AN "ONGOING CONVERSATION": METHOD AND SUBSTANCE IN ROBINSON'S *JUSTICE IN EXTREME CASES*

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It is important for any discipline to keep in touch with developments and ideas in other disciplines that would be considered relevant or connected to it. This proposition is as often stated as it is overlooked in academic research. There is often little appetite to genuinely engage in a fair, open, and thorough exchange between disciplines (even when closely connected), and part of it has to do with the difficulty of the task. It needs a scholar with a deep understanding of the different relevant areas to make this actually work. Darryl Robinson is one such person. He has written an insightful and important book about how international criminal law (ICL) can learn from—mainly—criminal law theory (and how criminal law can also be enriched by the kind of challenges that ICL presents).[1] Robinson offers a didactic, sober, interesting account about how reasoning in ICL should be conducted, which includes a plea for the need to take structural principles of criminal law more seriously. In doing so, he also provides much-needed clarity to the convoluted doctrine of command responsibility. His writing is characteristically clear and engaging. He pays careful attention both to the nuance and granularity of philosophical argument and to the concrete practical implications of each of his positions. In this brief reaction piece, I situate this book in the broader literature, highlight a few of its main contributions, and offer a few critical thoughts. The latter are very tentative, and are intended only to pursue the broader conversation he has kicked off.

Justice in Extreme Cases takes part in a "dialectic" conversation which consists of at least three different moments.[2] The first one, which Robinson terms "doctrinal," was concerned with constructing the system of ICL as we know it. It was broadly based, we could say, on the anti-impunity dogma.[3] The reaction against this initial position, the second moment, was a liberal critique of ICL: to use Gerry Simpson's expression, the "anti-anti impunity" position.[4] This critique was largely based, at a minimum, on respect for liberal principles as embodied in many domestic criminal law systems, and often on some of the internal criticisms to those systems

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

2. *Id.* at 60–61.

3. *Id.* at 60.

4. GERRY SIMPSON, ANTI-ANTI-ANTI IMPUNITY (typescript on file with author).

and their "neo-punitivist" turn.[5] The third strand of positions, as construed by Robinson and articulated by Simpson, cautions against a direct application of domestic criminal law principles in ICL, and provides arguments in defence of a more moderate, principled, and pluralistic type of ICL.[6] Robinson wants to develop a "new account" which draws on the best features of the "doctrinal" and the "anti-anti impunity" critiques, an account he portrays as more carefully liberal, humanistic, cosmopolitan, and reconstructive.[7] I think it is a particularly rigorous take on what Simpson witfully terms the "anti-anti-anti impunity" position.[8]

Robinson's account stands on a discrete diagnostic of a prevalent shortcoming in contemporary ICL (hardly the only one, as he will most likely agree). The main "problem" the book tackles is the need to take argumentation more seriously in ICL. In particular, Robinson highlights the need to focus more on the materials and considerations on which its decisions are based, as well as their relative importance and weight.[9] "Our reasoning is our 'math,'"—he illustrates—"and systemic distortions in our math will eventually throw off our calculations in significant ways."[10]

He argues, in particular, that tribunals typically resort to source-based reasoning—namely the parsing of legal instruments and precedents—and to teleological reasoning—the consequences that any particular decision or argument would bring about.[11] He identifies specific "problems" in the use of these forms of reasoning, which include unwarranted transplants of rules and institutions from other areas of international law (notably international humanitarian law and international human rights law) to ICL; the uncritical influence of victim-focused teleological or consequentialist claims; as well as certain ideological assumptions about the roles that "progress" and "sovereignty" play in international legal practice.[12] By contrast, he argues that a third form of reasoning, which he calls "deontic," is badly needed.[13] This type of reasoning, he suggests, is "normative" (i.e., moral), and requires taking into consideration what we owe to individuals.[14] In particular, he emphasizes the need to pay closer attention to the constraints imposed by the principle of culpability, as illustrated in its uses in domestic criminal law.[15] But the critical move is that this principle should not be conceived merely as a doctrinal rule (i.e., source-based

5. *See, e.g.*, Daniel R. Pastor, *La Deriva Neopunitivista de Organismos y Activistas como Causa del Despretigio Actual de los Derechos Humanos*, JURA GENTIUM (2006), https://www.juragentium.org/topics/latina/es/pastor.htm (last accessed Aug. 8, 2020) (arguing for a shift away from a neo-punitivist approach to criminal law).

6. ROBINSON, *supra* note 1, at 61; *see also* SIMPSON, *supra* note 4 (discussing different stances toward impunity in the context of international criminal law).

