PART I

Introduction and Problem

1

Introduction

OVERVIEW

This book is about the encounter between criminal law theory and international criminal law (ICL).[1] I argue that the encounter can be illuminating in both directions. Criminal law theory can challenge and improve ICL, and in turn ICL can challenge and improve criminal law theory. To manage the scope of the inquiry, I focus on one subset of criminal law theory: exploring the deontic[2] constraints of a system of justice, such as the fundamental principles of culpability and legality. ICL often addresses extraordinary circumstances and mass atrocities, which can pose special difficulties for this type of inquiry; however, these difficulties also present opportunities for insight.

I urge a "mid-level principles" and "coherentist" approach to identifying and delineating deontic principles. This approach differs from some common academic instincts, for example that we must seek certainty by grounding propositions in firm bedrock, or that we must ground normative claims in one of the main comprehensive ethical theories. Coherentism recognizes that, in the human condition, the best we can do is to work with all available clues. Prevailing understandings are fallible, contingent, human constructs; nonetheless, we use those understandings as the best guide we have, while also trying to improve them. Furthermore, I argue that principles of criminal justice are neither abstract and metaphysical, nor vengeful and backward-looking; they are thoroughly humanistic. Empathy, intuition, and experience are recurring touchstones in this book.

The study of deontic constraints is important for several reasons. One is to ensure that persons are treated justly. Another is that clarifying the constraints can produce more effective law that avoids excessively rigid conceptions that are not normatively supported. Yet another is that the study of ICL's novel problems can advance criminal law theory by revealing that many commonplace assumptions are

[1] 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.

[2] I explain this term more carefully in §1.1.3 and Chapters 3 and 4.

predicated on the "normal" context. As an analogy, the study of physics near a black hole, or at velocities near the speed of light, or at the subatomic scale, may lead us to notice that concepts we have used in everyday experience are actually more subtle than we thought. The study of special cases is necessary for a truly general theory of criminal justice.

To illustrate the proposed approach, I unpack specific controversies in command responsibility. Command responsibility is currently contested, confused, and convoluted. I trace how an inadvertent culpability contribution caused the present entanglement. I also argue that the "should have known" standard, which seems problematic at first glance, reveals on closer inspection a sound insight about justice. I offer prescriptions for a morally justified and practical law to address gross derelictions that unleash deadly forces.

1.1 CONTEXT: WHY PRINCIPLES MATTER

1.1.1 Rapid Construction of a New Body of Criminal Law

Domestic criminal law has existed in most regions for many centuries,[3] and yet the practices and principles of domestic criminal law are still contested. In comparison, ICL is still a nascent innovation. After some sporadic historic forerunners and a brief surge after World War II, ICL has really taken root only in the last two decades, following the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (known collectively as "the Tribunals").[4] Despite initial skepticism in the 1990s, the field has demonstrated its feasibility in securing the arrests and trials of major figures, and it has become relatively established far more quickly than anyone anticipated.

The field has also seen major stumbles and setbacks, and currently ICL is awash with controversies and criticisms from every direction. Projecting criminal law onto the international plane to respond to the worst crimes is still very much a new and uncertain experiment in human history. The International Criminal Court (ICC) in particular has been struggling, and, at the time of writing, several major ICC cases have collapsed or ended in highly controversial acquittals.

Contemporary ICL was produced by means of a rapid transnational conversation involving thousands of jurists, drawing on diverse sources and legal systems. The elaboration of ICL began in earnest in the mid-1990s, with the creation of international criminal tribunals. While there were some important international and national precedents, those precedents were often sparse and inconsistent. As a result,

[3] See, e.g., G MacCormack, *Traditional Chinese Penal Law* (Edinburgh University Press, 1990); P Olivelle (trans and ed), *Dharmasutras: The Law Codes of Apastamba, Gautama, Baudhayana, and Vasistha* (Motilal Banarsidass, 2003); J Tyldesley, *Judgement of the Pharaoh: Crime and Punishment in Ancient Egypt* (Weidenfeld & Nicolson, 2000).

