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

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Horizons:

The Future of the Justice Conversation

OVERVIEW

I conclude this thesis with three final overarching sets of observations. First, I make explicit some aspects of the coherentist method, which I modelled in the last two chapters. Second, I highlight the major and minor themes emerging in the framework I propose. Third, I survey some additional issues in ICL and criminal law theory to which the proposed framework could be fruitfully applied in the future.

8.1 COHERENTISM IN ACTION

Coherentist moves in Chapters 6 and 7

In Chapters 6 and 7, I was not merely dissecting current controversies in ICL; I was also demonstrating the proposed method. The types of considerations I invoked in my analysis would have seemed quite familiar from most legal and normative analysis: i.e. patterns of practice, consistency with analytical constructs, normative argumentation, and casuistic testing. And indeed they are the same considerations. I suggest that coherentism is the best underlying theory to explain how we engage in both legal and normative analysis. We form the best understandings that we can by drawing on all available clues.

I think that this method (mid-level principles, coherentist reconciliation) implicitly underlies a lot of valuable criminal law theory. For example, in Chapter 7, I employed a Paul Robinson's framework on imputed criminal liability, in which he explored the theories that underpin inculpatory doctrines (eg causation, equivalence, and

so on).[1] Paul Robinson's work in formulating that framework was itself an exercise in mid-level principles. He noted that exculpatory doctrines (defences) are often studied as a class, but that inculpatory doctrines had not been studied as a class for unifying principles. He studied patterns of practice, he hypothesized some mid-level constructs to categorize and explain the practice, he assessed which of those constructs are normatively justifiable, and then he generated prescriptions for a more analytically consistent and normatively sound body of law. In the case of Paul Robinson's framework, this method enabled analytical systematization and normative evaluation of the underlying justifications for inculpatory doctrines.

In Chapters 6 and 7, I worked with propositions that were arguably immanent within ICL practice (for example, that culpability requires causal contribution, or that principals have paradigmatic mens rea). I took those propositions as starting hypotheses, but was prepared to abandon them if there were convincing reasons to do so. (Both propositions proved to be analytical useful and normatively convincing, so I did not reject them as guiding constructs.[2])

I showed how the method can provide *analytical* clarity: for example, by unearthing internal contradictions between doctrines and stated principles (Chapter 6). I also demonstrated the *normative* work of the method (Chapter 7). To make normative arguments, I drew on patterns of practice, normative arguments, and casuistic testing (comparing the fault of commanders in different hypothetical scenarios). In Chapter 7 I showed how we can put building blocks together in a new way. For example I argued that command responsibility reflects a sound insight, responding to a set of circumstances in which a special fault standard is deontically justified.

I also showed how the coherentist method copes with uncertainty. In Chapter 7, I noted that some scholars argue against criminal negligence as a standard of culpability, but that most legal systems, most practice, most scholars and indeed the weight of the arguments favour the standard.[3] Similarly, the distinction between principals and accessories has its doubters, but it is a construct that is adopted in ICL and that is well supported in national practice and by normative argumentation, even if the boundaries

[1] §7.3.3 and see P Robinson, 'Imputed Criminal Liability' (1984) 93 *Yale LJ* 609.
[2] All conclusions are provisional, however, and could be changed in light of better arguments. See e.g. §6.8.3 on academic proposals for non-causal accounts of culpability.
[3] §7.3.1.

between direct and indirect roles can sometimes be contested.[4] If we were seeking Cartesian certainty, we would be paralyzed by those doubts, since we cannot say for sure that these ideas are 'right'. We would also be paralyzed by the unreliability of each source (practice, moral theories, our intuitions). The coherentist method draws a wide range of inputs, while being mindful of the limitations of each input, and seeks to develop the best possible model to reconcile those inputs. The coherentist method accepts up front that philosophical certainty is unattainable; we seek a level of confidence sufficient for the decision at hand. For the punishment of individuals, a high level of confidence is appropriate. But the body of available clues provides more than enough support for these practices, unless and until more convincing arguments are developed against the practice.

Why does practice matter in normative analysis?

