ENGAGING DARRYL ROBINSON'S *JUSTICE IN EXTREME CASES*: INTRODUCTION TO THE SYMPOSIUM

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International criminal law has grown exponentially in the past several decades. Institutions adjudicating this body of law have proliferated, including, most notably, the International Criminal Court (ICC), but also hybrid and internationalized courts, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. New courts are being created or contemplated in states such as Sudan and South Sudan. Additionally, international criminal law is increasingly adjudicated in national courts under the doctrine of universal jurisdiction. These institutions, particularly the groundbreaking International Criminal Tribunals for the former Yugoslavia and Rwanda, have developed a robust jurisprudence related to all aspects of the interpretation and application of this body of criminal law. However, this rapid institutional and doctrinal growth has not been matched by high levels of theoretical engagement. Theories concerning the appropriate principles to guide the interpretation and application of international criminal law are only beginning to emerge.

Darryl Robinson's book, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law*, is a welcome addition to the emerging literature on international criminal law theory. In it, Robinson tackles one of the most important challenges for any criminal law regime: developing a principled methodology for decision-making. The book begins by demonstrating that international criminal law lacks such a framework, and that this deficit has significant consequences for the regime's ability to effectuate justice. Robinson argues that the solution is not, as some have proposed, simply to apply the principles most commonly used in national legal systems, because those systems lack some of international criminal law's most important features. At the same time, the book suggests a deeper engagement with international criminal law theory can help to develop theories of criminal law applicable at the national level.

Given the breadth of his topic, Robinson wisely narrowed the book's focus to a particular aspect of the regime's theoretical deficiency: its failure adequately to adhere to deontic constraints. He argues that international criminal law's decision-makers have engaged in flawed reasoning methods that have undermined the regime's ability to honor its own commitments to liberal principles rooted in "compassion, empathy, and regard for humanity."[1] These reasoning methods have produced outcomes that fail to respect three important principles of liberal criminal justice: personal culpability, fair labeling, and legality.

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1. DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 59 (2020).

To correct this problem, the book proposes a coherentist decision-making method. Robinson disavows the project of identifying "privileged first principles,"[2] arguing instead for a discursive process of engagement with "the best available evidence" of what morality and justice require.[3] Coherentism requires decision-makers to consider such evidence as patterns of practice and normative arguments to develop mid-level principles. These principles become hypotheses that guide further discourse. The three principles above are given as examples of such mid-level principles.

Having set forth his coherentist method and identified three important but undervalued deontic principles, Robinson helpfully provides a case study so readers can experience the framework in action. Applying the method to notoriously confounding questions surrounding the elements of command responsibility, Robinson argues that the international criminal tribunals have interpreted and implemented this doctrine in ways that undermine personal culpability, fair labeling, and legality.

These important arguments provided rich fodder for the roundtable discussions that form the basis for this symposium. On February 21, 2020, just days before COVID-19 changed the world as we knew it, twelve prominent international criminal law scholars, including Robinson, gathered at Temple University's Beasley School of Law to discuss a late-stage manuscript of the book. Each participant had circulated a written commentary on the manuscript prior to the event, and two additional experts who were unable to attend the roundtable contributed written submissions that were included in the discussions. The roundtable was lively and productive. Participants began by engaging with the book's theoretical frame, before moving into a discussion of its application to the doctrine of command responsibility. After the event, Robinson incorporated feedback from the discussion into the final version of the book. He also helpfully provided written responses to the commentators, who then had the opportunity to revise their submissions in light of both his responses and the edits he had made to the manuscript after the roundtable. Finally, Robinson provided a response to the revised commentaries. This symposium issue is the result of these efforts. It is made particularly rich by the extensive exchanges among participants, both during and after the roundtable.

Like the roundtable discussions, the contributions to this issue address both theoretical questions raised in the book, as well as their application in the context of command responsibility. The first entry, by Milena Sterio, provides a helpful introduction to the arguments in the issue, highlighting what Sterio sees as the book's principal strengths, including its "humanity-based approach to international criminal justice," coupled with its realist recognition of the limits of human research and reasoning.[4] Next, Adil Haque, a philosopher by training, engages with the book's

2. *Id.* at 117.

3. *Id.* at 118.

4. Milena Sterio, *Darryl Robinson's Model for International Criminal Law: Deontic Principles Developed Through a Coherentist Approach*, 35 TEMP. INT'L & COMPAR. L.J. 5, 9–10 (2021).

philosophical frame.[5] Haque argues that claims about the importance of engaging in deontic analysis require justification, and he suggests several options, including naturalism, inclusive legal positivism, and exclusive legal positivism.