[4] D Robinson & G MacNeil, "The Tribunals and the Renaissance of International Criminal Law: Three Themes" (2016) 110 AJIL 191.

jurists had to make significant choices in shaping the doctrines. They made those choices under severe time pressures; there was not time to ponder rarefied points. Later choices in turn built on those initial choices at increasingly fine levels of granularity. Thus many hands have hastily woven together the elaborate tapestry of definitions and principles that we recognize today.

While it is an achievement that a body of criminal law was fashioned so quickly, it is inevitable that there will be oversights, contradictions or incoherencies in the resulting patchwork of doctrines. Now, as the need to articulate a common set of rules has become less urgent, the time is ripe for a more systematic analytical and normative examination of the fabric of rules that has been stitched together. It is an opportune moment for an invigorated criminal law theory of ICL.

1.1.2 The Liberal Critique and Possible Overcorrection

Scholarship about ICL has recently flourished and diversified, with scholars scrutinizing ICL from a multiplicity of perspectives, including interdisciplinary, critical, and theoretical approaches.[5] One prominent strand of this new scholarship has been the liberal critique of ICL, which brings criminal law theory to bear on ICL problems, with particular emphasis on the fundamental constraints of a liberal justice system. Scholars have pointed out that ICL, despite proclaiming its adherence to fundamental principles, often seems to contravene those principles.[6] Concerns initially tended to focus on "joint criminal enterprise," but critical attention quickly spread to other doctrines, such as command responsibility and duress. Many scholars are now doing thoughtful work in this vein.

But things move quickly in ICL. In the last decade, ICL has already demonstrated its adaptability by embracing the liberal critique. Scholarly literature and judicial reasoning has already evinced much more careful grappling with fundamental principles. Recent judicial decisions are particularly mindful of personal culpability and conversant with concepts from criminal law theory.[7]

[5] For impressive canvassing of the literature, see C Kreß, *Towards a Truly Universal Invisible College of International Criminal Lawyers* (Torkel Opsahl Academic, 2014); S Vasiliev, "On Trajectories and Destinations of International Criminal Law Scholarship" (2015) 28 LJIL 701; S Nouwen, "International Criminal Law: Theory All over the Place," in A Orford & F Hoffman, eds, *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016); C Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 2018).

[6] Among the first pioneers in this respect were G P Fletcher and J D Ohlin: G P Fletcher & J D Ohlin, "Reclaiming Fundamental Principles of Criminal Law in the *Darfur Case*" (2005) 3 JICJ 539; A M Danner & J S Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93 Calif L Rev 75; K Ambos, "Remarks on the General Part of International Criminal Law" (2006) 4 JICJ 660; M Damaška, "The Shadow Side of Command Responsibility" (2001) 49 Am J Comp L 455.

[7] As just two examples, see *Prosecutor v Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC T.Ch, ICC-01/04–01/06, 14 March 2012, at paras 917–1018 (co-perpetration and culpability); *Prosecutor v Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, ICC T.Ch, ICC-01/05–01/08, 21 March 2016 (command responsibility and culpability). Other examples are discussed

Indeed, there is a very real danger that the system may even *over*correct. 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.[8] Taking the broadest interpretation at every turn is overly simplistic, but so is always taking the narrowest. "Just Convict Everyone"[9] was rightly criticized as the problematic extension of one tendency, but "Just Acquit Everyone" is the problematic overextension of the opposite tendency.[10]

Whereas the Tribunals have, at times, been (unfairly) criticized by some commentators as "conviction machines," the ICC is, if anything, in danger of emerging as an "acquittal machine," given that the majority of cases so far have ended in acquittals, collapses at trial, and even failures at the charge confirmation stage. This trend has culminated in the controversial acquittals of Jean-Pierre Bemba in 2018 and then Charles Gbagbo in 2019.[11] Currently, the reflex narrative among many commentators is to ascribe every failed case at the ICC to faulty investigations by the Office of the Prosecutor. While investigative shortcomings are undoubtedly part of the problem, observers appear to be waking to the fact that judicial standards are also part of the equation and that some ICC judges may be applying abnormally exacting procedural requirements, evidentiary expectations, standards of review, narrow definitions, and conceptions of the culpability principle.[12]

elsewhere in the book, esp at §2.5. This laudable trend in judicial reasoning is noted in J D Ohlin, "Co-perpetration: German *Dogmatik* or German Invasion?," in C Stahn, ed, *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (Oxford University Press, 2015).

