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One of our editors, Joseph Rikhof, posed questions to Professor Darryl Robinson of Queen’s University about his new book.

Book cover Robinson**JR: What is this book about?**

DR: *Justice in Extreme Cases* brings criminal law theory to international criminal law (ICL), in order to unpack controversies, to critique approaches, and to suggest reforms. ICL is still a very recent development, compared to criminal law generally. Jurists rapidly stitched it together, drawing on different national systems and international law. They created many novel doctrines, for example on command responsibility, superior orders, and modes of liability. Each is shrouded in controversy.

Criminal law theory gives us helpful tools to critique or reform the system, making it more coherent and fair. Criminal law theory searches for organizing concepts and moral constraints of criminal justice. I focus in particular on fundamental principles of justice. For example, the legality principle states that people can only be punished for conduct that was criminal at the time. Or the culpability principle says, among other things, that people are criminally responsible only for their own conduct and its consequences.

There are many big challenges in ICL right now, but fairness to individuals is one important aspect of legitimacy. Do these new doctrines violate the culpability principle? Do familiar principles even apply in a new supranational system that often faces collective crimes and societal breakdowns, or do we need to rethink them? What legal reforms may are needed?

JR: Your title refers to “extreme cases”, what do you mean by that?

DR: ICL cases are, of course, often extreme in the obvious sense of the scale of atrocity. But I refer to “extreme cases” in a scientific sense. In science, studying extreme situations – for example near a black hole or at near-light-speed velocities – can help you discover new things about what you thought were general principles.

Similarly, ICL presents some extreme situations, such as mass coordinated crimes, breakdowns in rule of law, or states issuing criminal orders. Thinking about these special situations can inform our ideas about justice. So it is a two-way conversation: criminal law: theory can illuminate ICL, but ICL can offer new interesting puzzles that lead to new insights in general criminal law theory.

JR: Why is it important to study and clarify fundamental principles?

DR: There are two opposing reasons why principles are important. In early days, ICL jurists were often a bit cavalier about culpability and legality. Jurists focused on *doctrinal* arguments (interpreting treaties and following precedents) and on *consequentialist* arguments – mostly focused on maximizing deterrence. They proclaimed their commitment to culpability and legality, but in practice they often side-stepped the principles with simple doctrinal arguments.

I argue that criminal law requires a *third* kind of thinking. To have a helpful label, I call it "*deontic*" reasoning, because it focuses on duties to the individual, rather than sources or consequences. Deontic reasoning directly ponders the principled constraints on punishment, rooted in respect for the individual. In the book, I show how the lack of deontic reasoning led to various problems.

A second, newer reason, adds further urgency. There has arguably been an over-correction by some judges. Early judges at the ICTY and ICTR were criticized by academics, including me, for being too insouciant about principles. So, understandably, some judges seem to have lurched to the opposite extreme. Some judges are eager to show how strictly principled they are, but they are articulating principles in an absolutist, over-simplistic way that is unsupported in any theory or any practice anywhere. That kind of thinking can only result in acquittals, because no earthly court can satisfy these laboratory-of-the-mind conceptions.

JR: Right – so there are dangers with either extreme.

DR: Yes – *under-stating* the principles is bad, because it treats people unfairly. But *over-stating* the principles is also bad, because it undermines the system for no moral reason. A good account of principles is good for fairness, but it also avoids that second pitfall, and helps craft more effective law.

JR: You mentioned that novel situations might lead us to discover new things about fundamental principles. What are examples?

DR: As one example, we commonly say that the legality principle requires prior legislation, in order to give fair notice. But ICL is a system without a "legislature" per se. Instead, it draws on various sources such as treaty and custom. This invites you to really think about what "fair notice" means, why it matters, and how it can be given. Also, ICL often confronts terrible situations – such as the genocide by the Nazis in World War Two – that may not be criminalized in domestic law. Again, this raises questions about limits or exceptions, or the extent to which we can rely on morality for notice.

Or consider the culpability principle. In ICL, we take modes of liability from domestic systems, and use them to ascribe liability for much larger crime bases, involving hundreds of perpetrators and thousands of crimes. This is an opportunity to explore the outer limits and gradations of individual responsibility. Or we see situations of extreme duress, for example where a young soldier is ordered to kill civilians or be killed himself. That example might invite us to weigh the common law resistance to duress for murder, but we might also consider whether the role of soldier might impose any duties of fortitude.

JR: Do you make any suggestions for reform?

DR: My main example is command responsibility, because it is an important doctrine, a novel doctrine, and the subject of disastrously entangled controversies. I show that early reasoning in ICL was too flippant about the culpability principle. Defence objections were raised in early cases, but the judges shrugged them off with arguments that did not see or engage with the problem. I show how this led to a contradiction between the Tribunals' stated principle of culpability and what they actually explicitly did in practice. Later efforts to solve, deny, obscure this contradiction led to all of the controversies about command responsibility that we have today. Today we cannot even agree on whether it is a mode of liability, a separate offence, both, neither, or some unexplained obscure hybrid. I show that more careful reasoning could give more elegant solutions.

