

## DARRYL ROBINSON’S MODEL FOR INTERNATIONAL CRIMINAL LAW: DEONTIC PRINCIPLES DEVELOPED THROUGH A COHERENTIST APPROACH

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“Criminal law is predicated precisely on that personhood and responsibility; its task is assessing the extent of accused persons’ criminal responsibility based on their actions. Criminal law is not employed against sharks, or bears, or rocks, or machines; it is premised on the acknowledgement of the accused as a responsible human agent who could have chosen others.”<sup>1</sup>

Darryl Robinson’s new book, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law*, presents a compelling argument: that international criminal law would benefit from deontic reasoning.<sup>2</sup> According to Robinson, this type of deontic reasoning “requires us to consider the limits of personal fault and punishability,” and is a “normative reasoning that focuses on our duties and obligations to others.”<sup>3</sup> Moreover, Robinson argues in this book that coherentism is the best method for identifying and defining deontic principles.<sup>4</sup> Robinson explains that coherentism is an approach where “[w]e use all of our critical reasoning tools to test past understandings for bias and inapt assumptions” and where “we can take common formulations of fundamental principles as starting hypotheses, then continue to test and refine them.”<sup>5</sup> The advantage of coherentism, according to Robinson, is that it allows us to work with all available clues in order to solve problems of the middle range and to develop “mid-level principles,” which we can test to analyze whether they are normatively correct or analytically useful, and which we can then use to reform our practice.<sup>6</sup> In order to develop his argument, Robinson uses command responsibility as an example; he posits that under the deontic reasoning model, command responsibility should be recognized in international criminal law as a mode of accessory liability.<sup>7</sup> Robinson thus proposes a novel way of analyzing command responsibility—through the lens of deontic

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1. DARRYL ROBINSON, *JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW* 69 (2020).

2. *Id.* at 10.

3. *Id.* at 11.

4. *Id.* at 230.

5. *Id.* at 14.

6. *Id.*

7. *Id.* at 15.

principles developed by using a coherentist model.<sup>8</sup> Robinson's book is a significant contribution to existing literature within the field of international criminal law because of both its general analysis regarding how the field should continue to develop, and also in light of its more pointed analysis regarding command responsibility.

Robinson develops his argument carefully and methodically. In order to explain why deontic reasoning is necessary within the field of international criminal law, he criticizes other approaches and argues that they are often inadequately transplanted into international criminal law.<sup>9</sup>

For example, Robinson suggests that principles derived from international humanitarian law and human rights law may have been too casually embedded in the jurisprudence and scholarly analysis of international criminal law.<sup>10</sup> According to Robinson, "part of the problem lies in habits of reasoning and argumentation that were transplanted from human rights and humanitarian law without adequate recognition that the new context – criminal law – requires different thinking."<sup>11</sup> This has resulted in "some contradictory assumptions and methods of reasoning" within international criminal law.<sup>12</sup> Robinson illustrates this point by explaining that liberal principles embedded in human rights law seek to protect the individual from the state.<sup>13</sup> In criminal law, and in international criminal law, "it is now *we* who are wielding power over individuals, and thus the liberal principles now engage to restrain *us*."<sup>14</sup> Thus, although human rights law can provide guidance to international criminal law, it would be imprudent to develop the latter by simply importing principles from the former.<sup>15</sup> Similarly, Robinson cautions against superimposing international humanitarian law principles within international criminal law, because the former are focused on developing better systems, whereas the latter is concerned with imposing individual criminal liability.<sup>16</sup> Robinson endeavors to correct this through the imposition of deontic restraints, developed by using a coherentist model.<sup>17</sup> Robinson's model allows for the borrowing of human rights and international humanitarian law principles by those working in international criminal law, so long as deontic constraints impose appropriate limitations on such borrowing practices.<sup>18</sup>

Moreover, Robinson pushes back against victim-focused teleological reasoning in international criminal law.<sup>19</sup> This type of teleological reasoning is reductive,

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8. *Id.* at 13–15.

9. *Id.* at 20.

10. *Id.*

11. *Id.* at 22 (original italics omitted).

12. *Id.*

13. *Id.* at 25.

14. *Id.*

15. *Id.*

16. *Id.* at 39.

17. *See id.* at 12–14 (introducing the five central elements of his methodological framework).

18. *See id.* at 7–9 (explaining that deontic constraints are important for developing international criminal law because they promote respect for individuals).

