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Exploring justice in extreme cases: Criminal law theory and international criminal law

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PART II

PROPOSED FRAMEWORK:

A HUMANIST, COHERENTIST, DEONTIC ACCOUNT

Chapter 2 highlighted the *problem* that motivates this thesis: i.e. reasoning that fails to engage adequately with the deontic¹ constraints of criminal law. The next three chapters develop a *solution*. The following chapters address the various methodological hurdles in ascertaining and refining the fundamental principles appropriate in the special contexts of ICL, and provide a framework for deontic analysis in ICL..

In Chapter 3, I advance two main points. First, I respond to arguments questioning whether fundamental principles are even appropriate in the extraordinary contexts encountered by ICL. I argue that, even in extreme contexts of collective action and peer pressure, we must still consider moral constraints like culpability. Second, I argue that this does not necessarily mean replicating formulations of principles as known in national systems. We can re-examine what the underlying commitment to the individual entails in the given context.

In Chapter 4, I consider how we might go about such a discussion of principles. I argue for a ‘coherentist’ method, which means that we do not have to trace our views down to an ultimately ‘correct’ moral theory. Instead we work with all available clues, including patterns of practice and normative arguments, to build the most coherent and convincing picture that we can. This process accepts that we will never have ‘certainty’ about principles of justice. It is a human conversation about human ideas. Nonetheless the conversation is valuable: we must try to ensure that our institutions and practices are justified, and the justice conversation is our best and only method to advance that goal.

Chapter 5 gives some examples of new criminal law problems that arise given the special challenges of ICL. Thus, the solution is not simply a matter of applying general criminal law theory to ICL problems: ICL problems can raise new questions for criminal law theory. Thus, exploring these problems might provide new insights for both ICL and mainstream criminal law theory.

¹ By ‘deontic’ I mean constraints rooted in respect for the individual; these are constraints such as the legality principle and the culpability principle that allow the system to be described as a system of ‘justice’. I leave aside until Chapter 4 the question of the precise underpinnings of those principles. In that chapter, I will argue that they might be rooted in classical deontological theories or various other normative theories. The common kernel is simply that there are some constraints on how we treat individuals even in pursuit of good consequentialist aims.