Several other commentators also engage thoughtfully with the book's coherentist framework. For instance, Neha Jain questions whether the coherentist method leaves too much discretion in the hands of individual decision-makers;[6] and Alejandro Chehtman raises a similar concern that the method lacks a "common metric or scale," making decisions "ultimately seem somewhat arbitrary."[7] Randle DeFalco argues that principles, including those Robinson espouses, can conflict, and that such conflicts can complicate application of the book's theoretical framework.[8] Similarly, my own contribution argues that the complications that arise when values conflict are often exacerbated in international criminal law by the regime's responsibility to multiple communities, including the global community and the communities most affected by the crimes under adjudication.[9]

Three authors take up the invitation in Robinson's book to expand his framework and apply it to analyze other issues. Caroline Davidson takes a close look at what "strict construction" means in international criminal law, arguing that it has different implications in the international context than at the domestic level, and that this difference can help inform domestic courts' application of the doctrine—a continuation of Robinson's project of developing international criminal law theory as a way of informing criminal law theory more generally.[10] Alexander Greenawalt explores the implications of Robinson's approach for modes of liability that have generated controversy in international criminal law.[11] These include not only command responsibility, the subject of the book's case study, but also joint criminal enterprise and aiding and abetting liability. Greenawalt uses the doctrines to argue that formal doctrinal standards have a limited ability to safeguard values. Elena Baylis takes up the challenge Robinson issued in his book of applying the framework to analyze a new issue: how hybrid courts can better effectuate deontic values.[12] She argues that hybrid courts provide an especially appropriate venue for deontic considerations in light of their ability to draw on domestic norms, and that how the

5. Adil Ahmad Haque, *Jurisprudence in Extreme Cases*, 35 TEMP. INT'L & COMPAR. L.J. 11 (2021).

6. Neha Jain, *A Tale of Two Cities: Reflections on Robinson's Twinning of International Criminal Law and Criminal Law Theory*, 35 TEMP. INT'L & COMPAR. L.J. 25 (2021).

7. Alejandro Chehtman, *An "Ongoing Conversation": Method and Substance in Robinson's* Justice in Extreme Cases, 35 TEMP. INT'L & COMPAR. L.J. 37, 40 (2021).

8. Randle DeFalco, *A Coherentist Approach to Incoherent Law? Some Thoughts on Darryl Robinson's* Justice in Extreme Cases, 35 TEMP. INT'L & COMPAR. L.J. 45 (2021).

9. Margaret M. deGuzman, *Coherentist Deontic Analysis or Dialogic Community Value Identification: Which Way Forward for ICL?*, 35 TEMP. INT'L & COMPAR. L.J. 57 (2021).

10. Caroline Davidson, *Strict Construction, Deontics, and International Criminal Law*, 35 TEMP. INT'L & COMPAR. L.J. 69, 71–72 (2021).

11. Alexander K.A. Greenawalt, *Advancing Fundamental Principles Through Doctrine and Practice: Comments on Darryl Robinson*, Justice in Extreme Cases, 35 TEMP. INT'L & COMPAR. L.J. 79 (2021).

12. Elena Baylis, *Extreme Cases in Hybrid Courts*, 35 TEMP. INT'L & COMPAR. L.J. 95 (2021).

institutions engage in this task will likely affect their legitimacy.

Many of the contributions also explore aspects of the book's case study, which, as noted above, applies the coherentist method to analyze critically the doctrine of command responsibility. For instance, Jens Ohlin, along with several other commentators, including the present author, questions the book's advocacy of a negligence mental element for command responsibility.[13] In contrast, Diane Amann supports the "should have known" mens rea for command responsibility, emphasizing that this doctrine should not be a considered a "mode of liability," but rather "a distinct manner of imposing criminal punishment."[14] Likewise, James Stewart argues that the book's treatment of command responsibility as a mode of liability is not fully supported by its coherentist methodology.[15]

Finally, Mark Kersten's essay aims to expand on the book's framework by asking what place it contains for such issues as "power, politics, justice, race, identity, etc."[16]

Robinson closes the symposium with a response to some of the issues raised in the contributions. Among other things, he clarifies that his discussion of command responsibility as a mode of liability, rather than a separate offense, was not a normative choice, but was intended to illustrate the tribunals' failure to engage with the culpability principle. He also addresses the views of several commentators that recklessness or willful blindness are the appropriate standards for command responsibility, rather than negligence, noting that the divergence in opinion on this point may be more semantic than substantive, since the scholars all seem to agree that culpable ignorance ought to be included in the mens rea of command responsibility. Robinson's response further clarifies the contours of the book's inquiry in ways that both respond to some of the commentators and may help guide future readers of the book. He ends the response, as I will end this introduction, by expressing the hope that the book, along with the reflective conversations that emerged from the symposium, "will contribute to future conversations about the constraints of justice, for both national and international criminal law."[17]

13. Jens David Ohlin, *Complicity, Negligence, and Command Responsibility*, 35 TEMP. INT'L & COMPAR. L.J. 109, 113–20 (2021).

14. Diane Marie Amann, *On Command*, 35 TEMP. INT'L & COMPAR. L.J. 121, 128 (2021).

15. James G. Stewart, *How Coherent Is Coherentism? Misgivings About Treating Superior Responsibility as a Form of Complicity*, 35 TEMP. INT'L & COMPAR. L.J. 133 (2021).

16. Mark Kersten, *Forever Together or a Hope for Better? Liberalism and International Criminal Law*, 35 TEMP. INT'L & COMPAR. L.J. 143, 144 (2021).

17. Darryl Robinson, *The Author Responds: Culpability Theories in Extreme Cases*, 35 TEMP. INT'L & COMPAR. L.J. 155, 166 (2021).