644 (2005); Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377, 386–87 (2006); Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 137 (2008) ("Complicating efforts to create a holistic corpus of law is the fact that the international system lacks a standing world legislature that can fill interstices and lacuna, modernize ancient prohibitions, or fix faulty formulations.").

22. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 908 (2004) ("[N]otice concerns . . . [do not apply] when crimes fall deep within . . . societal prohibition.") (alteration in original); *see also* 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 31 (2007).

there may be far more complexity on the ground than lawyers would like to admit, and our lines between acceptable and unacceptable and criminal and non-criminal conduct may shift over time.[23] Moreover, unlike in domestic jurisdictions, where notice to potential criminals is often a fiction, in the context of ICL, with military training on international humanitarian law (IHL) and ICL, notice is more likely to be a realistic possibility.[24]

Robinson's observations on the "thin ice principle," which he offers in the context of the defense of superior orders, are pertinent to the issue of interpreting crimes as well.[25] The notion is that we may be less concerned about notice with ordinary crimes because we expect people who choose to skate on thin ice (or engage in arguably criminal behavior) to bear the risk of falling into cold water (or prosecution).[26] As Robinson aptly notes, however, soldiers do not have the same autonomy as ordinary citizens to hang up their ice skates, and "[t]here may be a good deontic basis to allow a soldier some margin for good faith error in truly ambiguous situations."[27] It may be that this margin for error is afforded at the point of a defense, but it is also worth contemplating at the point of interpreting the scope of the crime.

Limiting arbitrary enforcement of the criminal law, another justification for strict construction with deontic dimensions, applies somewhat differently depending on the ICL context. In domestic jurisdictions dealing with ordinary crimes, the argument goes, strict construction arguably serves to reduce the risk of arbitrary police enforcement.[28] At the ICC, this concern is far weaker, as the ICC lacks a police force. If we graft this concern to arbitrary exercises of prosecutorial and judicial discretion, even still, at the ICC, the justification is relatively weak. The prosecutor's discretion is quite constrained,[29] and judicial discretion is constrained by the requirement of written legal opinions explaining decisions.[30] By contrast, this concern about arbitrary enforcement may be very strong in ICL prosecutions in domestic jurisdictions. In the former Yugoslavia, for example, early on, the

23. *See, e.g.*, MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2012) (painting a complex picture of child soldiers); *see also* MARGARET M. DEGUZMAN, SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW 14 (2020) (questioning the idea of the inherent "gravity" of international crimes and offering a new conception that gravity consists "a function of values and goals" that provide guidance depending on the context).

24. Davidson, *supra* note 11, at 60.

25. *See* ROBINSON, *supra* note 1, at 136 ("The 'thin ice principle' argues that [people] should stay clear of possibly criminal conduct, and hence it is not unjust to punish them if they choose to walk the line and the conduct is found to be criminal.").

26. *See id.* (noting that normal citizens, unlike soldiers, have the option of steering clear of possibly criminal conduct).

27. *Id.*

28. *See* Price, *supra* note 22, at 887 (arguing that lenity should be understood as a means of promoting democratic accountability).

29. The Pre-Trial Chamber retains a significant role in overseeing investigations and charges. *See, e.g.*, Rome Statute, *supra* note 12, arts. 15, 53, 54, 56, 57, 61. The Security Council may also insist on a deferral of prosecutions. *See* Rome Statute, *supra* note 12, art. 16.

30. Judges must justify their decisions in lengthy, legal opinions published on the internet. *See* Davidson, *supra* note 11, at 67.

