

Cornell Law Library Scholarship@Cornell Law: A Digital Repository

Cornell Law Faculty Publications

Faculty Scholarship

7-1-2005

Reclaiming Fundamental Principles of Criminal Law in the Darfur Case

George P. Fletcher
Columbia Law School

Jens David Ohlin
Cornell Law School, jdo43@cornell.edu

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Criminal Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Fletcher, George P. and Ohlin, Jens David, "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case" (2005). *Cornell Law Faculty Publications*. Paper 435.
<http://scholarship.law.cornell.edu/facpub/435>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE COMMISSION OF INQUIRY ON DARFUR
AND ITS FOLLOW-UP: A CRITICAL VIEW

**Reclaiming Fundamental
Principles of Criminal Law
in the Darfur Case**

George P. Fletcher* and Jens David Ohlin**

Abstract

According to the authors, the Report of the UN Commission of Inquiry on Darfur and the Security Council referral of the situation in Darfur to the International Criminal Court (ICC) bring to light two serious deficiencies of the ICC Statute and, more generally, international criminal law: (i) the systematic ambiguity between collective responsibility (i.e. the responsibility of the whole state) and criminal liability of individuals, on which current international criminal law is grounded, and (ii) the failure of the ICC Statute fully to comply with the principle of legality. The first deficiency is illustrated by highlighting the notions of genocide and genocidal intent, as well as that of joint criminal enterprise. The second is exposed by drawing attention to the uncertainties and ambiguities surrounding such notions as recklessness and dolus eventualis, and in addition to the frequent reliance in both international case law and the legal literature on customary international law and loose concepts such as proportionality. The authors finally point out that if the ICC tries to operate as a real criminal court under the rule of law and shows sensitivity to the rights and interests of the accused, US fears of politicized prosecution will diminish.

* Cardozo Professor of Jurisprudence, Columbia University Law School; member of the *Journal's* Board of Editors; fletch@law.columbia.edu.

** Ph.D., Columbia University; J.D., Columbia University Law School; jdo18@columbia.edu.

1. Introduction

In the drafting of the Rome Statute, the primary focus of interest was the protection of victims. This is evident in the Preamble and the stigmatization of ‘impunity’ as an evil of international affairs.¹ Impunity means that those who deserve punishment escape the rigours of the law. Avoiding impunity requires that the ICC be able to intervene, under the principle of complementarity, whenever the national courts are ‘unwilling or unable’ to prosecute.

Treating the avoidance of impunity as a foundational value in the ICC highlights the difference between international and domestic criminal law and indicates the relative importance, in the former, of victims’ rights. Impunity is an evil because it frustrates abstract justice—and the interests of victims—in seeing justice done. In national systems of criminal law, the tables are turned. The focal point is not only justice for victims, but also the protection of criminal defendants against unfair convictions. No constitution in the world mentions the importance of avoiding impunity for criminal defendants or the importance of protecting victims. They quite rightly stress the rights of the criminally accused in the face of majoritarian excess.

It is understandable that in its founding phrase, the ICC would reflect the interests of international lawyers and that the rhetoric of international justice would favour the prosecution over the defence. Now that the Court has begun its initial investigations—and the Security Council has referred the Darfur atrocities to the Court—we should witness a shift of focus from the interests of international lawyers toward the values of criminal lawyers and their commitment to fair trials. In the process, we may discover some serious shortcomings of the Rome Statute that have not yet received adequate attention.

Some advocates of the ICC might think an international court is exempt from the due process and legality guarantees that guide national trials. But this would be a major misconception of the task and purpose of international criminal justice. The long-range value of the ICC is that it will teach countries of the world how to do justice as they seek to apply repressive measures in name of social protection. If the ICC deviates from the principles of due process and legality, it will become a teacher that will bring great harm to the world. The ICC must not only conform to the rules of fair trial; it must also exceed conventional practices of the nation states and set a model for the world of how a criminal court should function.

We do not assert in this commentary that international criminal law should be treated identically to domestic criminal law. There are, of course, relevant

1 See Rome Statute of the International Criminal Court, preamble (‘Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’).

differences, chief among them the unique history of international criminal law. Born from the ashes of 20th-century atrocity, international criminal law emerged as a response to impunity for the greatest crimes that had escaped the reach of the law. As such, it is a nascent legal enterprise. But one cannot defend its shortcomings by asserting that adherence to these principles would be too difficult. We assert that international criminal law, insofar as it aspires to be not just international law, but *criminal* law as well, must remain faithful to some basic principles of fairness and legality. The rationale for this assertion is that these basic principles are morally required in any true system of criminal law, regardless of its structure and irrespective of whether it is constituted at the municipal or international level.² The demands of fairness are constitutive of the rule of law itself, and insofar as international criminal law seeks to extend the rule of law to atrocity and crimes against humanity, it too must remain faithful to the demands of fairness. Furthermore, there is no reason to believe that a more rigorous criminal law at the international level will not be successful in achieving justice and ending impunity for atrocity.

In this brief comment on the *Report of the UN Commission of Inquiry on Darfur* and the Security Council referral of the Darfur suspects to the Office of the Prosecutor, we shall focus on two serious deficiencies of the Rome Statute. The first is the systematic ambiguity about collective versus individual responsibility. The historical transition from the Geneva Conventions to the Rome Statute also signalled an under-theorized shift from state and communal responsibility to the prosecution of individuals for the same actions that were previously the basis for state responsibility. This is far more serious than a simple procedural reorientation. An analysis of the Rome Statute, more searching and critical than that found in the standard commentaries, reveals a serious conceptual deficiency about the role of collective action in defining the crimes subject to prosecution. In part one, we explore these ambiguities, particularly as applied to the charge of genocide and in light of the debate about the evidence in Darfur.

Even more serious from the standpoint of criminal lawyers is the legality deficit that pervades the Rome Statute and the emerging ICC. Although the Rome Statute is the most specific statutory source for international criminal law enacted to date and includes provisions respecting the principle of legality that extend far behind the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) Statutes, these protections remain unconsummated. The International Community appears to commit itself to the principle of legality in Article 22

2 At least since Fuller, it cannot be denied that laws must be general, public, prospective, clear and consistent. See L.L. Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1964). H.L.A. Hart offers a similar account of the rule of law in *The Concept of Law* (Oxford: Clarendon Press, 1961). These criteria of the 'inner morality of law' apply equally, whether or not the rule of law is established by international institutions or domestic penal systems.

of the Rome Statute. Yet, as indicated by some of the arguments used in the *Report of the Commission of Inquiry on Darfur*, the community of international lawyers has yet to understand the full implications of legality in criminal cases. As we argue in Section 4, a proper understanding of legality should lie at the cornerstone of the inevitable shift from the influence of the drafters of the Rome Statute to the legitimate functioning of the ICC as a criminal court.