I should also underscore why it is appropriate to have regard to juridical practice in normative analysis. After all, you might wonder if recourse to practice reflects the 'naturalist fallacy': am I impermissibly conflating an 'is' (legal practice) with an 'ought' (deontic principles)? I refer to practice for two reasons. One, insofar as we are working analytically - trying to formulate mid-level principles that can categorize and explain practice – of course we must consider the practice that we seek to categorize and explain. More profoundly however, I think that practice can help inform us even on normative questions. Patterns of practice, worked out over time by jurists based on experience – and especially patterns of practice that re-occur in different legal traditions and cultures – may reflect broadly shared intuitions of justice.[5]

The obvious follow-up question is, 'yes, but what if all of those people's intuitions of justice were wrong?' That is absolutely a possibility, which the coherentist approach unflinchingly recognizes. There is no guidepost available to mortal human beings that is free from the risk of error.[6] Thus we approach each clue, including patterns of practice, with appropriate skepticism. We bear in mind that established patterns might reflect arbitrary traditions, or they may reflect biases and assumptions of a culture, or they even

[4] §7.3.2.
[5] See §4.3.1 on the 'normativity of the positive'.
[6] See §4.3.3(b).

may reflect quirks of the human mind. The coherentist method is aware of these risks and seeks to guard against them in the best and only way possible: by testing every clue against all of the other clues (eg normative arguments, considered judgments, casuistic testing). This method does not guarantee certainty or freedom from error. No method does. The strength of the coherentist method is precisely that it is constantly testing the components of our beliefs using all other available beliefs and experiences. Widespread juridical practice can assist us as one possible 'humility check' to test the moral theories and systems that we spin from our own minds.

Two levels of coherentism

A final clarification is that we apply coherentism on two levels: in legal reasoning and normative reasoning. I believe that legal reasoning involves seeking the best reconciliation of all of the types of considerations that are recognized in legal analysis: text, context, coherence with surrounding legal norms, objects and purposes, pertinent authorities and precedents, and general principles.[7] Often we cannot achieve perfect 'coherence' among all of the clues; some may outright conflict. An example of this is command responsibility: given the confused state of authorities, no possible solution perfectly reconciles every consideration. I believe that my proposed solution offers the highest level of coherence of any alternative.[8]

Much more importantly and unconventionally, I suggest that we use a coherentist methodology in our normative reasoning, including in our deontic analysis. As discussed in Chapter 4, no single comprehensive foundational ethical theory presents itself to all clear minds as the evident a priori starting point. Instead, we find ourselves alive in the world, and we have to draw on all available clues to try to make sense of things, including

[7] See e.g. ICC Statute, Article 21, which incorporates along with the Statute, the Rules and the Elements, as well as custom (state practice reflecting a sense of legal obligation) and general principles, and see the Vienna Convention on the Law of Treaties, Article 31, which includes Article 31(3)(c) (systemic integration with other relevant rules).

[8] Given the confused state of command responsibility, every possible interpretative solution requires rejection some authorities as inconsistent with the proposed solution. Furthermore, every possible interpretation of Article 28 entails downplaying some aspect of the text in favour of others. One must either disregard the express contribution requirement, or narrow the role of the 'failure to punish' branch, or strain against the express wording indicating that it is a mode of liability. My own proposed solution admittedly narrows the utility of the 'failure to punish' branch, but overall it offers the highest coherence between the text, the culpability principle, the purposes of command responsibility, and the broad body of precedents (beyond just the ICTY) since World War II.

making moral sense of things. We draw inter alia on normative arguments, moral theories, and our intuitive reactions, to try to form models that reconcile experiences and beliefs to the best extent possible.[9]

Starting in the middle as a valuable method

One of my main contributions in this thesis is to highlight that there is an alternative to the traditional scholarly Cartesian impulse that all propositions must be grounded in a deeper underlying theory, each supported by a level below until we reach some reliable foundation. Our traditional insecurity is that an account that is not grounded in solid foundations is flimsy. In my view, the classic Cartesian conception of rigour is not viable, because we could never discuss any of the current ethical questions before us until all foundational questions are settled.