7. ROBINSON, *supra* note 1, at 62.

8. SIMPSON, *supra* note 4.

9. ROBINSON, *supra* note 1, at 11–12.

10. *Id.* at 54.

11. *Id.* at 11.

12. *Id.* at 20–55.

13. *Id.* at 11–12.

14. *Id.*

15. *Id.*

reasoning on the terms captured by positive law), but rather as a deeper principle that captures fundamental requirements of justice.[16]

In order to make sense of the different inputs that appropriate reasoning in ICL should take into consideration, Robinson defends the approach of "coherentism."[17] This is his key methodological proposal, and he opposes it to a view he calls "foundationalist," which requires starting from a "bedrock that is certain and self-evident or agreed by all."[18] He thereby favours working with "mid-level principles," which include clues from patterns of practice, consistency with analytical constructs, normative argumentation, and casuistically considered judgments.[19] Put differently, he advocates that we abandon thinking of justification in "vertical" terms, more akin to a building,[20] and opt instead for the horizontal model of a well-construed web, in which each knot is made consistent with the rest so that they mutually reinforce each other.[21] This coherentist position also entails that Robinson's conclusions are contingent in the sense of being part of "an ongoing broader conversation."[22] They are presented as the most persuasive solution to any given problem after considering all existing inputs, but are hardly a correct solution in any stronger sense.[23] Coherentism, Robinson plausibly suggests, is the best we can hope for when facing uncertainty and disagreement over foundations.[24]

There is certainly a lot to agree with in the book. The focus on reasoning is analytically and normatively helpful. Some form of coherentism seems a persuasive way forward. The importance of defending fundamental constraints on punishment cannot be exaggerated. But the greatest strength of his book is its treatment of command responsibility. Robinson's analysis is particularly insightful, and without doubt one of the best available in the literature in terms of clarity, analytical rigor, and theoretical depth. Nonetheless, I believe there are a few issues in the book that require further reflection. I will divide my comments into issues regarding his preferred methodology and issues concerning his substantive conclusions.

An important question in the context of Robinson's coherentism is how to adjudicate between the different strands or considerations.[25] He generally states that this analysis requires drawing on "a wide range of inputs, while being mindful of the limitations of each input, and [then] seek[ing] to develop the best possible model to reconcile those inputs."[26] On these grounds, for instance, he claims that extensive

16. While deeper than a doctrinal rule, the culpability principle is not foundational. Robinson cares particularly for mid-level principles that are organized in a web together with practices, and analytical structures. *Id.* at 86. These mid-level principles are further discussed below.

17. *Id.* at 96–112.

18. *Id.* at 85.

19. *Id.* at 103–05.

20. *Id.* at 101.

21. *Id.* at 102.

22. *Id.* at 19.

23. *Id.* at 110–12.

24. *Id.*

25. *See id.* at 102 ("For many, this approach of reconciling available clues and simply accepting foundational uncertainty may sound disturbingly insecure or even flimsy.").

26. *Id.* at 225–26.

legal practice and fairly well-established understandings (i.e., the standard account of the principle of culpability) should prevail over normative arguments and clear intuitions that advocate expanding criminal liability in cases of a commander who failed to take adequate measures to prevent the commission of crimes, or in instances of dereliction of her duty to punish a subordinate—failures which nonetheless were not contributory to a specific crime.[27] Put differently, resort to legal practice and to theoretical understanding of culpability must prevail, Robinson suggests, over normative argument and widely held intuitions of justice.[28]

However, as this situation illustrates, Robinson's account of the coherentist method provides no clear or explicit way to rank different options. Insofar as the alleged web has many knots, and none of them have a greater weight than the others, his analysis is not particularly useful to sort out hard cases. Or better, it would likely lead to entirely different outcomes depending on who ranks the options or assigns weight to the different knots (moralists, institutionalists, et al.). Furthermore, I cannot help but think that there is a deeper problem here, insofar as the web is formed by knots as dissimilar as legal materials, principles of criminal justice, and normative arguments (including both deontological arguments and those based on the consequences of different actions). The problem with such a web is that these knots lack a common metric or scale on which we could measure them, making our decisions ultimately seem somewhat arbitrary.