2. Collective Action and Individual Responsibility

A. Implications of Individual Responsibility at the ICC

The imminent prosecution of suspected authors of international crimes before the ICC represents a fundamental shift from international law to criminal law. Although these concepts have been blurred together through the formation of international criminal law, it is important to remember that the source of this nascent enterprise is two disciplines with distinct goals. Historically, international law aimed its direction at the collective level, i.e. at the actions of nations and states, their interactions and their peaceful coexistence. When there was adjudication, it was directed at the collective level, where states were criticized for their collective illegal conduct under international norms, either through treaty or custom. Punishments for collective crimes included sanctions, reparations and loss of international comity. Criminal law, however, aimed its gaze at the individual, attributing legal responsibility for individual culpability and punishing offenders on that basis. Historically, criminal law was pursued by domestic officials only under domestic statutes. The emergence of modern international criminal law—culminating in the creation of the ICC—brings these two historical strains of legality together. While this convergence seems natural and desirable, a failure to appreciate these distinctions has produced a conceptual muddle.

Indeed, the distinction can be seen in the very authorization of the international tribunals. The Security Council authorized the ad hoc Tribunals for Yugoslavia and Rwanda—as well as its referral of the Darfur situation to the ICC—pursuant to its Chapter VII authority to restore international peace and security. This is a paradigmatic example of classic international law at the collective level, i.e. the need to adjudicate disputes and restore the balance of peaceful relations between international collectives. But the resulting prosecutions at the ICC must, by definition, take place at the individual level. While nations can, under specific circumstances, be brought before the International Court of Justice (ICJ) and hit with sanctions by the Security Council, it is only individuals who can be brought before the ICC and punished for genocide, war crimes or crimes against humanity.³ The whole argument

3 The court's jurisdiction is explicitly limited to 'natural persons'. See Art. 25(1) Rome Statute.

for the Security Council's intervention, if it is to be taken seriously, is that individual criminal responsibility is a pre-condition for resolutions at the collective level of international law. Only justice at the individual level will yield peace and security at the collective level. Or so the legal structure suggests.

Individual and collective responsibilities intersect in cases where individuals act under colour of state law with official state complicity. The allegations presented in the *Report of the UN Commission of Inquiry on Darfur* enumerate several instances where militia groups were said to act in conjunction with military officers exercising official state discretion. In such a case, there may be liability at both the individual and state levels. If the state itself is involved in the criminality, it may face the appropriate consequences under international law. But it is crucial to remember that during an ICC criminal prosecution, only the individual will be punished. The defendant alone will serve the jail time. It is for this reason that we urge fidelity to basic principles of criminal law that ensure that defendants are punished only for crimes that they are personally responsible for, as opposed to crimes of state. For these crimes, the state as a whole bears ultimate responsibility.

We must remember that international law and criminal law are two fundamentally different strains of law and that different doctrines apply to each. Individual criminal responsibility, whether pursued at the municipal or international level, must be adjudicated with the same serious commitment to legality. The international criminal justice system exists not because it is a higher form of justice, but simply to prosecute individual perpetrators when they act with municipal impunity. Impunity occurs when a state is unable to mount a prosecution, as might be the case with a collapsed government that has devolved into anarchy, or actual government complicity in the criminality, as is alleged in the case of Sudan. Regardless of the alleged government complicity, however, it must remain clear that the subjects of an ICC prosecution are individuals standing trial for their individual crimes. To prosecute an individual for the crimes of his state is to engage in impermissible collective punishment, and is a nasty throwback to a time when the romantic notion of blood guilt was confused with criminal adjudication. Criminal justice must stand or fall on the backs of individuals.

Specifically, the problems associated with this conceptual confusion can be seen in the *Report of the International Commission of Inquiry*. For example, the Report details a lengthy list of international human rights instruments and alleges wide-scale breaches of these human rights commitments in the Darfur region.⁴ Although the Commission was required by its mandate from the Security Council to discuss Sudan's violation of international human

4 See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, at 41–44 (discussing Sudanese responsibilities under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination).

rights law, these allegations are nonetheless irrelevant and potentially prejudicial for the ICC prosecutions. Individuals are prosecuted for violations of statutory or treaty-based *criminal* rules. The human rights instruments are agreements between states to adhere to international standards in their domestic state conduct. But they were not envisioned as a basis for individual criminal liability, nor are they required for that purpose. Indeed, the guiding spirit of the Rome Statute negotiations was to provide a basis for criminal liability and to fill a vacuum created by international law's focus on collective responsibility and the purely domestic character of criminal law. The fact that Sudan continues to violate human rights standards only serves to prejudice the outcome of an individual's trial.

Nor is it necessary to appeal to human rights law to guide interpretation of the Rome Statute. For example, Article 7 of the Statute defines crimes against humanity with sufficient clarity and precision, including murder, extermination, enslavement, torture, rape, etc., and there is no need to appeal to human rights law to unpack these relatively straightforward criminal concepts. Indeed, if there is any place to look for relevant illumination, it is domestic criminal legal systems—all of which make use of these primary concepts. Furthermore, appealing to international human rights law for interpretation only increases the possibility that criminal defendants will be subject to greater personal liability than envisioned by the Rome Statute. This is explicitly prohibited by Article 22(2).⁵

The degree of Sudan's violation of international human rights law is a question of collective responsibility for the entire nation, and one best suited for adjudication before the international bodies designed for that purpose. It has little bearing on the individual responsibility of individual actors indicted and standing trial before the ICC. To suggest that the former is relevant for the latter is to punish the individual for the crimes of his nation as a collective or, by association, for the actions of other citizens in the same nation.

Unfortunately, this appeal to international human rights law is not the only area where the current legal doctrine is insensitive to the distinction between collective and individual responsibility. The confusion can be seen in two other areas of international criminal law: the crime of genocide and the doctrine of joint criminal enterprise, which allows prosecution of individual members for the common criminality of an entire group. One must be careful here to ensure that the doctrine punishes group conduct where individuals are bona fide participants, as opposed to cases where individuals without the appropriate *mens rea* are prosecuted for group crimes. Insofar as the doctrine mirrors the doctrine of conspiracy in domestic criminal law, our position confronts not just international criminal law, but US criminal law as well, which has long relied on an overbroad doctrine of conspiracy. These issues will be the subject of section 2C. But before analysing the deficiencies of joint

5 According to Art. 22(2) 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.'

criminal enterprise, we consider the law of genocide—another area where the confusion of collective and individual responsibility is evident in the *Report of the International Commission of Inquiry*.

B. The Collective Nature of Genocidal Intent

The dialectic between individual responsibility under criminal law and collective responsibility under international law becomes most pressing when the crime in question is genocide. Indeed, the definition of the crime itself places it at the intersection of collective and individual responsibility, and we urge a careful consideration of this nexus when attempting to attribute criminal responsibility for this crime.