International Criminal Tribunal for the former Yugoslavia (ICTY) created the Rules of the Road project out of fear that conflict resume as domestic law enforcement agents began arresting people (possibly arbitrarily) for alleged atrocities.[31]

There are other possible justifications for strict construction particular to the ICL context, but they are expressive or instrumental rather than deontic. These include promoting the rule of law and human rights related to due process by modeling judicial restraint and, separately, protecting state sovereignty.[32] The rule of law-affirming function is indeed an advantage of restraint in interpreting international crimes, but one that is likely cancelled out by the also important value of expressing condemnation of the relevant conduct. There is a risk of going too far or, as Robinson puts it, "*Überdogmatisierung*," with strict construction for the sake of setting a good example.[33] Strict construction in the ICL context likewise may serve the less illustrious purpose of protecting state sovereignty,[34] which in turn may serve the, in my view, more legitimate instrumental goal of encouraging state participation in international criminal courts.[35]

A better construction of strict construction—one that seems consistent with Robinson's proposed deontic coherentist approach—is simply a command to choose the best interpretation keeping in mind certain limitations or considerations rooted in the legitimate concerns that undergird strict construction in ICL.[36] John Jeffries

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31. *See generally* U.N., *Working with the Region*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about/office-of-the-prosecutor/working-with-the-region (last visited Sept. 21, 2020).

32. *See* Davidson, *supra* note 11, at 67–71 (noting that potential justifications include promoting human rights, the rule of law, perceived legitimacy of the ICC, protecting state sovereignty, and bolstering the gravity requirement).

33. ROBINSON, *supra* note 1, at 6 ("[T]here is a very real danger that the system may even overcorrect. It is entirely understandable that judges, in response to sustained academic criticism that their approaches are too expansive, might swing to the opposite extreme, adopting approaches that are excessively conservative, demanding, and rarefied, all in the name of rigour. It has become arguable that judges – particularly at the ICC – may be falling at times into the opposite pitfall of *Überdogmatisierung* – that is, excessively rigid over-theorizing that loses sight of the purposes and practicalities of criminal law adjudication in non-ideal earthly conditions.").

34. *See* Davidson, *supra* note 11, at 70 ("Although less noble than justifying strict construction based on human rights principles, the sovereignty justification for strict construction warrants attention . . . .").

35. The canon likewise may have a gravity-supporting function, but strict construction is a blunt tool for defining gravity. *See id.* at 72 ("This gravity-enforcing notion of strict construction may put ICL on more solid footing from a philosophical perspective. The graver the crimes, the more justified the encroachment on state sovereignty. The chief problem with this notion of strict construction as a means of bolstering the Rome Statute's requirement is that it is an imperfect tool for guaranteeing gravity.").

36. This proposal is a riff on John Jeffries's proposal rejecting lenity in the United States. Discussing the United States' lenity canon and the void for vagueness doctrine, "[J]effries advocates interpreting criminal statutes by considering the merits of the particular *issue*, not the particular *case*, at hand, subject to 'three generalized constraints': courts 'should avoid usurpation of legislative authority,' courts 'should avoid interpretations that threaten unfair surprise,' and, finally, judges 'confronting ambiguity in a penal statute might usefully ask whether a proposed resolution makes the law more or less certain.'" *Id.* at 87 (quoting John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195, 220–21 (1985)).

has argued that, in the American context, these constraints include avoiding unfair surprise, avoiding usurpations of state authority, and seeking to clarify the law. I believe that similar constraints are in play with ICL, but some clarification of the meaning of the constraints and their implications for ICL is perhaps useful.

First, and most importantly from a deontic perspective, judges should avoid unfair surprise to defendants. Notably, this is not the same thing as mere "foreseeability," or, at least, it makes clear to whom the crime must have been foreseeable. (Robinson likewise dismisses the prevailing foreseeability standard in this context as too permissive.)[37] It is unfair surprise to *the defendant* that has the potential to offend deontic principles and thereby make a prosecution unjust.[38] This consideration thus requires an assessment of the strength of the support for a particular interpretation. Arguably, "the absence of a preexisting international norm criminalizing the conduct creates a rebuttable presumption of unfair surprise."[39]

Second, to address the somewhat atypical separation of powers concerns of ICL and the instrumental goal of encouraging state participation in the Rome regime, judges should avoid usurpations of state "legislative" authority.[40] For the purposes of the Rome Statute, this means that ICC judges should avoid interpretations criminalizing behavior that states clearly intended not to include when they drafted the Rome Statute. (This constraint is effectively the French understanding of the bar on crime expansion by analogy.)[41] Importantly, it does not prevent judges from clarifying the law where states delegated lawmaking authority to international judges via vague provisions or ones drafted ambiguously by design.[42] Application of this criterion in domestic jurisdictions adjudicating international crimes is likely to be different, as courts will have to consider whether domestic legislation is the end of the inquiry or whether international law permits or demands a broader or different interpretation of a crime, which requires an inquiry into the role of international law in relation to national law.[43]

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37 . ROBINSON, *supra* note 1, at 131 ("Relevant jurisprudence allows, for example, 'foreseeable' judicial innovations, but this leaves almost no limitation on judicial creativity.").