It may seen particularly counter-intuitive to engage in debates about deontic principles without committing to a single underlying foundational theory. But the quest to identify the 'correct' theory or morality is endless, and our conclusions may actually be more reliable, not less reliable, if they are supported by multiple theories as well as a wider range of clues.

In my view, mid-level principles and coherentism offer the best theory of criminal law theory: it is the best account of how we generally do and should reason in this area. Many scholars I know assume a classical foundationalist model, and yet they apply coherentist methods, even without formal awareness of coherentism. As a result, they think they are foundationalists taking a shortcut or being incomplete. I draw attention to the coherentist 'web' alternative to the classical 'linear' model of justification. We can still be rigorous, but rigour requires a different structure of substantiation, tested by all-things-considered judgements and searing scrutiny of arguments. Awareness of the coherentist structure of justification helps us better see its demands, its strengths, and its limitations. We can be suitably humble about our opinions and conclusions, recognizing that they are in all cases provisional and revisable.

[9] One may even choose to adopt a comprehensive theory, such as a Kantian or contractarian theory, but I would suggest that the reasons leading one to do so are still coherentist: one adopts such theories insofar as they seem to be useful models in reconciling the clues. Similarly, in science, models are often provisionally adopted for as long they are helpful in reconciling the clues. But the models may still be set aside if they contradict too much experience, or if experience leads us to replace them with better models.

8.2 MAJOR AND MINOR THEMES

In this section, I will highlight the major themes of my proposed framework for assessing deontic principles in ICL. I will also highlight some recurring minor themes, which relate to reasoning in ICL.

8.2.1. Major Themes: Criminal Law Theory Meets ICL

(1) The deontic dimension. Legal analysis in criminal law, including ICL, requires not just the familiar source-based analysis and teleological analysis, but also a third type of reasoning, which I have called deontic analysis. Deontic analysis differs from source-based analysis, which parses texts and precedents, and teleological analysis, which assess purposes and consequences. I hope that this term can be added to the ICL lexicon, as it succinctly conveys this distinctive type of reasoning, focused on justice for the individual as opposed to broader social impact. Deontic analysis directly considers the *principled* limits of institutional punishment in light of the personhood, dignity and agency of human beings affected by the system.[10]

(2) Two reasons. The study of deontic principles is important for at least two reasons. First, it clarifies important normative constraints, in order to ensure that the system does not treat persons unjustly. Second, and less obviously, it can also help shape better policy. Where doctrines are needlessly conservative due to an ungrounded, fallaciously restrictive impression of the constraining principles, coherentist deontic analysis can pave the way to more effective laws.[11]

(3) Learning from criticisms. I examined the most important criticisms of 'liberal' accounts (accounts concerned with deontic constraints). I argued that a sophisticated and humanistic approach to deontic principles can learn from and avoid common criticisms of liberal accounts. A 'liberal' account need not entail unsound individualistic methodologies, nor invocation of timeless metaphysical axioms, nor

[10] §1.3.1.
[11] §1.1 and §2.5.

disregard for social context. A sophisticated and humanistic liberal account can draw on human experience and social context.[12] On the minimalist sense in which I use the term 'liberal' (and in which it is commonly used in criminal law theory), it simply requires respect for individuals and thus requires justification for the punishment of individuals.

(4) Open-minded and reconstructive. I examined thoughtful arguments that familiar (deontic) principles of justice from national systems may not be appropriate or applicable in ICL contexts. I concluded that deontic principles do matter in ICL, but the special contexts of ICL may lead us to refine our understanding of the principles. To ignore deontic principles would not only contravene moral duties owed to the individual, but would probably also contradict values inherent to the enterprise of ICL (eg the 'inner morality of law').[13] However, I advocate an open-minded approach that is prepared to re-evaluate familiar principles: salient differences in contexts may generate deontically-justified refinements of principles in order to recognize special cases.[14]

