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Cross-Cutting Issues

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1.1 Purposes and Scope of the Study

1. Presently, many of the debates and controversies in ICL concern modes of liability. Indeed, international jurisprudence is inconsistent in this area, as demonstrated by the numerous and high-profile debates surrounding the definition of the constitutive elements of direct co-perpetration,[1] indirect co-perpetration,[2] JCE,[3] aiding and abetting,[4] common purpose liability,[5] conspiracy,[6] incitement[7] or superior responsibility.[8] This situation has left the state of the law unclear, to the detriment of accountability and uniformity of ICL. While the constitutive elements of war crimes, crimes against humanity, genocide and aggression have been clarified in many studies, there is no contemporary comprehensive research that has addressed in detail all the different forms of responsibility for these international crimes.

2. To fill this gap, the Geneva Academy of International Humanitarian Law and Human Rights has launched a project aiming at providing a comprehensive analysis of the *actus reus* and *mens rea* requirements of each and every mode of liability which engages individual criminal responsibility for international crimes. Through this comprehensive comparative research, the authors of the Study had the opportunity to uncover the many *lacunae* and controversiesthat have emerged in this field.

3. The Study has been undertaken with a view to establishing principles for each mode of liability that can be used by those working in international judicial bodies – such as the ICC, the ICTY, the ICTR, the MICT or the ECCC – and investigative institutions – such as fact-finding missions and commissions of inquiry set up by the UN Security Council, the UN Secretary General or by other UN-related entities. The Study could further be of use to newly created international or hybrid Tribunals (such as the ones which have been currently established for Kosovo and for the Central African Republic) or future international investigative commissions. In such cases, the Study could impact not only the jurisprudence or reports of the institutions concerned, but also their founding documents.

[1] See Ch. 5 of the Study.
[2] See Ch. 5 of the Study.
[3] See Ch. 6 of the Study.
[4] See Ch. 7 of the Study.
[5] See Ch. 10 of the Study.
[6] See Ch. 13 of the Study.
[7] See Ch. 14 of the Study.
[8] See Ch. 15 of the Study.

4. The target audience of the Study further includes national institutions, i.e. national courts and tribunals, policy makers and/or legislators. Following the adoption of the ICC Statute and the complementarity principle enshrined in it,[9] the paradigm for the prosecution and adjudication of international crimes has shifted towards the national level.[10] It is generally accepted that ICC states parties should adopt legislation that is in conformity with international standards and take up the investigation and prosecution of international crimes. Of course, the authors of the Study are mindful that considerations of constitutional sovereignty, legality and equality before the law may bar national institutions from relying on sources beyond domestic criminal law, especially when it comes to modes of criminal responsibility. Moreover, some states may consider their domestic criminal law to be sufficiently developed, following which the Study may not be of any value to them. We will return to these delicate points below when examining the challenges posed by the purposes of the Study. Lastly, by offering a conceptual analysis, the Study may be relevant to academics, scholars and legal commentators in the fields of ICL, IHL or national criminal law.

5. Regarding its material scope, it should be made clear at the outset that the Study exclusively focuses on individual criminal responsibility and modes of liability. It does not address state responsibility. The latter operates according to its own legal regime under general public international law, which is different and separate from ICL.[11] State responsibility for international crimes is, like state responsibility for any other internationally wrongful act, neither civil nor criminal in nature.[12] As recognized by the ICJ, it is *sui generis*.[13] The regime for state responsibility is enshrined in the ILC Articles on State Responsibility, of which the UNGA took note in 2001.[14] The Assembly expressly exempted from the Articles' scope of application 'any question of the individual responsibility under international law of any person acting on behalf of a State'.[15] Conversely, the ICC Statute provides that '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'.[16] That said, it would be misleading to assert that these two regimes never intersect or overlap. Bianchi has rightly observed in this regard that '[t]heir relationship is better described in terms of "complementarity" and their interaction may depend on a number of variables, including the context in which the issue of responsibility arises'.[17] For instance, an individual – who