38. Davidson, *supra* note 11, at 87, 95–98; 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*.").

39. *Id.* at 87. Here, I do not advocate an actual notice standard, but rather an assessment as to whether a reasonable person in the actor's situation standard would be unfairly surprised.

40. For Jeffries, this was legislative authority. *See* Jeffries, *supra* note 36, at 220 ("[A] court should avoid usurpation of legislative authority . . . . In many situations, interstitial judicial lawmaking is both politically legitimate and institutionally unavoidable. Considerations of political legitimacy do, however, require that (constitutional imperatives aside) judicial decisions be consistent with legislative choice, either express or implied.").

41. Davidson, *supra* note 11, at 88.

42. *Id.* at 89–90; *see also* Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 57 (2005) (arguing that the term "gender" in the Rome Statute is an instance of "constructive ambiguity").

43. In Chile, for example, courts have used international norms of ICL, IHRL, and IHL, such as the obligation to investigate and prosecute those responsible for war crimes and crimes against humanity, to override domestic legal constraints, including an amnesty law and statutes of limitation. Caroline Davidson, *ICL By Analogy*, 26 U.C. DAVIS J. INT'L L. & POL'Y 1 (2020).

Related to these first two constraints in this proposed formula, strict construction also means avoiding the problematic teleological rationale (identified by Robinson long ago and addressed again in his book) of justifying expansive interpretations of crimes based on the circular aim of "ending impunity" and the misguided practice of uncritically conflating the aims of a given tribunal's statute with the aims of the IHL or international human rights law (IHRL) instrument from which an ICL norm is derived.[44] As Robinson eloquently expounds in this book, ICL institutions such as the ad hoc tribunals and the ICC assign criminal liability and impose punishment and thus are subject to different constraints rooted in fundamental (or mid-level) criminal law principles than IHL or IHRL regimes.[45]

Finally, judges should seek to clarify ICL and international law generally. To paraphrase Jeffries, some rules are bad, but some rule is usually better than no rule.[46] Clarity is important in light of deontic obligations to potential future defendants.[47] Clarity is especially important in a relatively nascent field like ICL. In many instances, this approach will mean reading ICL consistently with IHL and international human rights norms.[48] However, there will be instances where a narrower reading of ICL is warranted, such as where states intended to exclude the conduct from the crime or where, due to the atypical or novel context, there is a risk of unfair surprise, or, as Robinson argues, where imposing criminal liability in a particular situation would contravene other fundamental or mid-level criminal law norms on personal culpability.[49] In these instances, ICC judges may clarify the law through transparent reasoning on how they reached a particular definition of the crime and why it diverged from IHL or human rights norms.

In writing my earlier article on strict construction, I suspected that I had only scratched the surface of the relevant constraints, but I suggested them in the hopes that they contribute to the cosmopolitan conversation on principles for which Robinson has so eloquently argued. It worked! Robinson suggests a few more constraints or, as he calls them, a "cluster of . . . considerations."[50] Among them, he

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44. ROBINSON, *supra* note 1, at 27–31; *see also* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008) [hereinafter Robinson, *Identity Crisis*].

45. ROBINSON, *supra* note 1, at 42–45.

46. Jeffries, *supra* note 36, at 221 ("Of course, not every rule is a good rule, but the lack of any rule is usually a bad idea. To be avoided, therefore, is an interpretation that creates or perpetuates openendedness in the criminal law.").

47. *Id.* (arguing that open-ended interpretation is undesirable because it creates future opportunities for abuse of the criminal law). Clarity also may serve deterrent aims better by sending a clear message of the line between criminal and non-criminal.