(5) A two-way conversation. Accordingly, the encounter between criminal law theory and ICL is not necessarily a one-way conversation, in which criminal law theory is deployed to clarify, critique, systematize and improve ICL. Instead, it can be a two-way conversation. ICL can raise new problems that put formerly peripheral questions into the center. Mainstream criminal law theory understandably assumes the 'normal' case, of an interaction between a modern state and the individuals within its jurisdiction, in a society that is relatively stable. ICL routinely confronts situations that fall outside of that paradigm. In doing so, ICL problems require us to clarify assumptions about law-making, fair notice, authority, citizenship, community, legitimacy, and many other concepts. The study of extreme or special cases may lead us to realize that there are implicit preconditions and limitations in propositions that we had thought to be elementary. Thus, the study of special cases can help foster a more truly general theory of criminal law.[15]

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[12] §3.3. For example, criminal law theory enquires about the responsibility of the individual not because of ideological or methodological blinders that leave it only able to perceive individuals, but rather because once we employ criminal law, and choose to punish individuals, we necessarily must enquire what the individuals are accountable for. Similarly, criminal law theory does not require imagining humans as socially unencumbered beings; it can look at actions in their social context and with their social meaning.

[13] See e.g. L L Fuller, *The Morality of Law,* 2nd ed (Yale University Press, 1969).

[14] §3.2.

[15] Chapter 5.

(7) The humanity of justice. I have also emphasized the 'humanity' of justice. I do so in response to criticisms that the constraints are doctrinal artifacts, or products of abstract philosophies, or concerns particular to Western culture. Criminal law is carried out for prospective human aims (it is not just pointlessly retributive). Its constraints reflect respect for humanity. The constraints are human-created concepts (as opposed to a priori Platonic forms), and they are clarified through human processes. There is reason to doubt the common claim that criminal law, or constraints like the culpability or legality principle, are purely Western preoccupations, given similarities emerging in practices in diverse regions (before colonization and before the emergence of criminal law in Europe), and empirical studies showing widely-shared commonalities in senses of justice. Because these principles are human constructs, shaped and refined through human processes, any discussion of the principles is of course fallible, but it is nonetheless a valuable endeavor. The best we can do is to do the best we can do to verify that practices and institutions are justifiable.

8.2.2 Minor Themes: Improving Reasoning

I have also argued that scholarship should be attentive not just to outcomes reached, but also to the *reasoning* employed. Problematic reasoning will eventually generate problematic outcomes. I believe that alertness to the following themes can help us spot problems and anomalies and help us foster more sophisticated and sound legal reasoning.

(1) Need for deontic analysis. As mentioned above (§8.2.1), early ICL discourse tended to rely heavily on source-based and teleological reasoning, with somewhat weaker deontic reasoning. Early ICL jurisprudence and literature often approached fundamental principles as if they were doctrinal rules, using doctrinal tools rather than deontic analysis.[16]

(2) Value of criminal law theory. Furthermore, early ICL discourse was not always conversant with helpful tools of criminal law theory. Thus, for example, early arguments wrongly equated all modes of liability with 'commission',[17] or made inelegant

[16] For examples of doctrinal reasoning that failed to engage with the deontic constraints, see §6.3.2 and §6.5.
[17] See e.g. §7.3.2.

statements about criminal negligence.[18] The organzing concepts of criminal law theory can help clarify ICL, and the use of such concepts in ICL has already improved tremendously.[19]

(3) Alertness to patterns. It is important to be alert to possible systematic distortions in reasoning. I have pointed out numerous illustrations of some problematic habits of reasoning, particularly in the earlier days of ICL, that would tend to distort reasoning away from fundamental principles.[20]

8.3 FURTHER QUESTIONS

The following are some topics that are ripe for coherentist deontic inquiry.

8.3.1. Further Questions in Command Responsibility

In this thesis, I have dissected two controversies in command responsibility in considerable detail. Nonetheless, those two chapters were are only toes in the water. As I noted, I skimmed over several debates in the interests of providing succinct illustrations. For example, how much causal contribution is required for accessory liability?[21] What about the arguments that omissions cannot make causal contributions?[22] Could successor commander liability be justified with a new alternative

[18] §7.2.1 and §7.3.1.

[19] See §2.5.