8 M Bergsmo, E J Buis & N H Bergsmo, "Setting a Discourse Space: Correlational Analysis, Foundational Concepts, and Legally Protected Interests in International Criminal Law," in M Bergsmo & E J Buis, eds, *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opshal Academic, 2018) at 3–5; E van Sliedregt, "International Criminal Law: Over-Studied and Underachieving?" (2016) 29 LJIL 1; see also §2.5.

9 M E Badar, "Just Convict Everyone! Joint Perpetration from *Tadić* to *Stakić* and Back Again" (2006) 6 Int'l Crim L Rev 293.

10 See §2.5.

11 *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment pursuant to Article 74 of the Statute, ICC A.Ch, ICC-01/05–01/08 A, 8 June 2018; *Prosecutor v Gbagbo and Goudé*, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, ICC T.Ch I, ICC-02/11–01/15–1234, 15 January 2019 (Judge Carbuccia).

12 I explore the possibility of "overcorrection" in the *Bemba* case in Annex 4; see also D Robinson, "The Other Poisoned Chalice: Unprecedented Evidentiary Standards in the *Gbagbo* Case?" (5 November 2019) EJIL Talk (blog); see also D M Amann, "In *Bemba* and Beyond, Crimes Adjudged to Commit Themselves" (13 June 2018) EJIL Talk (blog); L N Sadat, "Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in *Prosecutor v Jean-Pierre Bemba Gombo*" (12 June 2018) EJIL Talk (blog); M Jackson, "Commanders' Motivations in *Bemba*" (15 June 2018) EJIL Talk (blog); S SáCouto, "The Impact of the Appeals Chamber Decision in *Bemba*: Impunity for

The inclination toward higher standards is commendable, but if barriers to conviction are increased out of misguided enthusiasm beyond what is required by deontic principles, then one sacrifices the system's impact and purpose for no deontic or consequentialist reason. A convergence of inappropriately rigid standards will, at best, increase the time and resources required for each investigation and prosecution; at worst, it will lead to the continued collapsing of cases. Either outcome entails unnecessary expenditure of social resources and a diminishment of the intended expressive message and beneficial impact of ICL. Thus it is all the more important to delineate soundly the fundamental principles appropriate to the system.

1.1.3 Two Reasons to Clarify Principles

Scholars sometimes suggest that the way out of this quandary is to "balance" utilitarian and deontological considerations.[13] But "balance," while sound as an aspiration, is still a bit too vague. It does not provide us with a conceptual framework of how and why these considerations would be "balanced," nor does it provide a methodology for doing so.

A helpful first step was famously suggested by H L A Hart, who helped to clarify the interplay of consequentialist and deontological considerations.[14] Purely deontological accounts of criminal law are generally unconvincing, because the objective

Sexual and Gender-Based Crimes?" (22 June 2018) IJ Monitor (blog); J Trahan, "*Bemba* Acquittal Rests on Erroneous Application of Appellate Review Standard" (25 June 2018) Opinio Juris (blog); J Powderly & N Hayes, "The *Bemba* Appeal: A Fragmented Appeals Chamber Destabilises the Law and Practice of the ICC" (26 June 2018) Human Rights Doctorate (blog); B Kahombo, "Bemba's Acquittal by the Appeals Chamber of the International Criminal Court: Why Is It So Controversial?" (9 July 2018) ICJ Africa (blog); F Foka Taffo, "Analysis of Jean-Pierre Bemba's Acquittal by the International Criminal Court" (13 December 2018) Conflict Trends (blog); B Hyland, "The Impact of the *Bemba* Appellate Judgment on Future Prosecution of Crimes of Sexual and Gender-Based Violence at the ICC" (25 May 2019) ICC Forum (blog); L Sadat, "Judicial Speculation Made Law: More Thoughts about the Acquittal of Jean-Pierre Bemba Gomba by the ICC Appeals Chamber and the Question of Superior Responsibility under the Rome Statute" (27 May 2019) ICC Forum (blog); D Guilfoyle, "Of Babies, Bathwater, and List B Judges at the International Criminal Court" (13 November 2019) EJIL Talk (blog).

