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

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PART III

ILLUSTRATIONS

In Part III, I illustrate the themes of this thesis by applying the proposed methodology to specific problems in ICL. In doing so, I will:

- (1) show that early legal reasoning in ICL often did not engage adequately with the deontic dimension, generating problems and contradictions;
- (2) showcase deontic analysis and, in particular, the coherentist approach to such analysis;
- (3) show that careful deontic analysis can help avoid unjust doctrines, and avoiding needlessly conservative doctrines that overstate the relevant constraints;
- (4) generate new doctrinal prescriptions; and
- (5) show how ICL can raise new questions for general criminal law theory.

Why focus on command responsibility?

I will illustrate these themes with two chapters, each focusing on a different controversy in the law of command responsibility. Why do I devote two chapters to this one doctrine, when we have all the myriad puzzles of ICL still awaiting our scrutiny? I could instead offer a broader but thinner survey of numerous current controversies in ICL. However, if we attend carefully to command responsibility, there is a lot to unravel, and a lot to learn. We can ‘see a world in a grain of sand’.⁵⁷

Command responsibility raises fascinating issues for criminal law theory. Whereas other modes of liability in ICL were transplanted from established domestic analogues, command responsibility developed in international law. Accordingly, command responsibility has not yet been scrutinized to the same extent as domestic modes of liability, which have been refined and debated by jurists and scholars in many countries over centuries of experience. Command responsibility is a valuable and intriguing doctrine. It addresses a particular pathology of human organization: dangerously inadequate supervision in contexts of power and vulnerability.

Outline of arguments

In Chapter 6, I look at the controversy as to whether command responsibility requires (or should require) some causal contribution to the subordinates’ crimes. The culpability principle, as recognized by ICL, requires that a person in some way contribute

⁵⁷ W Blake, ‘Auguries of Innocence’ in Nicholson & Lee, eds, *The Oxford Book of English Mystical Verse* (Clarendon Press, 1917).

to a crime in order to be a party to it. I will show that early reasoning in Tribunal jurisprudence engaged inadequately with the deontic dimension, producing an internal contradiction with the culpability principle. I will also show command responsibility jurisprudence became increasingly convoluted following efforts to deny or avoid this root contradiction. The analysis will show that careful deontic analysis can help avoid some muddles and produce clearer, more justified law.

Chapter 7 considers another controversy, the mental fault requirement of command responsibility. Early Tribunal jurisprudence disavowed criminal negligence, which was a well-intentioned and commendable caution. I argue, however, that after more careful analysis, a criminal negligence standard actually maps *better* onto personal culpability than the tests devised by the Tribunals. I argue that the ‘should have known’ standard in the ICC Statute is deontically justified and should be openly embraced and supported. This chapter illustrates several of the themes of Part II. First, tools of criminal law theory can clarify and benefit ICL doctrine. Second, careful deontic analysis can sometimes help us avoid needlessly conservative doctrines which were based on unfounded overestimates of the relevant constraints. Third, novel doctrines and contexts of ICL can help us test and reconsider common assumptions in criminal law theory. Command responsibility reveals a special set of circumstances that overturns the standard assumption that criminal negligence is categorically less serious than subjective foresight.