Genocide is both collective and individual. It is collective in the sense that both the perpetrator and the victim are groups. While scholarly attention has focused on the collective nature of the victims, and indeed catalogues the kinds of groups (including racial, ethnic and religious groups) that can be victimized by genocide,⁶ less attention has been paid to the collective nature of the perpetrators. Genocide is not merely one individual seeking to annihilate an entire ethnic group. History teaches us that genocide is the attempt to wipe out an ethnic group by another ethnic group. It is for this reason that genocide brings strong collective shame and guilt to a nation that has perpetrated it. Indeed, this shame and collective guilt may very well persist even after the individuals involved have passed from the scene.

Despite this collective aspect to the crime of genocide, the international law of war since Nuremberg, including Yugoslavia and Rwanda, and now Sudan as well, represents an attempt to hold *individuals* accountable for a collective action. But accomplishing this task has been insufficiently theorized at two levels. The first is the objective element, when it is clear that many individuals may have participated in small ways. The second is the subjective element of genocidal intent. We consider both in this article.

The *Report of the International Commission of Inquiry* concludes that there was no genocide in Sudan because there was no genocidal intent at the collective level, i.e. the government of Sudan was allegedly motivated by a desire to engage in a counter-insurgency campaign, possibly at the expense of civilians, but was not motivated by a desire to annihilate an ethnic group.⁷

6 There are, of course, well travelled academic debates about what kinds of groups can be the object of genocide. The 1948 Genocide Convention defined genocide as applying to national, ethnic, racial or religious groups, although several commentators have noted that this list excludes some obvious candidates, such as political groups and tribes. The restrictive reading of genocide by the convention posed some obvious difficulties during the Rwandan prosecutions at the ICTR, given the uncertain ethnic differences between the Hutu and Tutsi populations. But we need not resolve such questions here.

7 See *Report of the International Commission*, at 130–131 (concluding that while objective elements of the offence of genocide were present in Sudan, the subjective element was missing).

Nonetheless, the Report concedes that some government individuals may have acted with individual genocidal intent. This raises the question of how one attributes genocidal intent to the group, since evidence of intent will almost always be found at the individual level. The scholarly literature's failure to deal with these problems represents a fundamental lack of theoretical engagement with the relationship between individual and collective responsibility, and the distinction between moral guilt and criminal adjudication.

It is within this context that the collective and individual elements of genocide are frequently confused, preventing a conceptually clean analysis. The problem is not only the confluence of individuals and groups, but also the emergence of different *kinds* of groups. We have already argued that the historical paradigm of genocide is the clash of embattled groups, i.e. the attempt by one ethnicity to wipe out the population of another group. While it may be theoretically possible for one individual to engage in a genocidal attack, there is no reason to think that such a mass murder would be one of 'the most serious crimes of concern to the international community as a whole'.⁸

Although our conception of genocide accords with both the common-sense understanding of the term and the understanding of historians, it is widely out of step with the Rome Statute's treatment of the offence. Under the language of Article 6 of the Rome Statute, a simple murder 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group' qualifies as genocide. But it is clearly overbroad to call these kinds of attacks genocide. While certainly they are horrendous and demand punishment, the Rome Statute's classification of them as genocide flies in the face of the historical paradigm, where an ethnic group proclaims its superiority over another and seeks its annihilation. But under the Article 6 paradigm, almost any hate-crime murder would qualify as genocide, since racist fanatics usually seek the destruction of the ethnicity they despise. While these murders are undeniable criminal, one should not trivialize genocide by including it in such company. In cases recognized by history as true genocide, the ethnic group as a whole carries the intention to destroy.

Genocide is, by definition, a collective endeavour, yet international criminal prosecutions seek punishment of individual perpetrators. It is perhaps for this reason that in the law of genocide, we see the emergence of *three* groups. One group is the ethnic perpetrator, the second group is the ethnic victim, and the third group is the smaller group engaged in the common criminal purpose—the military unit, the militia or the gang—contemplated by the Rome Statute's Article 25(3)(d), the statutory surrogate of joint criminal enterprise. The addition of the third group to the analysis comes in as a concession to the realities of prosecuting individuals under international criminal law.

8 See Art. 5 Rome Statute.

The transition from the collectivized international law of nations to the individualized criminal law of the ICC requires this conceptual move. It would be folly to attribute *criminal* responsibility to an entire ethnicity, although one of us has argued in the Storrs Lectures that it may still be necessary to attribute collective *guilt* to an entire ethnic group.⁹ But moral guilt and criminal responsibility are distinct concepts, with their own internal logic. Moral guilt might be attributed to an entire nation when that nation has engaged in egregious historical wrongs, such as launching an aggressive war without cause or persecuting a minority. Citizens of the nation might bear a piece of that moral guilt insofar as they belong to the nation, even if they did not individually approve of the programmes and policies in question. Indeed, such might be the case where nations are led by dictators without democratic legitimacy. Just as a citizen can take pride in the praiseworthy accomplishments of his nation, so too the citizen can be shamed by the moral wrongs of his nation. It is in this sense that an entire nation can be the subject of collective moral guilt.

But this notion of collective moral guilt must be distinguished from the notion of criminal responsibility. Nations are not the subject of criminal law—individuals are targeted for trial and punishment. However, international criminal law deals with the categories of crimes frequently associated with the collective moral guilt of nations: crimes against humanity, war crimes and genocide. These crimes are rarely—if ever—accomplished on an individual level. It is perhaps for this reason that international criminal law has become so focused on the law of conspiracy and the doctrine of joint criminal enterprise. In order to make the project of international criminal justice possible, crime is prosecuted relative to a discrete group engaged in the kind of common criminal purpose that one associates with a specific conspiracy. International criminal law has oriented itself toward these discrete smaller groups precisely because the larger groups—nations and states—cannot be the appropriate objects of *criminal* responsibility.

This switch in focus from the nation as a whole to the discrete smaller groups that are the subject of joint criminal enterprise has the potential to create conceptual difficulties along the way. The issue of genocidal intent will become a central question when adjudicating whether genocide occurred in Darfur. It seems intuitively clear that genocide occurs when an entire ethnic group, say a nation or a people, attacks another ethnicity with genocidal intent. But the judges at the ICC will most likely look to the intent of the smaller collective engaging in the common criminal purpose, i.e. whether they formulated specific military plans with the intent to destroy an ethnic group. This switch in focus to the smaller group is perhaps inevitable given the language of Article 23(d). In performing such an analysis, we must remember that the intent of the smaller group really stands in as a proxy for the intent

9 See G.P. Fletcher, 'Liberals and Romantics at War: The Problem of Collective Guilt', 111 *Yale Law Journal* (2002), at 1526–1527.

of the larger collective when the crime in question is genocide. Although the criminal planning envisioned by the Rome Statute may occur at the level of active military operations, through a joint criminal enterprise by military officers and militia leaders, the ethnic hatred at the heart of genocide stems from the intent of nations. But, as we demonstrate in the following section, the doctrine of joint criminal enterprise presents its own complications.