[13] To give just one example, see B Womack, "The Development and Recent Applications of the Doctrine of Command Responsibility: With Particular Reference to the *Mens Rea* Requirement," in S Yee, ed, *International Crime and Punishment: Selected Issues, Vol 1* (University Press of America, 2003). The aspiration is correct, but I will elaborate in this book on the roles of deontic and consequentialist reasoning.

[14] H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford University Press, 2008) at 3–12 and 74–82. See also J Rawls, "Two Concepts of Rules" (1955) 64 Philosophical Review 3. The proposal that the general justifying aim may be entirely utilitarian has been questioned by other scholars. For example, John Gardner notes that retributive considerations may be not only a constraint on punishment, but also a part of the aim and indeed the essence of punishment: J Gardner, "Introduction," in Hart, *supra*, at xii–xxxi. The point for now is that *even if* the justification for the system is consequentialist (reducing crime), deontological considerations at least constrain the pursuit of those aims.

of "righting the cosmic balance" by meting out deserved punishment does not seem to justify the expense and hardships flowing from criminal law. Conversely, purely consequentialist accounts of criminal law are also inadequate, because they fail to capture our abhorrence at punishing the innocent. If punishment of an individual could be decided solely on utilitarian grounds, there would be no inherent limits precluding punishing the innocent. Presumably, we object to punishing the innocent not only because it is inefficient or because it erodes long-term confidence in the system, but also and more importantly because it is unjust.[15] Hart helpfully distinguished between the justification of the *system* as a whole and the justification of the *punishment of a particular individual*. Thus it may be that the system as a whole is justified by its social benefits, but punishment of a particular person still requires individual desert. There have been many discussions and developments since then, questioning whether the justifications are quite so separate.[16] Nonetheless, this basic model is sufficient for now to illuminate the importance of constraints. The point is that, regardless of the basis of justification of the system as a whole, it is important to respect constraints of justice. In this book, I will use the term "deontic" to refer to these constraints, which arise from respect for the individual. I will set aside until Chapter 4 the question of the more precise philosophical underpinnings of those constraints.[17]

Hart's clarification helps us to see what is at stake in formulating and respecting fundamental principles. Where we breach a deontic commitment to the individual by understating or neglecting a fundamental principle, we are treating that individual *unjustly*. Conversely, where we *overstate* a fundamental principle – that is, when we are too conservative because we construe a principle unsupportably broadly – we sacrifice beneficial impact for no normative reason. It is "bad policy." We are failing to fulfill the aim of the system for no countervailing reason.

Thus clarifying the fundamental principles of justice that constrain the system will assist ICL in two ways. Most obviously, it delineates what we must not do because it would be unjust. Conversely and less obviously, it also delineates the zone

[15] Utilitarian arguments could be advanced to respond to this challenge, for example by highlighting the disutility if society learned that innocents were liable to punishment. However, such counter-arguments are unsatisfactory because they are contingent on empirical facts and thus still leave open the possibility of punishing innocents if doings so benefits society. Hart, *supra* note 14, at 77.

[16] It is possible, for example, that there are both consequentialist and deontological considerations at play in the justification of the system and in the justification of the application of punishment, and there could be connections between the aims of the system and its constraints, rather than a system of purely consequentialist aims and deontological "side constraints." See, e.g., Gardner, "Introduction," at xii–xxxi; K Ambos & C Steiner, "On the Rationale of Punishment at the Domestic and International Level," in M Henzelin & R Roth, eds, *Le Droit Pénale à l'Éprouve de l'Internationalisation* (LGDJ, 2002); M Dubber, "Theories of Crime and Punishment in German Criminal Law" (2005) 53 Am J Comp L 679.