In this context, a particular claim he makes seems unwarranted. Robinson claims that non-consequentialist ("deontic") normative considerations should play an important role in assessing competing legal propositions.[29] So far, so good. Yet he goes on to defend some form of lexical prevalence of duties over consequences.[30] He argues that consequences should have "to respect deontic constraints of justice."[31] Accordingly, culpability must constrain the maximization of deterrence, as well as the treatment of individuals as potential risks.[32] He grounds this priority of duties over consequences on a commitment to liberalism defended in a "minimalist" sense as "respect for the autonomy, dignity, or agency of the individual."[33] However, this would hardly suffice to convince people in the opposite camp, insofar as utilitarians and consequentialists in general would reject that such a view is what morality or, better, justice requires. Put differently, whether autonomy, dignity, or agency are sufficiently weighty to displace the maximization of deterrence is precisely what is at issue, so it can hardly be the argument on which the prevalence of culpability over consequences is based. Moreover, any such strong

27. *Id.* at 224–27.

28. *Id.* at 226–27.

29. *Id.* at 243–44.

30. On an important side note, Robinson defends a model based on duties to the individual, not on the individual's rights. *Id.* at 23–25. I find this choice peculiar and counterintuitive. I wonder why he prefers a duty-based model to a rights-based model. Ultimately, the latter is much more attuned to legal institutions and practices, as well as to legal and normative discourse, i.e., to the specific type of considerations his coherentist model suggests we should pay attention to.

31. *Id.* at 73.

32. *Id.* at 33–34.

33. *Id.* at 64–65.

prevalence sits very uncomfortably with his purposefully contingent coherentist approach.

Perhaps a more underappreciated problem for Robinson's methodology in this context stems not from the normative knots, but from the legal ones. That is, many would doubt the extent to which his moral position is compatible, not with (liberal) criminal law theory, but with prevailing notions of criminal law practice in many contemporary societies. For example, Douglas Husak has persuasively argued how contemporary criminal law systems in developed democracies have pursued legal agendas leading to overcriminalization, even at the expense of principled restrictions like the ones Robinson advocates.[34] Nicola Lacey has gone even further in tracing the particular conceptions of responsibility that underlie existing criminal law systems, and their evolution in modern and contemporary criminal law theory.[35] In particular, she has argued that, from the 1990s, the prevalent notion of responsibility has moved to a conception of responsibility based on the individual's character, and increasingly on the notion of risk.[36] These developments, again, are hardly compatible with the direction Robinson believes ICL should move towards, which is based on more classical, liberal understandings of responsibility (culpability).[37] But this may be particularly problematic for his account precisely because of the role he attributes to existing legal practices in his coherentist approach.

A final worry is that Robinson's model of coherentism may be too rigid as a general methodology for certain types of critical reflection on ICL. To the extent that legal practice and doctrine have a very significant weight in the preferred way of sorting out complex legal and practical issues, this methodology can hardly favour proposals for a more ambitious and radical change. For instance, he rejects proposals for considering certain forms of command responsibility as a separate offence, rather than as a mode of liability, on grounds that the applicable law does not allow such a proposal.[38] Robinson also rejects certain forms of command responsibility, arguing that tribunals have imputed responsibility as an accessory to the principal's crime.[39] Even if there may be persuasive normative considerations to doubt this conclusion, as he admits,[40] it seems that his framework would simply rule them out. But why should theory be so deferential to the law?

Put differently, it seems that this version of coherentism may function at best as a way to determine what the law establishes *lex lata* (positive law) (mind those legal positivists that would jump at the traction conceded to morality here), but it is not particularly well suited to explorations of its content *de lege ferenda* (the basis

34. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008) (defending the limitations of sanctions to combat as applied to overcriminalization).

35. *See* Nicola Lacey, *Comparative Criminal Justice: An Institutional Approach*, 24 DUKE J. COMPAR. & INT'L L. 501, 520 (2014) (analyzing changes in the notion of responsibility in domestic legal systems).

36. *Id.*

37. ROBINSON, *supra* note 1, at 76–78.

38. *Id.* at 165–67.

39. *Id.*

40. *Id.*

of new law), at least not if these explorations would require deeply revising existing legal practice or radical reform. This observation hardly affects Robinson's pragmatic claims, insofar as he is interested in the soundest "plausible interpretive options for the Tribunals," not in "which approach would be preferable for a national legislator or treaty drafter."[41] However, this approach constrains theoretical thinking about the law to quite a narrow enterprise. I can think of many instances in which normative thinking should concern itself with speaking directly to treaty drafters and legislators as a way to improve our legal system. One such context is the current discussion over decriminalization of abortion in Argentina and elsewhere, which requires deep legal reform.[42] In the context of the book, the fact that Robinson recognizes that the "separate offence" approach to command responsibility may be preferable to his doctrinal arguments in virtue of it not ignoring the culpability principle is a good illustration of his argument's limitations.[43]