[9] Art. 17 ICC Statute.
[10] Para. 10 Preamble ICC Statute; Art. 1 ICC Statute.
[11] A. Bianchi, 'State Responsibility and Criminal Liability for Individuals', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 16, at 16. See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 3 February 2006, ICJ Reports 2007, para. 173.
[12] The final version of the ILC Draft Articles on State Responsibility no longer refers to the notion of 'international crime', which had been used in its 1976 version (Art. 19(2)). See generally J. H. Weiler, A. Cassese and M. Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin: Walter de Gruyter, 1989).
[13] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra n. 11, at 170.
[14] UNGA Res 56/83, 12 December 2001.
[15] Art. 58 ILC Draft Articles on State Responsibility.
[16] Art. 25(4) ICC Statute.
[17] Bianchi, supra n. 11, at 16. See also A. Pellet, 'La responsabilité de l'Etat pour commission d'une infraction internationale', in H. Ascensio, E. Decaux and A. Pellet, *Droit international pénal* (Paris: Pedone, 2012) 607, at

acts as a *de jure* or *de facto* state organ and violates international law – may well trigger both state and individual responsibility for the same act.[18] Indeed, as the ICTY held in *Furundžija*, '[u]nder current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or punish torturers'.[19]

6. The Study also does not address issues relating to corporate liability, which has surfaced following a controversial judgment rendered by the STL on whether legal persons can be held criminally accountable at the international level for contempt of court.[20] Of course, this will not prevent the Study from analysing the collective dimension that ICL has acquired since the recognition of 'system criminality'[21] in Nuremberg.[22] Indeed, the drafters of the Nuremberg Charter proposed the 'collective criminality-theory' to prosecute and adjudicate 'major war criminals' of the crime of conspiracy, and in subsequent proceedings to try lower and mid-level accused for membership of a criminal organization.[23] As we will see below, despite the affirmation of the principle of individual criminal responsibility at the international level, the notion of system criminality is still relevant in modern ICL. For instance, the collective criminality-theory constituted a source of inspiration for the ad hoc Tribunals when devising the JCE/common purpose liability theories.[24] This is not surprising in a context where international crimes – in particular genocide and crimes against humanity – are, by nature, crimes which require the collective involvement of individuals at different levels, and, in particular, persons in high political or military leadership positions. The unique features of international crimes have required retailoring the traditional forms of criminal responsibility developed in domestic criminal law. It is, however, essential to recall here that the collective nature of these crimes does not obviate the need to individualize the criminal responsibility of those persons involved.[25]

607–629. See generally B.I. Bonafè, *The Relationship between State and Individual Responsibility for International Crimes* (Leiden: Nijhoff, 2009).

[18] E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 6.

[19] ICTY, *Furundžija*, Trial Chamber Judgment, IT-95-17/1-T, 10 December 1998, para. 142.

[20] STL, *Al Jadeed [CO.] S.A.L./New T.V.S.A.L. (N.T.V.) Karma Mohamed Tashin Al Khayat*, Contempt Judgment, STL-14-05/T/CJ, 18 September 2015, paras. 55–72; STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-06/PT/AP/AR126.1, 23 January 2015, paras. 31–36; STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, Decision on Motion Challenging Jurisdiction, STL-14-06/PT/CJ, 6 November 2014, paras. 21–74. See generally N. Bernaz, 'Corporate Criminal Liability under International Law', 13 *Journal of International Criminal Justice* (2015) 313–330.

[21] The term 'system criminality' was coined for the first time by IMTFE Judge Röling: B.V.A. Röling, 'Aspects of the Criminal Responsibility for Violations of the Laws of War', in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Naples: Editoriale Scientifica, 1979), at 138, 203. See also A. Nollkaemper, 'Introduction', in A. Nollkaemper and H.G. van der Wilt (eds.), *System Criminality* (Cambridge: Cambridge University Press, 2009).

[22] See P. Beauvais and A. Khalifa, 'Les modes collectifs de participation à l'infraction', in Ascensio *et al.*, supra n. 17, 503, at 503–515.

[23] N. H.B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford, Oxford University Press, 2000). See also van Sliedregt, supra n. 18, at 20–23.

[24] van Sliedregt, supra n. 18, at 20–23.

[25] G. Werle, 'General Principles of International Criminal Law', in Cassese, *The Oxford Companion*, supra n. 11, 54, at 58.

7. Lastly, it is important to emphasize that the Study does not discuss grounds excluding criminal responsibility, i.e. defences, whether procedural (official capacity/immunity, age) or substantive (mental incapacity, intoxication, self-defence, duress, superior orders, mistake of fact or law, military necessity, reprisals or '*tu quoque*'). It has been considered reasonable to first start an analysis of international modes of liability as such and, once that is finalized, examine whether grounds excluding or limiting responsibility should be explored in a separate research project. To conduct a proper and thorough analysis of modes of liability has already proved to be extremely complex and time-consuming.