C. Collective Responsibility and the Question of Joint Criminal Enterprise

The classic answer to these questions was the law of conspiracy, which has found its way into modern international criminal law through the doctrine of joint criminal enterprise. The doctrine applies to a defendant who participates with a plurality of persons to form a common plan or design to commit an international offence. In this section, we offer two criticisms of the Report's reliance on the doctrine of joint criminal enterprise. First, the doctrine as it was applied at the ICTY is inapplicable to the Darfur prosecutions because the Rome Statute's language has effectively replaced it. Secondly, the doctrine itself is substantively overbroad and transgresses basic principles of legality that limit punishment to personal culpability. Consequently, we urge revision of the doctrine.

The doctrine of joint criminal enterprise is most useful for the prosecution in situations where two individuals belong to the same collective enterprise, with a common criminal purpose, but only the second one commits the criminal harm in question. But, for whatever reason, prosecution of the first alone is considered an insufficient response. Perhaps the first offender is unavailable or otherwise not subject to conviction. Or perhaps the first can be convicted, but the prosecution regards the second as equally culpable.

Joint criminal enterprise represents a broad theory of complicity. It permits the prosecution of one individual for the crime of a second individual, even if the first did not have the intention of aiding the second and even if the first is unaware of the second's existence. It is clear from the *Report of the International Commission of Inquiry* that the ICC prosecutions for Sudan will rely heavily on this doctrinal move. But on what basis is it legitimate to attribute intent to the whole collective? The doctrine of joint criminal enterprise is the law of conspiracy dressed up in the jargon of modern economic activity. Joint enterprises were thought to be the Communist path to economic collaboration with the West. Now the West has appropriated the term and its prestige to impose a dubious form of criminal liability.

The history of the doctrine is one of judicial creativity. The ICTY developed the doctrine of joint criminal enterprise in response to the ICTY Statute's requirement that criminal liability could only be imposed in cases where the defendant 'planned, instigated, ordered, committed or otherwise aided and abetted' in criminal activity (Article 7(1) ICTYSt.). However, the doctrine as developed in *Tadić* was markedly expansive. Individuals were subject to equivalent liability for the foreseeable criminal acts of their fellow conspirators,

even if the criminal act was *not* part of the common plan. Unable to ground its argument in the language of the statute, the *Tadić* court claimed that this version of joint criminal enterprise was ‘implicit’ in the ICTY Statute and reasoned from the statute’s stated object and purpose of extending jurisdiction of the tribunal to those responsible for serious violations of international law in the former Yugoslavia.¹⁰ The Court also relied heavily on the role of conspiracy in war crimes prosecutions dating back 50 years.

We argue that the ICTY’s formulation of joint criminal enterprise has largely been displaced by the passage of the Rome Statute, which, unlike the ICTY Statute, includes a specific provision, setting forth the contours of vicarious liability. Article 25(3)(d) of the Rome Statute imposes liability on members of groups that act with a common criminal purpose.¹¹ But the *Report of the International Commission of Inquiry* demonstrates that despite the Rome Statute’s Article 25(3)(d), the ICTY doctrine of joint criminal enterprise survives. The Report cites *Tadić* approvingly and relies heavily on the case law developed during the ICTY trials. The doctrine is likely to be central during the ICC prosecutions, because the Report identifies six members of the Sudanese government, including military officers and ‘high officials of the central Government’, who are suspected of engaging in joint criminal enterprises.¹²

We contend that the doctrine of joint criminal enterprise as developed in *Tadić* should have limited application before the ICC, which is governed by the Rome Statute’s Article 25(3)(d)—a more precise statutory provision than the judicially created doctrine of joint criminal enterprise. The language of Article 25(3)(d) includes no reference to ‘foreseeable criminal acts’ but does require that the contribution to the criminal plan be ‘intentional’. But, in fact, all that has to be intentional is the act of doing something that constitutes a contribution, e.g. selling gas to those who are driving to the scene of the intended massacre. The culpability nexus between the contribution and the ultimate criminal harm is left vague. The contributor might have the aim of furthering the plan (Article 25(3)(d)(i)) or simply have knowledge of the group’s intention (Article 25(3)(d)(ii)), i.e. if the gas station attendant knows of the group’s criminal objective, he is guilty for ‘intentionally’ selling them gas. In the final analysis, the knowledge requirement would be sufficient because no one could have the aim of furthering the group objective without also having knowledge of that purpose. The American case law is clear that

10 See Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, § 189.

11 Article 25(3)(d) Rome Statute establishes criminal liability for intentional actions that contribute ‘to the commission or attempted commission of such a crime by a group of persons acting with a common purpose’. The action must also meet one of two criteria: ‘[b]e made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court’; or ‘[b]e made in the knowledge of the intention of the group to commit the crime’.

12 See *Report*, § 542.

merely being a contributor with knowledge of a conspiracy's criminal purpose is insufficient for liability.¹³ The Rome Statute should be no less demanding.

There is no case law interpreting the language of Article 25(3)(d) because there has never been a prosecution before the ICC. The issue is therefore one of first impression. We object to the criminal prosecution of an individual based on a theory of liability not found in the Rome Statute but found in a case law interpretation of the ICTY Statute. This practice illustrates the legality deficit discussed in greater detail in Section 3. Should the international community of lawyers prefer the doctrine of joint criminal enterprise as developed at the ICTY, perhaps the Rome Statute should be amended.

Our second criticism of the Report's reliance on the doctrine of joint criminal enterprise goes to the substance of the doctrine itself. The doctrine explicitly renders all parties of a conspiracy *equally responsible* for the criminal acts of the group, regardless of their individual 'role and function in the commission of the crime'.¹⁴ This interpretation of the doctrine clearly violates the basic principle that individuals should only be punished for personal culpability. By ignoring all relevant differences between members of a conspiracy, the doctrine erases the moral distinctions between, say, the architects of a serious crime and those whose participation was merely peripheral. To ignore these distinctions is to trample on the basic moral principles that provide the foundation for criminal liability and punishment. Individuals should only be punished relative to their individual culpability.

The doctrine of joint criminal enterprise also falters insofar as it imposes strict liability for criminal acts that were not part of a common plan. This version of the doctrine is applied in cases where it was foreseeable that members of the conspiracy might perpetrate the criminal act, even if it was not agreed upon in advance. As any good lawyer knows, virtually any consequence can be characterized as foreseeable. This unwarranted extension of the doctrine goes to the heart of the confusion between collective and individual responsibility. Individuals must be prosecuted for their own actions. If an individual is to be punished for a group conspiracy, liability must be limited to the criminal purpose or plan *that was agreed to* by the participants. Naturally, these deficiencies in conspiracy law can also be found in many municipal legal systems, including many jurisdictions within the United States. Both municipal law and international criminal law might benefit from greater clarity with respect to the distinctions between collective and individual culpability and the interaction between them. A more restrictive doctrine of conspiracy would remain faithful to the internal moral logic of the rule of law. Given that the judges of the ICC will be interpreting the Rome Statute with fresh eyes, and ought to be unrestricted by ICTY case law, we urge restraint and conceptual clarity as they formulate and apply an international law of conspiracy.