[20] Chapter 2. (4) Finally, even though I have distinguished between doctrinal and deontic reasoning, sensitivity to deontic considerations can influence our doctrinal analysis. For example, it can influence what we notice when we survey precedents. I gave examples in which Tribunal chambers failed to notice patterns in the precedents that, if followed, would have complied with the culpability principle. For example, the *Celebici* decision found 'no support' for a contribution requirement even after citing passages of authorities that expressly supported it. Had the judges examined those precedents with the culpability principle in mind, they might have at least detected that pattern in the precedent. Thus, what we are sensitive to may influence what we perceive.

[21] §6.8.3.

[22] §6.8.3 and Annex 1.

account of culpability that does not require causal contribution?[23] I have explored such questions in another work, using the framework and method outlined in this thesis.[24]

As I noted in §8.4.2, there other major issues in command responsibility that I have not yet touched on. For civilian superiors, is the special fault standard justified, or is the bifurcation in the Rome Statute appropriate? What precisely is required for 'effective control'? The law has generally approached the latter question using source-based and teleological analyses. However, there is a deontic dimension: if the 'should have known' test is deontically justified in specific circumstances, then the 'effective control' test should track the limits of those justifying circumstances.[25] Deontic analysis can also assist in the future interpretation of the third element, the 'failure to take all necessary and reasonable measures', which I have not touched upon here.[26]

8.3.2 Other Frontiers

Legality, superior orders, and duress. I noted several other questions in Chapter 5 that should be examined using this framework. First, ICL – a system without a legislature, which has often encountered mass atrocities that are not clearly criminalized in positive law – provides an excellent context to explore the parameters of the legality principle.[27] Second, the doctrine of superior orders has been hotly debated in doctrinal terms, but the normative grounding is surprisingly unexplored. Such an inquiry may provide lessons about state authority, role morality, and mistakes of law, that could

[23] §6.8.3. As the best example to date of an attempt in this direction, see A J Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30 *Mich J Intl L* 251.

[24] D Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution', (2012) 13 *Melbourne J Int Law* 1.

[25] In this vein, see H van der Wilt, 'Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control' in C C Jalloh, ed, *The Sierra Leone Special Court and Its Legacy; The Impact for Africa and International Criminal Law* (CUP, 2014) 144;

[26] . The *Bemba* Appeal Judgment hinged on the interpretation of that element; the Judgment has been criticized inter alia for an excessively narrow construal of command responsibility liability that is not supported by authorities or legal reasoning. Thus, it may be an example of the 'over-correction' discussed in Chapter 1. On an account mindful of deontic limits, we would of course avoid any criticisms rooted only in a pro-prosecution simplistic teleological approach. The *Bemba* Appeal Judgment can at least be commended for being empathetic to the position of a commander and for focusing on what can reasonably be expected of a commander. Other aspects have been criticized as too generous (for example with respect to 'remote commanders'); a coherentist deontic approach can help avoid excessively rigid approaches created by unsubstantiated impressions of the constraints. *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC A.Ch, ICC-01/05-01/08 A, 8 June 2018.

[27] §5.2.1

illuminate both this specific doctrine and also general criminal law theory.[28] Third, situations of extreme duress, such as in the *Erdemović* case, can help us better articulate the deontic underpinnings of the duress defences, such as 'expectations of firmness' from fellow humans; there has not yet been much discussion about how 'social roles' may influence those expectations.[29]

Tools of criminal theory. In Chapter 5, I also highlighted various tools of criminal law theory – such as 'community, 'citizenship', 'authority' and even the basic framework of 'the state' itself.[30] Scrutiny of ICL problems would likely reveal problematic cases for each of these tools, leading us to refine (or possibly even reject) some of the tools.