19. *See id.* at 27–31 (objecting not to teleological reasoning per se, but to the reductive and

according to Robinson, because it assumes that international criminal law only has one single purpose—maximizing victim protection.<sup>20</sup> In addition, this type of teleological reasoning “is ‘aggressive’ because it uses that (presumed) single purpose to override other tools of construction, such as the text and context.”<sup>21</sup> Robinson accepts that teleological reasoning is an important and appropriate part of legal reasoning; he warns, however, against using such reductive and aggressive forms of teleological reasoning, as these can lead toward over-simplistic and problematic tribunal judgments and inappropriate development of the field of international criminal law.<sup>22</sup> Robinson also cautions against the use of victim-focused teleological reasoning in international criminal law because such reasoning is often embedded with utopian aspirations.<sup>23</sup> For example, international criminal law, if driven by victim-focused teleological reasoning, may embrace overly ambitious goals to end, as opposed to manage or reduce, crime.<sup>24</sup> “Admirable, but utopian, objectives such as eliminating crimes, which no criminal law system can achieve, are likely to generate calls for ever harsher rules and thus promote a tendency away from principled restraints.”<sup>25</sup> Thus, according to Robinson, international criminal law driven by purely victim-centric teleological reasoning may develop in unwarranted and normatively unsound directions.<sup>26</sup>

Robinson is equally skeptical of using national criminal law principles in international criminal law.<sup>27</sup> He agrees with other scholars, such as Mark Drumbl and Mark Osiel, that ordinary criminal law principles may not be applicable in the context of international crimes.<sup>28</sup> Robinson, however, argues that although we may discard such domestic criminal law principles in light of the special context of international criminal law, we should not “discard our underlying deontic commitment to our fellow human beings.”<sup>29</sup>

In addition to explaining why existing approaches to international criminal law may be inadequate or incomplete, Robinson argues that legal reasoning is equally important as legal conclusions.<sup>30</sup> According to Robinson, we must pay careful attention to our legal reasoning because faulty reasoning may eventually produce faulty outcomes and judgments (“[o]ur reasoning is our ‘math,’ and systemic distortions in our math will eventually throw off our calculations in significant ways.”).<sup>31</sup> Thus, Robinson’s proposal—applying deontic reasoning to the field of international criminal law—is one based on humanity and “respect for the moral

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aggressive form of teleological reasoning in international criminal law analyses).

20. *Id.* at 29.

21. *Id.*

22. *Id.* at 31.

23. *Id.* at 36–39.

24. *Id.* at 36.

25. *Id.* at 37.

26. *Id.* at 38.

27. *Id.* at 70–71.

28. *Id.* at 70, 72–73.

29. *Id.* at 62.

30. *Id.* at 54.

31. *Id.*

agency of individuals.”<sup>32</sup> In addition, Robinson’s proposal is based on compassion and empathy; Robinson views the latter as a “kernel of justice.”<sup>33</sup> Robinson argues that the adoption of this approach will result in a “more careful liberal account: a humanistic, open-minded (or reconstructive), cosmopolitan, and coherentist account.”<sup>34</sup>

In order to illustrate his argument, Robinson engages in a comprehensive analysis of command responsibility.<sup>35</sup> Robinson analyzes and criticizes different ways in which the International Criminal Tribunal for the former Yugoslavia (ICTY) has characterized command responsibility. It has, for example, conceived of command responsibility as a separate or *sui generis* offense and has rejected the causal contribution requirement.<sup>36</sup> Robinson argues that the “confusion” and “fragmentation” in the Tribunal jurisprudence has resulted from an unresolved contradiction: a failure to comply with the culpability principle.<sup>37</sup> The culpability principle is fundamental to a vision of international criminal justice based on humanity, and thus constrained by deontic principles.<sup>38</sup> International criminal law which imposes punishment on individuals who are not truly culpable is another vision driven by other, non-humanity based purposes; Robinson would argue that this vision of international criminal law is inadequate, unjust, and unnecessary.<sup>39</sup>

In order to “untangle” command responsibility and to align it with the principle of culpability, Robinson proposes that command responsibility ought to be recognized as a mode of accessory liability, “as it was in World War II jurisprudence, in [some] early [Yugoslavia] Tribunal jurisprudence, and in the [International Criminal Court (ICC)] Statute.”<sup>40</sup> In addition, Robinson argues that the commander’s dereliction of duty must at the very least have a causal effect on the troops’ own wrongdoing—the commander must “encourage,” “facilitate,” or somehow “have an effect on subordinate crimes.”<sup>41</sup> Imposing responsibility on a commander whose behavior did not have a causal effect on the subordinates’ behavior and did not in some manner contribute to the commission of the crimes would go against the principle of culpability.<sup>42</sup> Robinson also argues that the “should have known” mens rea standard, present in the ICC Statute but neglected or misapplied in some ICTY cases, is appropriate and justified by deontic reasoning

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32. *Id.* at 62.

33. *Id.* at 67.

34. *Id.* at 62.

35. *See generally id.* at 194–222.

36. *Id.* at 169–70.

37. *See id.* at 143–76 (applying a coherentist method of deontic principles to expose the Tribunal’s failure to consistently apply the culpability principle).

38. *See id.* at 162–63 (arguing that respect for culpability principles requires engagement with deontic arguments).

39. *See id.* at 173–74 (providing a serial list of arguments that establish the need for more debate on this issue).

40. *Id.* at 15, 194.

41. *Id.* at 15, 145.