13 See *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940), affirmed 311 *United States Reports* (US) 215 (1940); *United States v. Blakenship*, 970 F.2d 283 (7th Cir. 1992).

14 See *Report* at § 540.

3. The Legality Deficit

Both international law and modern codified criminal law are offshoots of the Enlightenment. The universality of the human condition and the equality of all persons nourish the international field of human rights and ultimately the genesis of new crimes, such as genocide and crimes against humanity, designed to protect all persons and ethnic groups. The criminal law represents a different strain of enlightened values. The principle of legality—the idea that all crimes should be legislatively defined prior to their commission—bespeaks respect for different value systems among potential perpetrators and a recognition, as well, that the zeal of criminal prosecution requires disciplined restraint. The principle of *nullum crimen sine lege*, as reflected in Article 22 of the Rome Statute, codifies this concern by requiring fair notice to potential offenders that their conduct will trigger criminal punishment. It also imposes discipline on the Office of the Prosecutor and the ICC by insisting that they justify criminal indictments and convictions by appealing directly to the language of the Rome Statute.

Despite this nominal commitment to legality in the Rome Statute, the rest of the Statute, the practice of the ad hoc Tribunals and the arguments of international lawyers reveal a significant ‘legality deficit’. They contain many features that fall short of what we expect under the rule of law in a domestic legal system. Most clearly inconsistent with the principle of legality is punishment by analogy. The former Soviet Union and the Third Reich were subjected to repeated attacks for permitting punishment by analogy. This means, essentially, that the governing statutes prescribe punishment, say, for one way of committing the offence and then permit the courts to punish for conduct that is equally bad and similar to the cases actually prohibited. So, for example, if the statute punishes forcible genital intercourse as rape, it would be punishment by analogy to punish forcible oral copulation as rape or the equivalent offence. If the latter is illegal, it should be included in the Statute.

Punishment by analogy is evident in the structure of crimes against humanity, e.g. in Article 7(1)(k), which authorizes the Court to extend liability to any ‘inhumane conduct of a similar character’. Another provision is Article 7, which punishes various sexual offences ‘or any other form of sexual violence of comparable gravity’ (Article 7(1)(g)). These are classic examples of punishment by analogy. The basic approach is to take the specified offences and inquire whether the unmentioned offences are sufficiently similar and sufficiently evil to warrant punishment. A problematic example under the just-mentioned provision punishing rape and other acts of sexual violence is female circumcision. This seems to be a crime of sexual violence, but is the widespread or systematic practice of female circumcision a crime against humanity under Article 7? No one quite knows.

The legality deficit in the Rome Statute should concern us not only because we do not have an answer to the question of what is punished and what is not, but also because we aspire to an international criminal court under the rule

of law. The standards of legality must be just as high as they are in the United States or in any democratic country.

When there is a legality deficit in a criminal regime, you can assume this deficit exists to serve the interests of the prosecution. There is little doubt that a pro-prosecution mentality pervades the Rome Statute from the Preamble, stressing the suffering of the victims, to the abolition of the statute of limitations (Article 29). Typically, a criminal statute provides for a strict rule of interpretation in order to protect the interests of the accused. The freedom of all citizens depends on their knowing in advance what will be punished and what will not be. The interpretation should therefore favour the accused. It should reflect the principle *in dubio pro reo*. The scales of justice in criminal law are clearly slanted in favour of the accused. The Rome Statute nominally concurs with this principle in Article 22(2) by requiring strict interpretation of the definition of crimes. But, as we have seen, the other provisions of the Rome Statute violate this requirement by encouraging punishment by analogy. Also, Article 21(3) mandates that the interpretation of the Statute should ‘be consistent with internationally recognized human rights’. Though this phrase obviously refers to the rights of the accused, it can also be read to include the rights of the victims, which opens the door to a more aggressive mode of prosecution.

The Statute does provide one significant deviation from governance by statutory law—a departure that serves the interests of the accused. According to Article 31(3), the Trial Chamber may recognize new claims of justification and excuse, so far as they are supported by comparative legal research into diverse national legal systems. This power of the ICC is perfectly consistent with the principle of legality because the defendant is entitled to warning of only those elements that might lead to his conviction. Engaging in creative refinements of the ‘grounds excluding criminal responsibility’ stands in the tradition of the great European criminal courts, notably the German Supreme Court, which, in 1927, became the first court in the world to recognize a general principle of necessity as a justification.¹⁵

In order to see how the ‘legality deficit’ might influence the Darfur prosecutions, we need to pay closer attention to the charges. In all cases of mass killings and suffering, the central crime of violence is always the killing of civilians. Whether this is captured as a war crime under Article 8(2)(a)(i) (‘wilful killing’), or as a widespread or systematic crime against humanity under Article 7(1)(a) (‘murder’), the basic crime is the same. A member of an armed squad kills people who are minding their own business. Depending on the nature of the armed squad and the linkage with an armed conflict—as well as the widespread or systematic nature of the killing—this would

15 Judgment of the German Supreme Court, 11 March 1927, 61 RGSt. 242. An English translation of the case can be found in G.P. Fletcher and S. Sheppard, *American Law in a Global Perspective: The Basics* (New York: OUP, 2005), 42–49.

be classified under Article 7 or 8. It might also be an act of genocide, as discussed in the first half of this paper.

For all its simplicity, however, the crime of killing is much more complicated than the commentaries to the Rome Statute assume and it will be on this terrain that we will find ample arguments to fend off undisciplined prosecution. We will discuss three issues that require attention.

A. *The Required Intention*

Even apart from the issues of collective and individual intention that trouble the law of genocide, the difficulty is understanding whether indirect killings are subject to punishment. Indirect killings are those that are not the object of the actor's intention. Consider the Report's finding that 'those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare' (§ 640). If this is true (and it is a very significant admission), there is much more in doubt than just the charge of genocide. As described in this admission by the Report, the intention to kill is indirect rather than direct. The deaths are a side effect of a military project. Under these circumstances, we have our doubts as to whether the killing is properly characterized as either a 'wilful killing' or 'murder'. In § 180, the Report claims that the required *mens rea* for the offence of murder as a crime against humanity is 'the criminal intent or recklessness required for the underlying crime'.

There are at least three convincing reasons why this claim in the Report is false, at least with regard to the punishability of reckless killing. First, Article 30 of the Statute explicitly limits the permissibly recognized culpability states to intention and knowledge 'unless otherwise provided'. Every criminal lawyer knows that 'intention and knowledge' implies the exclusion of recklessness and negligence. No one claims that Articles 7 and 8, defining war crimes and crimes against humanity, are cases where a lesser mental state is 'otherwise provided'. The only provision that does so provide, so far as we know, is Article 28, which recognizes command responsibility on the basis of negligent supervision of subordinates in the field. It follows that recklessness cannot legally be a basis for liability for a crime against humanity or a war crime.