As another example, I also defend the criminal negligence standard in command responsibility. In this, I may be going against a lot of scholarly thought. Jurists and scholars were rightly wary of criminal negligence, because at first glance it seems out of place with serious international crimes. But I give a more careful account, returning to first principles. I show that it can be deontically justified. The military commander is allowed to engage in the staggeringly dangerous activity of supervising troops, but is entrusted to mind the leash of the dogs of war. Criminal negligence in this responsibility shows a culpable disregard for the lives and safety of others. While it is not enough fault to make a person a "principal" to the crimes, it is enough for "accessory" liability, which is indirect.

So, I argue that the jurists who created command responsibility over the decades were actually reflecting a sound intuition of justice. On closer analysis, it is justified in its context of a particular extreme case (this exceptionally dangerous activity). By rehabilitating the criminal negligence standard, I would avoid several complications in Tribunal jurisprudence. It allows a tidier, clearer law that is both more fair to the accused and more effective.

JR: Are there any special challenges in trying to find principles appropriate for international criminal law?

DR: Yes – many! To me, the most important question was whether deontic principles like the culpability and legality principles are just "Western" constructs. I don't want to simply replicate understandings of principles from leading legal systems; I want something that is more broadly human. Interestingly, I noticed that criminal law and fundamental principles seem to have broader origins than many people assume. These practices emerged in several different places, including in

China, Egypt and other places, centuries before they did in Europe. Criminal law tends to emerge where social units grow over a certain size. The constraining principles of justice seem to have broader roots too. They also crop up in cross-cultural empirical studies of intuitions of justice. There are reasons to think there is something very "human" about the most basic ideas of justice.

Another problem is: where do you find fundamental principles? Typically, writers take either a "black letter" doctrinal approach, which draws from precedents and authorities, or a philosophical approach, which draws from some master moral theory. My book takes a middle path. I talk about principles implicit in the practice and which are supported by multiple moral theories. So I don't suggest there are necessarily any absolute "answers".

Ultimately, justice is a human idea, refined through a human conversation. We humans find ourselves in the world, and we have to do the best we can to figure out facts and moral principles, using all of the clues that we can. My method gives some guiderails to help ground our conversation, but in the end there will always be room for deliberation on questions at the margins.

JR: What drew you to this topic?

DR: I have been working on these problems for over twelve years. I was very mindful that the issues in the book are relatively fine-grained and philosophical, compared to some of the massive controversies that have arisen in the meanwhile about ICL. Most situations investigated by the ICC are in Africa, leading to understandable accusations about bias against Africa. Meanwhile, the USA and Russia are upset that the ICC is looking at their actions, and they claim the ICC is a weapon of lawfare by the powerless against the powerful. At the same time, the ICC has major internal and operational struggles. All of these issues are very important. The emergence of ICL reflects a tectonic shift – projecting criminal law onto the international plane – so intense controversies will continue for some time.

The questions in this book – the constraints of justice – are important too. These questions will have an enduring importance not just for ICL but for all legal systems. Especially these days when so many systems, including in Canada, are swallowed by the "tough on crime" agenda.

JR: Who should read this book?

DR: First, I think the book will be interesting for students, scholars, and practitioners in ICL, who are looking at problems and reforms. Second, I hope it will also be interesting for criminal law theorists and moral philosophers, because I suggest that the study of ICL problems may be revealing.

Third, I think students in general may benefit from one core idea – the need to develop deontic reasoning. In teaching Canadian criminal law, I find students easily pick up doctrinal and consequentialist reasoning. But deontic reasoning is often more elusive. It requires, among other things, empathetic appreciation of the situation that the accused faced. Often people think of accused persons as "the other", and hence they are not sensitive to possible injustices. You need all three

forms of reasoning for a holistic understanding.

JR: The cover is really eye-catching - does it have a particular meaning?

DR: Yes – inverted expectations. At first glance, it looks like the globe of the Earth – which is such a familiar image in books on international law. But on closer inspection, the blue globe is actually the sky, and the encircling green is actually the ground. It is upside-down from the normal picture. The idea is that the study of ICL can overthrow expectations, which can lead you to see things in a new way.

JR: What are some take-away lessons from the book?

DR: That fundamental principles are not abstract and metaphysical, but rather they are deeply human. We figure them out through a fallible, human deliberative process, doing the best we can to reconcile the clues. That doing justice requires empathetic role-taking not only with victims and society but also with accused persons. The goal is to create a system of justice that is fair, humanistic, widely-acceptable, and ultimately beneficial to all.

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About the author

Darryl RobinsonDarryl Robinson is a professor of law at Queen's University. He has helped shape the doctrines of international criminal law, as a negotiator of the ICC Statute and other instruments (1997-2003), a legal adviser at the International Criminal Court (2004-06), and as a scholar. He received the Antonio Cassese Prize for International Criminal Legal Studies for his work on the theory of international criminal law.