48. *See, e.g.*, ROBINSON, *supra* note 1, at 245–47 (arguing that human rights law and criminal law are not incompatible, but "misapplication" or "inapposite" application of "human rights assumptions and reasoning habits" failing to consider the "context shift" from human rights law to ICL are problematic; "The addressee of the prohibitions is no longer the state, and the remedy is no longer civil; hence we have to engage with a new set of deontic constraints.").

49. The culpability principles at issue in Robinson's discussion of command responsibility, for example, relate to the requirement of a causal contribution and mens rea. Robinson, *Identity Crisis, supra* note 44, at 946–52.

50. ROBINSON, *supra* note 1, at 132.

suggests: "[M]indful[ness] of . . . legality considerations (whether conduct was 'innocent when done,' the judicial versus legislative role, and predictability); other deontic principles, such as culpability and fair labelling; the proper scope of criminal law; and the even narrower scope appropriate for ICL (which authorizes transnational interventions)." [51] Some of these considerations overlap with the constraints I suggested. Others, including requirements of culpability and the importance of fair labeling, are welcome refinements.

As to command responsibility, Robinson offers a persuasive example of the application of his deontic cosmopolitan coherentist methodology through a critique of command responsibility doctrine and a proposed alternative. I will address command responsibility only as it pertains to strict construction at the ICC. Whether the command responsibility question Robinson uses to illustrate his cosmopolitan deontic coherentist approach properly triggers the Rome Statute's Article 22(2) rules on strict construction is not obvious. On the one hand, there seems to be little ambiguity on the face of the Rome Statute that command responsibility requires a causal contribution.[52] On the other, Robinson suggests that the scholarly literature (and caselaw from other courts) made it somewhat less clear how ICC judges would interpret the provision, such that perhaps there is more to this "as a result" business than meets the eye.[53]

The reasoning that Robinson employs in concluding that, thinking like a deontic cosmopolitan coherentist, yes, a causal contribution is required but risk aggravation is sufficient causal contribution,[54] likewise appears consistent with the notion of strict construction as a command to find the best interpretation of a provision, subject to the constraints of not reading into crimes conduct that states clearly intended to exclude, avoiding unfair surprise to defendants, and choosing an interpretation that brings clarity to the law. Robinson's approach seems unlikely to unfairly surprise (it is narrower than previous approaches requiring no causal contribution) and seems consistent with states' intent as it is consistent with the explicit language of the Rome Statute. Moreover, it has the advantage not only of clarifying the murky doctrine of command responsibility but also, as Robinson emphasizes, of bringing ICL's doctrine of command responsibility in line with

51. *Id.*

52. *See* Rome Statute, *supra* note 12, art. 28(a) ("A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces . . . ."); *id.* art. 28(b) ("With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates . . . .").

53. *See* ROBINSON, *supra* note 1, at 259 (noting that "the Bemba Trial Chamber, like the Pre-Trial Chamber, affirmed the requirement of causal contribution" and that "[t]his finding ought to be unsurprising, since the requirement is explicit in the ICC Statute: Article 28 expressly requires that the crimes be 'a result of' the failure by the commander 'to exercise control properly,'" but that "as a result of the convoluted debate emerging from Tribunal jurisprudence, the matter had been contested," including by Amnesty International).

54. *See id.* at 190.

criminal law principles on culpability.

Clarification of the idea of strict construction in ICL, though but a small piece of Robinson's significant contribution to international criminal law theory with this book, offers an example of the potential positive feedback loop that Robinson envisions between ICL theory and criminal law theory generally.[55] If international judges and scholars embrace a more nuanced conception of strict construction in light of the legitimate principles undergirding the canon in the context of ICL and ICL institutions, instead of using it as a "crude tiebreaker,"[56] this thinking may serve as a model for domestic jurisdictions, where the principle likewise causes confusion. One hopes that this "conversation," in the long run, will lead to a more sensible and just inquiry for all.

55. Robinson argues that it's a two-way exchange—ICL theory can and should draw from criminal law theory, and vice versa. *See id.* at 14 ("The extreme cases and novel problems of ICL may reveal that seemingly elementary principles contain unnoticed conditions and parameters.").

56. *Id.* at 132.