42. *Id.* at 15, 178.

and standards.<sup>43</sup> According to Robinson, the “should have known” standard adequately imposes responsibility on commanders who knew of subordinates’ wrongdoing, and also on those who purposefully chose not to know.<sup>44</sup> This standard:

does not exculpate where the commander has created her own ignorance, through a criminal dereliction of the duty of vigilance entrusted to her to guard against precisely this danger. Culpability-based rationales of causation and equivalence apply to the commander who, contrary to this duty, buries her head in the sand.<sup>45</sup>

Finally, Robinson posits that a commander, charged with command responsibility as a form of accessory liability, need not have the same mens rea as the principal perpetrators (her subordinates).<sup>46</sup> Robinson convincingly argues that roles matter, and that command responsibility, as a mode of accessory liability, needs to appropriately take into account the distinction between principals and accessories in its imposition of different mens rea standards on the former versus the latter.<sup>47</sup>

Robinson further illustrates his argument regarding command responsibility in one of the book’s annexes, where he discusses in detail the ICC’s *Bemba* decision.<sup>48</sup> By analyzing the reasoning and conclusions of the *Bemba* Pre-Trial, Trial, and Appellate Chambers, Robinson provides the reader with an additional opportunity to understand how deontic reasoning may be applied in an international criminal tribunal’s jurisprudence. Robinson concludes that the *Bemba* Pre-Trial and Trial Chambers correctly applied deontic reasoning through a coherentist method;<sup>49</sup> this observation may be one of the greatest affirmations that Robinson is correct in his view of international criminal law, because his view coincides with the views of highly distinguished ICC judges (it is also possible that the ICC judges have read Robinson’s prior work and are influenced by his thought processes and legal analysis).

In sum, Robinson develops a model of command responsibility guided by deontic principles and constraints, by using a coherentist approach.<sup>50</sup> Command responsibility, according to Robinson’s model, is a form of accessory liability which embraces the concept of criminal negligence, a positive duty for the commander to inquire into subordinates’ ongoing behavior, a rejection of the standard of actual possession of information for the commander, and the adoption of the “should have known” standard in its place.<sup>51</sup>

Robinson concludes his impressive argument with a return to a defense of

43. *Id.* at 15–16.

44. *Id.* at 203–05.

45. *Id.* at 216.

46. *Id.* at 15.

47. *Id.* at 212–13.

48. *See id.* at 257–71 (discussing ICC’s Pre-Trial, Trial, and Appellate Chambers in *Prosecutor v. Bemba*, ICC-01/05-01/08A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III’s “Judgment Pursuant to Article 74 of the Statute,” (June 8, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf)).

49. ROBINSON, *supra* note 1, at 271.

50. *Id.* at 257–71.

51. *Id.* at 218–20.

deontic principles and a coherentist approach as a general matter. He argues that deontic analysis of international criminal law is necessary if one embraces international criminal justice through the lens of humanity.<sup>52</sup> Unlike source-based/doctrinal and teleological/purpose-driven analysis, “[d]eontic analysis directly considers the principled limits of institutional punishment in light of the personhood, dignity, and agency of human beings affected by the system.”<sup>53</sup> Robinson believes that coherentism is the most appropriate method for identifying these important deontic principles.<sup>54</sup> Because we do not have at our disposal an “uncontroverted and reliable foundational ethical theory,”<sup>55</sup> we should resort to coherentism, because this approach enables us to set aside the search for “certainty” and for “ultimate foundations” and to instead draw on all available clues to develop mid-level principles which will ultimately lead toward appropriate normative beliefs.<sup>56</sup>

Robinson’s argument is elegant, compelling, and realist. First, Robinson develops a tremendously insightful argument about the appropriate reasoning and constraining principles that ought to be imposed on the field of international criminal law; he does so in a logical and seemingly simple manner, which contributes toward the overall elegance of his argument. Robinson’s book flows, from the introduction, through more theoretical reasoning and the practical example of command responsibility, to the general conclusion regarding the necessity of deontic reasoning in international criminal law, and to the lengthy and additionally convincing annexes. Robinson’s clear and concise writing style contributes additionally to the general gracefulness of his argument. Second, Robinson’s reasoning and conclusion are compelling. To many readers, it will appear natural and necessary to adopt a humanity-based approach to international criminal justice. When he writes that criminal law is not employed against non-humans, such as sharks, bears, rocks, and machines, but against the accused who is a responsible moral agent, Robinson conveys a powerful and convincing message that humanity-based principles need to ground international criminal law.<sup>57</sup> Finally, Robinson’s arguments are realist—he recognizes that human research and reasoning are imperfect and thus advocates for the development of mid-level principles upon the consideration of all available clues.<sup>58</sup> Robinson is in favor of humanity while recognizing its limitations and inherent flaws; thus, his model for international criminal justice is based on the former but developed through a realist approach that takes into account the latter.<sup>59</sup> Robinson’s book is an enormous contribution to the field of international criminal law. It is likely that Robinson will continue to influence the ICC and other international criminal tribunals and that his work will shape the future jurisprudence of such tribunals.

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52. *Id.* at 229.

53. *Id.* See generally *id.* at 11–12.

54. *Id.* at 230.

55. *Id.*

56. See *id.*, glossary at 282 (defining coherentism using the quoted terms).