Secondly, the terms 'murder' (Article 7) and 'wilful killing' (Article 8) clearly imply that recklessness alone cannot be sufficient for liability. The term 'murder', as contrasted with 'manslaughter', refers to the most heinous degree of criminal homicide. It is the same as referring to *Mord* in German or *assassinat* in French. The Rome Statute did not pick the most heinous version of criminal homicide by accident. The point is to restrict liability to the cases most deserving of punishment. According to Article 31(1) of the Vienna Convention on The Law of Treaties, the terms of treaties must be interpreted in light of their 'ordinary meaning'. With regard to a legal term with a fixed understanding in the domestic legal systems of the world, the ordinary meaning is obviously settled.

In common-law systems, recklessness is almost never sufficient for murder. The Model Penal Code requires, in addition to recklessness, ‘circumstances manifesting extreme indifference to the value of human life’ (§ 210.2(1)(b)). The common-law term for this degree of indifference to human life was captured by the metaphor of an ‘abandoned and malignant heart’. There is simply no warrant to reduce murder to a simple crime of recklessness.

Thirdly, even if there were liability for reckless homicide under the Rome Statute, we could hardly apply the provision because there is no firm understanding of what the term means. The Rome Statute does not define the term and there is an enormous confusion in the literature about its meaning. The English and the Americans mean something totally different when they refer to reckless killing.¹⁶ Continental Europeans have no precise equivalent because they typically divide all criminal liability into only two categories: *dolus* (intention) and *culpa* (negligence). The appeal of recklessness to common lawyers is that it provides a middle station between *dolus* and *culpa*. If there were to be a translation of the Model Penal Code’s definition of ‘recklessness’ into German, the proper term would be *bewusste Fahrlässigkeit* (conscious negligence).

Professor Cassese writes that ‘recklessness’ means the same thing as *dolus eventualis*, but this is not correct.¹⁷ The term ‘*dolus eventualis*’ is used in the Continental literature to describe the borderland of intentional killing. Recklessness focuses on the risk that the perpetrator is willing to take, but *dolus eventualis* is about the actor’s attitude, regardless of the risk of harm. The punishable attitude, as defined in the German literature and case law, is one of approval and identification with the evil result. If the purpose of an armed band is to rid an area of potential military opponents and they know that some people will die as a result, their attitude is not necessarily *dolus eventualis*. Their killing is *dolus* only if they realize that specific people will die, approve and desire this result in their hearts, and decide to continue with their action.¹⁸ If the test were reckless killing, the emphasis would be on the gravity of the risk and the military benefits of the operation. Whether this is the situation of the alleged killing in Darfur would be a question of fact, to be resolved at trial. But the Trial Chamber should not even reach that question because there is no basis for the claim that either murder by recklessness or murder by *dolus eventualis* is punished under the Rome Statute.

The analysis of ‘wilful killing’ of a civilian under Article 8 is even more straightforward. The term ‘wilful’ unambiguously applies only to these actions that represent the actor’s total commitment of purpose. In American legal English, there is little doubt that the term is even more restrictive than

16 Compare Model Penal Code, § 2.02(2)(c) with A. Ashworth, *Principles of Criminal Law* (3rd edn, Oxford: OUP, 1999), 183–191.

17 See A. Cassese, *International Criminal Law* (Oxford: OUP, 2003), 168.

18 On the meaning of *dolus eventualis* in the continental literature, see G.P. Fletcher, *Rethinking Criminal Law* (1978) (New York: OUP, 2000), 445–449.

'intention'. There are many cases in American courts where the term 'wilful' is read to require 'consciousness of wrongdoing' as a condition of liability.¹⁹ The technical meaning of 'wilful' appears to be lost on the community of international lawyers. The translations of the Rome Statute into French and Spanish routinely equate the term with 'intentional'. To our dismay, William Fenrick writes in the Commentary edited by Otto Triffterer that 'wilful killing' includes reckless killing and then defines recklessness more broadly than would be tolerable in an American courtroom (as roughly the equivalent of 'foreseeable').²⁰

It is time that criminal lawyers claim their proper place in the interpretation and application of the Rome Statute. The proper place to begin is with the analysis of the criteria of culpability.

B. The Impact of Customary International Law

In most cases of attacks on civilians, the action is not a direct or intentional killing of a specific person, but rather a military operation that entails severe collateral or indirect damage to civilians or civilian objects. An attack is prohibited when the collateral harm is excessive relative to the military objective. The language of Article 8(2)(b)(iv) of the Rome Statute is the key provision: 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' is a war crime. According to this provision, the attack must be intentional 'in the knowledge' of excessive collateral harm to civilians. Even if this provision is considered sufficiently precise to constitute a norm of criminal law, the Commission of Inquiry goes too far in seeking to apply it to the circumstances of Darfur.

Section 259 of the Report seeks to restrict the possibility of launching attacks that endanger civilians by imposing certain rules said to be derived from 'customary international law' (CIL). For example, commanders may not attack unless they give 'effective advance warning'. There are many recognized exceptions to this rule but it is troubling that the rule is even suggested as a supplementary requirement for testing the legality of attacks on areas that include civilians.²¹

Note the way customary international law is used in the Commission's analysis. The point is not to generate an additional defence or 'ground for excluding criminal responsibility' according to Article 31(3), which would be

19 See, e.g. *United States v. Wallace*, 40 F.Supp. 2d 131 (EDNY 1999).

20 See O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 182.

21 These rules of customary international law appear to be drawn from the 1977 Protocol to the Geneva Convention, Art. 57.

a permissible deviation from the statutory rule. Rather, the point is to inculcate commanders who launch attacks without giving effective warning. Custom is used here as a means of *increasing* exposure to criminal liability. This is illegitimate, we contend, under the principle of legality proclaimed in the Rome Statute under the maxim of *nullum crimen sine lege*.

We have three fundamental concerns that lead us vigorously to oppose the reliance on CIL as means of inculcation in criminal prosecutions, whether in domestic courts or international courts. The first is the notorious difficulty of establishing a sufficient consensus to validate a rule as CIL. In domestic legal systems, where there is constant interaction among individuals encountering each other in public places, many customs do in fact develop. Men hold doors open for women (or at least used to do so). Men take off their hats in church and put on some head covering in a synagogue or mosque. People shake hands by using their right hands. These are trivial examples of customs that have become customary rules. They are in fact a matter of etiquette rather than the kinds of issues on which laws would be passed. But one could imagine more serious customary practice, say, the practice of tipping in the United States. There are fairly rigorous rules about when to tip and how much. You could imagine a society in which the same rules applied to services provided by the police or medical personnel in hospitals.