1.2 Methodology and Structure of the Study

8. The Study examines each mode of liability according to a similar pattern of analysis. First, it presents established principles grounded on an examination of the statutes and jurisprudence of international tribunals and courts (i.e. the ad hoc Tribunals, hybrid Tribunals and the ICC). These are principles on which no, or only minor, controversies have emerged at the international level. Second, it identifies the main disagreements in the jurisprudence of these institutions and in the legal literature (with respect to the latter, only when they are recurring and substantial). Third, in an attempt to overcome these disagreements, it determines, through a comparative and/or an analysis of the underlying rationale, the main trends at the international (or domestic) level or, in the absence of such trends, the most appropriate solution in light of the principles underlying ICL. We will return to the challenges raised by applying such a methodology in Section 1.3 below.

9. The Study is organized in the following way. It first recalls its purposes, scope, methodology, challenges and organization. It then analyses each and every mode of liability separately. This analysis – which constitutes the core of the Study – is divided into six parts: Individual Commission (Part I); Joint Commission (Part II); Participation (Part III); Participation in Group Activities (Part IV); Inchoate and Preparatory Acts (Part V); and Other Forms of Responsibility (Part VI). Finally, in Concluding Observations (Part VII), the Study outlines few contemporary issues that have been raised throughout the research.

10. In order to guarantee the coherence of the Study, to facilitate its reading and to ultimately reinforce its utility, all chapters devoted to each mode of liability reflect the pattern of analysis described in para. 8 above. First, an introduction briefly recalls: (i) the conceptual evolution of the relevant mode of liability; and (ii) the debates surrounding this evolution (which are discussed in more detail in the subsequent sections of the chapter). Second, each of the chapters provides a general definition of the relevant mode of liability, distinguishes it from closely related modes of liability, and discusses its scope of application. Indeed, the question of whether a given mode of liability applies only to certain international crimes has sometimes been the subject of significant discussions at both the international and national levels and thus deserves particular attention. Third, all chapters attempt to distil from the jurisprudence of international courts and tribunals the main constitutive elements of each mode of liability. In this regard, a distinction is drawn between 'uncontested elements' and 'open questions'. The 'open questions' are further explored with a view to proposing principles acceptable to all courts and tribunals. As various modes of liability often raise similar controversies, to resolve

them, the same methodology described in para. 8 above is followed throughout the Study. This aims at reinforcing the coherence and credibility of the research. Fourth, the status of the mode of liability under ICL is briefly discussed. Fifth, evidentiary indicators that would assist practitioners in proving (or disproving) a given mode of liability are presented. The last section proposes uncontested principles that are drawn from the foregoing analysis. A short bibliography and tables of cases concludes each chapter.

11. Reflecting the general methodology of the Study outlined above, each chapter is in principle structured as follows:

1 Introduction
2 Meaning and Application
  2.1 Definition and Related Concepts
    (a) Definition
    (b) Related concepts
  2.2 Scope of Application
3 Constitutive Elements
  3.1 Uncontested Elements
    (a) Material elements
    (b) Mental elements
  3.2 Open Questions
    (a) Background
    (b) Discussion
  3.3 Overall Assessment
4 Status under International Criminal Law
5 Evidentiary Factors
6 Concluding Principles
Select Bibliography
Selected Cases

1.3 Challenges of the Study

12. The Study's purposes and methodology raise several challenges.

13. The Study aims at having an impact internationally and nationally by reinforcing homogeneity within ICL through the establishment of principles that could be of direct use by institutions located at these two levels. This assertion requires further explanation.

14. While we accept the inherent pluralist nature of ICL,[26] it is submitted that, where possible at the international level, we should develop a more homogeneous body of law

[26] E. van Sliedregt and S. Vasiliev, 'Pluralism: A New Framework for International Criminal Justice', in E. van Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford: Oxford University Press,

relating to modes of liability. The ad hoc and hybrid Tribunals, by looking at the sources of international law, mainly at international customary law and, to a lesser extent, general principles of law,[27] have clarified the law governing a number of modes of liability. In doing so, they have usually followed a methodology that relies on an examination of the decisions rendered by international courts and tribunals – such as the Nuremberg and Tokyo Tribunals or the Tribunals established under Allied Control Council Law No. 10[28] – and a comparative analysis of the principal domestic legal systems, while duly taking into account of the specificities of the international legal order.[29] To reinforce consistency within the law, the ad hoc and hybrid Tribunals have increasingly relied on their own jurisprudence, even though they do not need to adhere to the principle of *stare decisis*.[30] Their jurisprudence has also had an influence on other international judicial and

2014) 3–39. For a critique on the attempt to develop uniformity within ICL, see A. Greenawalt, 'The Pluralism of International Criminal Law', 86 *Indiana Law Journal* (2011) 1063–1130.