Aiding and abetting. Beyond the issues I have already listed, there are countless other issues to be examined with this method. For example, the ICL 'aiding and abetting' doctrine has engendered fierce controversy, particularly with the dispute in ICTY jurisprudence over whether the assistance must be 'specifically directed' toward the crimes.[31] The battlefield is drawn between two camps, one favouring a 'knowledge' test and one favouring a 'purpose' test, but it seems to me that both are flawed. The 'knowledge' test seems too broad, as it encompasses contributions that do not seem culpable, and the 'purpose' test seems to narrow, as it excludes contributions that do seem culpable. A coherentist account would search for more convincing accounts.[32] The problem is particularly fierce with respect to so-called 'neutral contributions', and ICL provides new fact patterns with which to explore that problem. For example, if a state is assisting a rebel group that is fighting for a legal and worthy cause, but the group is committing crimes, at what point should officials of the assisting state become personally criminally liable? These are ways in which ICL doctrine can still be refined, and in which ICL may help inform general criminal law theory.

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[28] §5.2.3.

[29] §5.2.2.

[30] §5.1.3.

[31] See e.g. L N Sadat, 'Can the ICTY Šainović and Perišić Cases Be Reconciled?' (2014) 108 *AJIL* 475; K Heller, 'Why the ICTY's 'Specifically Directed' Requirement Is Justified'', (2 June 2013) *Opinio Juris* (blog), opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified; J Stewart, 'Specific Direction' is Indefensible: A Response to Heller on Complicity', (12 June 2013) *Opinio Juris* (blog), opiniojuris.org/2013/06/12/specific-direction-is-indefensible-a-response-to-heller-on-complicity; J Ohlin, 'Specific Direction Again', (17 December 2015), *Opinio Juris* (blog), opiniojuris.org/2015/12/17/specific-direction-again.

[32] See e.g. A Sarch, 'Condoning the Crime: The Elusive Mens Rea for Complicity', 47 *Loy U Chi L L* 131 (2015-6) 131, suggesting an intermediate element of 'condoning'.

Co-perpetration in large-scale crimes. ICL also provides a rich context to examine individual responsibility in massive collective enterprises. ICL has adopted co-perpetration doctrines from national systems, but those doctrines were generally designed for much smaller groups of perpetrators. Contexts involving hundreds or thousands of contributors, with very different degrees of contribution, invite us to clarify the outer limits of culpability.

Control theory. The coherentist method is useful not just for studying fundamental principles but also for the other organizing constructs we use to refine criminal law. For example, the ICC has adopted the 'control theory' to delineate between principals and accessories.[33] The control theory is a construct that can be analyzed as a 'mid-level principle'.[34] It is is analytically helpful, because it helps understand and systematize the practice, and normatively attractive, because it provides a sufficiently grounded and convincing basis to distinguish principals from accessories. Of course, there are many controversies and disputes about the control theory,[35] but it is well-established enough to at least work with it as a starting hypothesis. On a coherentist method, we would then ask: is it useful? What are its implications? Are there better (more normatively convincing and analytically fitting) theories?

At the time of this writing, the resurgence of ICL has been underway for about twenty-five years, which seems like quite a while in the span of our human lifetimes. However, compared to the history of criminal law, it is still an extremely recent and nascent experimental development. ICL is a fast-moving field. When I started work on the project, my main concern was hasty reasoning that neglected deontic constraints. Now that deontic constraints are a mainstream preoccupation of ICL, the potential problems of an 'over-correction' are emerging. This, it is all the more urgent to have a

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[33] The control theory regards principals as having 'control' over an aspect of the crime, for example by making an essential contribution. *Prosecutor v Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, T.Ch, ICC-01/04-01/06, 14 March 2012 at para 918-33 and 976-1006.

[34] §4.3.1.

[35] N Jain, 'The Control Theory of Perpetration in International Criminal Law' (2011) 12 *Chicago J Intl L* 159; T Weigend, 'Perpetration Through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9 *J Intl Criminal Justice* 91; J D Ohlin, E van Sliedregt & T Weigend, 'Assessing the Control-Theory' (2013) 26 *LJIL* 725; L N Sadat and J Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 *LJIL* 755; J D Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' C Stahn, ed, *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (OUP, 2015) 517.

methodology to explore the best understandings of the constraints. It is not the case that the narrowest conception is ipso factor the best and most principled conception. A coherentist method draws on many points of reference and thus at least gives a common basis for debate. There remains a great deal to learn for both ICL and criminal law theory.