Customary law begins as a customary practice and then ripens into a binding rule when those who follow the rule begin to regard the practice as binding on them. Jewish law is quite familiar with this phenomenon. Men started wearing skullcaps when they prayed and this custom eventually became binding. It became customary Jewish law. As H. L. A. Hart explains, these rules become binding because the actions are done ‘as a law’ and, in the course, become binding because they are done ‘because of the law’.²²

There is no doubt that something similar occurs in international law, even though the interaction of states and their representatives is minimal compared to modern urban societies. Yet, when the practice of states does converge, and this convergence is sustained by a sense of reciprocal obligation, we can speak of CIL. The classic example is the recognition of the three-mile limit as a binding rule of international law. The problem generally, however, is that there is almost never the kind of convergence of state practice that would be parallel to the examples we have given of customary rules in domestic culture.

In the last several decades, CIL has taken on an entirely different meaning. Now, CIL seems to mean whatever states declare to be their fundamental value aspirations, whether these value commitments are honoured in the breach or not. This new sense of CIL is evident in the American Law Institute’s 1987 Restatement of the Law (Third): The Foreign Relations Law of the United States Article 702, which declares a number of human rights to be part of CIL and binding on all states, whether they have consented or not. This ‘wish list’ of

22 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 124–125.

human rights obligations, if it has meaning at all, acquires its force from the pious pronouncement of states that certain egregious abuses constitute violations of international law. Of course, the list includes primarily those abuses that were common in the 20th century—racial discrimination, forced disappearances and torture. It is understandable that the pious leaders of the West—many of whom indulged in these practices in the recent past—would declare them to be peremptory rules of CIL. Unfortunately, the piety of the West cannot coherently be considered a source of law.

A good example is the prohibition against murder, which is on the ‘wish list’ of the Restatement. There is certainly no convergence among citizens not to engage in murder. States themselves often engage in the mass murder of racial, ethnic and political enemies. This is alleged to have occurred in Darfur. Where, then, is the convergence of behaviour necessary to establish a rule of customary law? The fundamental paradox of all criminal law is that we would not be interested in repressive and punitive measures unless criminal deviations from the rule threatened our well-being. There must be enough crime to make the apparatus of criminal law a worthwhile expense. If that is the case, then surely there is no customary law of abstaining from criminal behaviour. By its very nature, criminal law does not conform to those fields where customary law is possible.

Perhaps the advocates of CIL are content with saying that states everywhere concur in prohibiting a certain harmful activity, such as murder. Of course, an authoritative legislative norm remains valid, even if it is widely breached. But though every state might have a similar prohibition, they are all independent of their neighbours. There is no reciprocal obligation not to murder. Parallel but independent actions cannot establish a rule of customary law. Suppose that in every house in the community, the owners independently decided not to lock their doors at night. No one knew that others were doing the same thing. Under the circumstances, their unknowing convergence would not constitute a rule of customary law.

When the *Report of the International Commission of Inquiry* informs us that certain duties are incumbent on commanders as CIL, we have to wonder whether the drafters mean to refer to CIL in the traditional sense, implying actual convergence coupled with a sense of reciprocal obligation, or the modern sense expressed in the Restatement Third of Foreign Relations Law. Either way, we contend, the use of CIL in criminal proceedings would be objectionable.

Imagine a place where tipping is the standard practice but an eccentric refuses to tip. The deprived waiter, taxi-driver or police officer may be able to sue the deviant eccentric for compensation, but a criminal prosecution would be out of the question. No prosecutor could stand up in court, anywhere in the world—at least not in a modern legal system—and defend his charge solely on the ground that it violated customary law.

Despite the clarity of these points, it is not easy to convince international lawyers that invoking CIL in criminal cases violates the principle of legality. We understand that international lawyers regard customary law as the

supreme form of binding law—even more binding than treaties—because it applies to those who refuse to sign the treaty. Yet, there is an obvious breakdown of legal thought when the international lawyers invoke CIL instead of treaty authority as a basis for inculcating criminal suspects. They know they cannot make up new crimes, such as terrorism or the genocide of political opponents, that are not included in the defined ‘jurisdiction’ of the ICC under Article 5, but, for some odd reason, the drafters of the Report of the Commission think they can impose customary rules in defining the scope of the charge of ‘intentionally launching an attack’ in the knowledge that the collateral will be excessive. This is a totally erroneous deviation from the rule of law. The Rome Statute must be applied as it is written, without additional constraints that supposedly emanate from customary international law.

A third factor of concern to us bears on this conclusion: the necessity, for the sake of legality, of distancing the law of the ICC from prior international instruments that pervasively use the phrase ‘law and customs of war’. It is hard to know when this phrase came into currency. Francis Lieber did not use it in 1863.²³ Its first appearance may have been in the Hague Conventions. The 1899 Convention is even entitled ‘Laws and Customs of War on Land’. The basic point of the Hague Conventions is that the signatories agreed to abide by the customs, as well as the laws of war. Then, the phrase ‘laws and customs of war’ enters the lexicon by becoming one of the four conditions in the famous definition of belligerency in Article I to the Convention Annex. If a fighter does not abide by the custom of war, he or she loses the privilege of being a belligerent and cannot qualify for POW status if captured. The result is that he or she is treated as an ‘unlawful combatant’ under the *Quirin* test.²⁴

The phrase ‘laws and customs of war’ played an important role in the jurisprudence of the ICTY. For example, the *Furundžija* decision analyses several charges in violation of the ‘laws and customs’ of war and expresses no qualms about identifying torture as violation of CIL.²⁵ The phrase ‘laws and customs of war’ also appears in the Rome Statute. Without prejudice to an analysis of the phrase’s proper meaning in the ICTY, we have found that the phrase has no particular meaning in the Rome Statute and it most definitely does not support the inclusion of inculpatory restrictions on the basis of CIL. The phrase is used in the *chapeaus* of Articles 8(2)(b) and 8(2)(e) as a general introduction to the specifically enumerated war crimes in those two divisions. The word ‘custom’ appears nowhere else in the Statute, and the phrase ‘customary international law’ is absent entirely.

23 General Orders Number 100. Lieber uses the word ‘custom’ precisely once in a non-legal proposition. Art. 115 (‘It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them’).

24 *United States v. Quirin*, 317 US 1 (1942).

25 Judgment, *Furundžija* (IT-95-17-A), Appeals Chamber, 21 July 2000.

The provision that we have been discussing—namely Article 8(2)(b)(iv) on intentionally launching an attack with knowledge of excessive collateral damage—is included under this general heading of ‘laws and customs of war’. This provides us with some information, but not much. It is like finding the crime against money laundering classified under the heading ‘organized crime’. This classificatory information has little if no bearing on the interpretation of the statute. Annex Article I to the 1907 Convention famously enumerates four conditions for qualifying as a combatant. It is hardly a warrant for treating CIL as an additional source of criminal prohibitions under the Rome Statute.