[17] In Chapter 4, I will argue that concern for deontic principles does not necessarily commit one to any single deontological theory; on the contrary, there are multiple philosophical accounts that could converge in agreeing on these constraints.

of *permission*, where there is no deontic constraint limiting the pursuit of sound policy (for example promoting general welfare or human flourishing).

In this book, when referring to "fundamental principles" or "deontic principles," I am provisionally[18] referring to the following three principles.

(1) The first is the principle of *personal culpability* – namely, that persons are held responsible only for their own conduct. ICL recognizes as "the foundation of criminal responsibility" that "nobody may be held criminally responsible for acts or transactions in which [they have] not personally engaged or in some other way participated."[19] The principle also requires sufficient knowledge and intent in relation to the conduct[20] such that we may find the person "personally reproachable."[21]

(2) A second is the principle of *legality* (*nullum crimen sine lege*, "no crime without law"), which 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.[22] This principle is a "solid pillar" without which "no criminalization process can be accomplished and recognized."[23]

(3) At times I will refer to a possible third principle, the principle of *fair labelling*, which requires that the label of the offence should fairly express and signal the wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act.[24]

[18] See Chapter 4.

[19] *Prosecutor v Tadić*, Judgment, ICTY A.Ch, IT-94-1-A, 15 July 1999, at para 186; see also *Judgment of the International Military Tribunal (Nuremberg)*, reproduced in (1947) 41 (supplement) AJIL 172 at 251 ("[C]riminal guilt is personal").

[20] See e.g. *Prosecutor v Delalić et al (Čelebići)*, Judgment, ICTY T.Ch, IT-96-21-T, 16 November 1998 ("*Čelebići* Trial Judgment") at para 424; A Cassese, *International Criminal Law* (Oxford University Press, 2003) at 136–37; ICC Statute, Arts 30–33; G Werle & F Jessberger, " 'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law" (2005) 3 JICJ 35.

[21] H-H Jescheck, "The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute" (2004) 2 JICJ 38 at 44. As will be discussed in the next section, ICL jurisprudence has also required blameworthy moral choice: see e.g. *United States v Otto Ohlendorf et al* (*Einsatzgruppen case*), 4 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10*, Case No 9.

[22] ICC Statute, Art 22; Čelebići Trial Judgment, supra note 20, at paras 415–18; B Broomhall, "Article 22, *Nullum Crimen Sine Lege*," in O Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, 2nd ed (Beck, 2008) at 450–51.

[23] *Čelebići* Trial Judgment, *supra* note 20, at para 402. The principle has also been described by the Sierra Leone Special Court as an "essential element of all legal systems": *Prosecutor v Sesay, Kallon and Gbao*, Judgment, SCSL T.Ch, SCSL-04–15-T, 2 March 2009, at para 48. See also *Prosecutor v Vasiljević*, Judgment, ICTY T.Ch, IT-98–32-T, 29 November 2002, at paras 193–96 (fair notice, specificity).

[24] See, e.g., *Prosecutor v Kvočka*, Judgment, ICTY A.Ch, IT-98–30/1-A, 28 February 2005, at para 92, emphasizing the difference between two forms of participation (commission versus accessory), "both

1.1.4 Special Challenges in ICL

Scholars have advanced numerous thoughtful criticisms questioning whether familiar principles even apply in ICL. Are we simply transplanting principles that may be inappropriate in extraordinary contexts of mass criminality? Are fundamental principles simply "Western" constructs that should not be imposed in other settings?[25]

Even if we had provisional answers to those questions, what method would we use to discuss the parameters of fundamental principles, especially in the new contexts of ICL? The legality principle is often said to require prior legislation, but what does this principle entail in a system that does not have a legislature? The culpability principle requires a degree of "fault" (mental aspect) and a degree of involvement in a crime (material aspect) for liability, but how much fault and how much involvement? Unusual contexts and extremes require and enable us to explore the parameters of the principles.