Admittedly, he does acknowledge that "national legislation or a treaty amendment could even posit both concepts, recognizing command responsibility as a mode of participation and establishing a separate offence."[44] He adds that the German and Korean legislation are commendable models of this position.[45] Yet this observation further illustrates the limitation I find problematic in his version of the coherentist approach (i.e., one that gives significant normative weight to legal rules as they currently stand). Namely, insofar his account is able to incorporate the "separate offence" approach only on the grounds that it is provided in some domestic legislation, it is still unduly constrained by specific legal facts. Yet, if it were able to defend such a departure of existing law on grounds of sound normative argument, it would cease being coherentist in the terms Robinson initially defended.

Let me now make a couple of points regarding the book's substantive positions. I was not persuaded by two of the practical solutions Robinson advocates for on command responsibility. First, he argues against convicting a commander for failure to punish an initial crime on grounds that it cannot be said, taking into account the dominant view of the principle of culpability, that she contributed to it.[46] This proposition means, per hypothesis, that a commander who gets her whole unit replaced every time they perpetrate a crime would be able to escape conviction indefinitely. Similarly, Robinson argues that a commander who takes up her command position after the crimes were committed, and yet does not punish the offenders, has not contributed to the crimes and therefore is not to be punished.[47] This rule would lead to counterintuitive outcomes. For example, a military organization that changes commanders every time the unit perpetrates one of the

41. *Id.* at 164.

42. *See, e.g.*, *Argentina: Legalize Abortion*, HUMAN RIGHTS WATCH (Aug. 31, 2020, 10:00 AM), https://www.hrw.org/news/2020/08/31/argentina-legalize-abortion# (advocating for legalization of abortion). Normative arguments led to the legalization of abortion in Argentina on December 30, 2020.

43. ROBINSON, *supra* note 1, at 164.

44. *Id.* at 165.

45. *Id.*

46. *Id.* at 164.

47. *Id.*

relevant crimes would be able to simply ensure lack of conviction to its commanders. Put differently, and as Robinson acknowledges,[48] his restrictive approach based on a reading of the principle of culpability would leave an impunity gap that seems normatively problematic.

This puts us in an awkward position. One way to address this gap would be to conceptualize failure to punish as a separate offence, yet as we saw above, this option is to a large extent rejected because it is incompatible with existing law and practice (not on normative grounds). The alternative, which Robinson pursues, puts to rest the normative uneasiness by suggesting it is of little practical relevance given that such situations will only arise in exceptional circumstances.[49] This example further shows the theoretical limitations of this approach I discussed above. It can provide an account of the best solution only within the existing legal and institutional framework. This is no doubt an important contribution, yet I wonder whether theorists should be constrained in this way.

Second, I was not persuaded by Robinson's admittedly preliminary defence of the higher threshold for civilian superiors to be held accountable on the basis of command responsibility.[50] That is, he defends the distinction drawn in the Rome Statute which requires that non-military superiors must have "consciously disregarded" information about crimes, which is more restrictive than the "should have known" requirement Robinson advocates for military commanders.[51] He explicitly recognizes that he is outlining the area and that this issue warrants further study.[52] Yet I am puzzled by his initial solution (again siding with law rather than normative considerations). That is, I would readily admit that the conditions under which civilians "should have known" about certain particular offences would likely be significantly different than the conditions under which we require military commanders to have knowledge about them. I would thereby concede that this would entail a more restrictive threshold vis-à-vis their potential liability to punishment. In effect, the responsibility of civilians in training, supervising, and controlling for certain offences is admittedly different from those of military commanders. But if we accept—with Robinson—that liability requires contribution, I fail to see why grossly negligent dereliction of the duty to punish by civilians, *which contributed to the crime*, should escape liability.

In sum, engaging with *Justice in Extreme Cases* is a highly fruitful enterprise. The book is full of insight, nuance, and careful legal argument. It is a model for everyone interested in interdisciplinary work between international criminal law and criminal law theory. I believe it will be of enormous interest for practitioners and scholars working on command responsibility. I cannot stress enough how much I have learnt from Robinson's meticulous rendering of this topic.

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48. *Id.* at 158.

49. *Id.* at 268–69.

50. *Id.* at 221–22.

51. *Id.*; *see also* Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002) (defining the criminal liability of military commanders and other superiors).

52. ROBINSON, *supra* note 1, at 220.