To sum up, customary international law has no role in international criminal law, except perhaps to increase the options for the defence. To use custom to enhance the prospects of conviction is to violate the fundamental assumptions of modern criminal law. ‘Customary law’ is anathema in the criminal courts of every civilized society. The reason for legislation is to drive custom from the system and to create a regime based on rules and standards declared publicly, in advance, by a competent authority. The Rome Statute represents public standards of that sort but the rules of customary international law—whether real or imagined—do not.

If the Report had grounded its restrictions in the 1977 Protocol to the Geneva Convention or the Hague Convention of 1907, the problem of legality would be more subtle. According to Article 21(1)(b), the Court may apply ‘applicable treaties’ as a source of law. It is hard to know what this means. The other treaties in question are not designed to generate criminal sanctions. They do not speak directly to individuals as addressees of the norms. Whether they are ‘applicable’ or not is contestable. While Article 21 might arguably admit these treaties as a source of law, it does not ever suggest the applicability of CIL. Referring to the general principles of international and national law in Article 21(1)(c) might confuse some into thinking that this is a covert reference to CIL. But it is clearly not. The general principles of criminal law as developed in American and German law are not customary rules. Consider the general principles of ‘no liability without fault’ and the distinction between justification and excuse.²⁶ They are defended as binding because they are normatively correct—not because they are conventionally accepted. Leading scholars have always advocated innovations in the basic principles of law before the courts and the public adopted their teachings. Also, to be sure, one of the most basic principles of national law that should be recognized under Article 21(1)(c) is that we do not punish on the basis of customary law.

C. The Problem of Proportionality

The heart of the case against commanders for launching attacks against areas that include civilian inhabitants is the issue of excessive harm relative

26 See the comparative analysis of these principles in *Rethinking Criminal Law*, *supra* note 18.

‘to the concrete and direct overall military advantage anticipated’. The Report says that this is a ‘subjective standard’ (§ 260). It is not clear what the authors mean—perhaps that ‘excess’ is in the eye of the beholder, including the subjective perceptions of commanders in the field.²⁷ If that is the case, no one could be guilty under the Rome Statute. We suspect the authors mean the standard is not very precise, which raises issues of legality rather than excessive deference to the perceptions of potential offenders.

This topic remains regrettably under-theorized. So far as we can tell, there is no analysis of the issue of proportionality either in the Triffterer Commentary²⁸ or in Cassese’s leading text, *International Criminal Law*.²⁹ The deficit in theory adds to the deficit in legality, for the ICC is likely to think about proportionality as though it were a strict matter of balancing the costs and benefits of the attack. This approach is suggested in the Report (§ 260), which conditions proportionality on ‘a balancing between the expectation and anticipation of military gain and the actual loss of civilian life or destruction of civilian objects’. This means that if, on balance, the attack generates more harm than military gain, it is illegal. This way of thinking about proportionality is deleterious for the defence. It is a consequence of not understanding the moral foundations of the law of war in the Catholic doctrine of double effect.³⁰

The prohibition against killing civilians and the rule against disproportionate harm are both rooted in the theological doctrine that absolutely prohibits the killing of innocent people (in the context of war, civilians), but which permits killing if the purpose is sound. Even in cases in which killing is permitted, however, the rule against disproportionate side effects applies. The problem is figuring out which of the many standards of proportionality apply in this situation.³¹ There is good reason to think that ‘excessive’ or ‘disproportionate’ means the same thing in this context, as it does in self-defence cases where the legitimate defensive purpose permits killing as a side effect to the legitimate purpose of warding off the attack. The rule of proportionality will limit the right to prevent the attack where the collateral harm is clearly disproportionate to the defensive interest. You cannot kill 1,000 people in order to save one person from assault. In these extreme cases, the use of force is clearly out of bounds. The same is true, we believe, for the standard of excessive harm in the Rome Statute. It should only lead to conviction

27 That this is the meaning is suggested by the later statement that the subjective standard ‘must be applied in good faith’ (§§ 160).

28 See Commentary, *supra* note 20, at 197 (superficial discussion of Art. 8(2)(b)(iv)).

29 See Cassese, *supra* note 17. Article 8(2)(b)(iv) is mentioned on pages 60 and 165 but there is no discussion of proportionality in either place. The index does not contain any apparent reference to the concept.

30 This doctrine is widely discussed in the philosophical literature. See, e.g. M. Walzer, *Just and Unjust Wars* (3rd edn, New York: Basic Books, 2000), 152–159.

31 These various standards are discussed in the forthcoming book by G.P. Fletcher, *Justice in the Face of Enemy Fire* (New York: OUP, 2006).

in cases of extreme disproportion. It is not enough that the costs outweigh the benefits; the harm must be grossly and obviously excessive relative to the military purpose.³² In § 260, the Report reaches essentially the same conclusion ('the prohibition of the most glaringly disproportionate injuries to civilians'). But it would be preferable if the Report had analysed this issue properly in its theoretical context. We are concerned that the predicted limitation to the 'most glaringly disproportionate injuries to civilians' is a consequence of conceding, not entirely correctly, that the standard is 'subjective' rather than properly analysing why the disproportionate harm is at the extreme end of the spectrum.

4. The USA and the ICC

Sensitivity to these conceptual confusions will only grow in importance as the ICC moves from an academic and diplomatic exercise to a legal reality. The US decision to abstain from the Security Council referral—instead of exercising its veto, as many had expected—ensures at least a limited future for the ICC.

The official US position has always been an objection to an international court that would exercise jurisdiction over foreign nationals from countries not signatories of the Rome Statute. US diplomats make frequent reference to the Rome Statute's Article 124 and its opt-out provisions for Rome Statute parties, arguing that it would be absurd to give parties who have agreed to the Rome framework greater exemptions than those who never agreed to it in the first place. Putting aside for the moment the obvious rationale for giving greater opt-out protections to signatories—creating a clear incentive to sign the treaty—the US position need not stop the Court from becoming a reality. The US abstention over the Darfur referrals indicates that the US will not push their opposition to the point of blocking all ICC referrals—as many UN observers had anticipated—but will instead threaten vetoes in order to receive specific assurances that US nationals will be excluded from the Security Council referrals and exempted from the Court's jurisdiction. The ICC will be allowed to continue its work so long as US nationals remain at arm's length from the reach of international criminal justice.

The American government might even become more supportive of the Court if political observers witnessed growing sensitivity to the rights and interests of the accused. The more the ICC becomes like a real criminal court, operating under the rule of law, the more American politicians are likely to shelve their fears of politicized prosecution and support the ICC as an important instrument of international peace and harmony.

32 See G. Werle, *Völkerstrafrecht* (Tübingen: Mohr Siebeck, 2003), n. 996, at 377 ('the attack is permissible only if the civilian collateral damage is not disproportionately high [*nicht unangemessen hoch*] relative to the gain achieved by the military attack').