Where can we look to identify and clarify the appropriate principles? Scholars in the liberal tradition in ICL sometimes invoke principles as declared in ICL itself, principles appearing in national systems, or principles deduced from normative argument. But each of these potential sources of reference are problematic and vulnerable to critique.[26] We need a method to even embark upon criminal law theory in ICL.

1.2 OBJECTIVES

In this book, I have three main objectives. First, I demonstrate the *problem* – that is, the need for more careful deontic reasoning. Second, I outline a *solution* – a method for deontic analysis, especially in new contexts such as ICL. Third, I *apply* the methodology to some specific problems to demonstrate and clarify its application and to illustrate the themes I have identified.

to accurately describe the crime and to fix an appropriate sentence." See also *R v Finta* [1994] 1 SCR 701 at para 188:

> [T]here are certain crimes where, because of the special nature of the available penalties or of the stigma attached to a conviction, the principles of fundamental justice require a mental blameworthiness or a mens rea reflecting the particular nature of that crime. It follows that the question which must be answered is not simply whether the accused is morally innocent, but rather, whether the conduct is sufficiently blameworthy to merit the punishment and stigma that will ensue upon conviction for that particular offence.

See generally A Ashworth, "The Elasticity of *Mens Rea*," in C F H Tapper, ed, *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981); G Williams, "Conviction and Fair Labelling" (1983) 42 Cambridge LJ 85; D Guilfoyle, "Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law" (2011) 64 Current Legal Problems 255.

[25] M Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) at 8, 24, 38, 123–24.

[26] See Chapter 4.

1.2.1 The Problem: The Need for More Careful Deontic Analysis

First, I demonstrate the problem to which this project responds – namely, the need for more careful deontic reasoning in ICL. One of the recurring themes in this book is the importance of attending to reasoning. While most scholarship understandably focuses on the *outcomes* reached by an analysis (for example the rule adopted), I argue that we must also attend carefully to the *reasoning* employed. Law is a reasoning enterprise, and if there are systematic distortions in reasoning, then sooner or later that reasoning will lead to errors and problems.

To better isolate what I mean by "deontic" reasoning, I will contrast it with two other types of reasoning: source-based reasoning, and teleological reasoning.

- *Source-based* reasoning involves parsing legal instruments and precedents to determine what the legal authorities permit or require.
- *Teleological* reasoning examines purposes and consequences.

I argue that criminal law also requires a third kind of reasoning: deontic reasoning.

"Deontic" reasoning is normative reasoning that focuses on our duties and obligations to others. Deontic reasoning focuses not on what the texts and precedents allow or how to maximize beneficial impact, but on the principled constraints arising from respect for the personhood or agency of accused persons as moral agents. This type of reasoning requires us to consider the limits of personal fault and punishability.

I propose the term "deontic" as a useful addition to the lexicon of ICL jurisprudence and literature. Even in criminal law theory literature, we have struggled with various wordy or imperfect terms (e.g. "mindful of constraints of justice," "justice-oriented," "desert-based," "culpability-based," "tracking moral responsibility," "principled," "liberal") to convey this type of reasoning. The term "deontic" succinctly and elegantly captures this distinct and necessary form of reasoning, and handily distinguishes it from, for example, precedential or teleological reasoning. I will explain this type of reasoning in much more detail in Chapters 3 and 4. As I will explain in Chapter 4, what I call "deontic" reasoning does not necessarily have to be grounded in the leading deontological ethical theories; there are multiple ethical theories that could support principled constraints such as the legality and culpability principles.[27]

As I will show throughout this book, ICL jurisprudence and scholarship have always been proficient in source-based and teleological reasoning, but have often trailed in the deontic dimension, at least in the earlier days.[28] Of course, ICL has always declared its commitment to fundamental principles of justice, but the early tendency was often to engage with those principles as if they were mere "legal" or "doctrinal" rules. As a result, the principles were often downplayed or circumvented

[27] See esp §3.3 and §4.3.
[28] See Chapter 2 and see further illustrations in Chapter 6.