[27] See D. Akande, 'Sources of International Criminal Law', in Cassese, *The Oxford Companion*, supra n. 11, 41, at 51.

[28] On this point, it is worth citing the finding of the *Kupreškić* Trial Chamber that: '[b]eing international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? ... [T]he authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter ... Here again attention should however be drawn to the need to distinguish between various categories of decisions and consequently to the weight they may be given for the purpose of finding an international rule or principle. It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10 ... These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law ... In sum, international criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgments, as the latter are at least based on the same corpus of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation' (ICTY, *Kupreškić*, Trial Chamber Judgment, IT-95-16-T, 14 January 2000, paras. 540–542).

[29] See M. Delmas-Marty, 'Comparative Criminal Law as a Necessary Tool for the Application of International Criminal Law', in Cassese, *The Oxford Companion*, supra n. 11, 97–103.

[30] In the system of the ad hoc Tribunals, the Trial Chambers are bound by decisions and judgments rendered by the Appeals Chamber, though not by decisions of other Trial Chambers. The Appeals Chamber may depart from its own decisions and judgments for cogent reasons (see ICTY, *Aleksovski*, Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, paras. 92–115). It is, however, more difficult to determine to what extent these principles also apply across Tribunals (i.e. whether the ICTR Trial Chambers are directly bound by decisions and judgments rendered by the Appeals Chamber in an ICTY case and *vice versa* or whether the SCSL Appeals Chamber is bound by decisions and judgments of the ICTY Appeals Chamber) (see ICTY, *Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47-AR72, 16 July 2003, para. 26; SCSL, *Taylor*, Appeal Judgment, SCSL-03-01-A, 26 September 2013, para. 472). Some unity within the law is also guaranteed by the fact that the UN Security Council has established a common Appeals Chamber and Prosecutor for both the ICTY and ICTR. Although no such direct links exist between the ICTY/R and SCSL, Article 20(3) of the Statute of the SCSL expresses the will of the UN that the SCSL does not function in isolation. Indeed, it states that: '[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda'. Moreover, the SCSL recognized that the ad hoc Tribunals, the SCSL and ICC 'belong to a unique, and still emerging, system of international criminal justice' (see SCSL, *Brima*, Decision and Order on Defence Preliminary Motion on Defects in the

investigative institutions. The ICC Statute has added some clarity by specifying the different modes of liability in its Article 25(3). Moreover, through a provision on the applicable sources of law before the ICC,[31] making the Statute the primary source of law (prioritizing it over the more flexible rules of customary law), it limits the legislative power of judges. Despite the fact that the jurisprudence of the ad hoc and hybrid Tribunals does not bind the ICC,[32] it has relied on the former case law of the Tribunals when interpreting provisions of the ICC Statute.[33] This approach has contributed to a certain stability and unity of the principles governing modes of liability. On the other hand, we see that, certainly in the initial stages, there was an appetite at the ICC to forge its own path in developing modes of liability.[34] This has led to the ICC distancing itself explicitly from ad hoc Tribunal case law and embracing a specific approach to criminal participation referred to as 'control of the crime'. As Cryer observed, the ICC has 'tended too often towards the view that the Rome Statute creates something close to a self-contained regime, rather than a part of a system of international criminal law enforcement'.[35]

15. This brings us to the fact that there is a high degree of heterogeneity in the law on modes of liability in ICL. A number of reasons account for this. First, the jurisprudence of the ad hoc and hybrid Tribunals has generated several controversies, in particular with regard to the law on JCE[36] and aiding and abetting.[37] These controversies, that to a large extent remain unresolved, are, in part, due to the fact that the Statutes of the ad hoc and hybrid Tribunals do not offer detailed provisions on modes of liability. They also flow from the difficulties of establishing precise customary principles or general principles of law and of conducting proper comparative analysis, especially in case of divergences

Form of the Indictment, SCSL-04-16-PT, 1 April 2004, para. 20). In light of this, the SCSL has decided to 'apply the decisions of the ICTY and ICTR for their persuasive value, with necessary modifications and adaptations, taking into account the particular circumstances of the Special Court' (ibid., para. 25).

[31] Art. 21 ICC Statute.

[32] Article 21 of the ICC Statute makes clear that the jurisprudence of the ad hoc and hybrid Tribunals do not constitute binding precedent. See in that regard V. Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Brill, 2009), at 305.

[33] C. Stahn and L. van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?', in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Nijhoff, 2012), Vol. I, at 38.

[34] See ICC, *Katanga and Chui*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 508; ICC, *Katanga*, Trial Chamber Judgment, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 1395; ICC, *Ruto et al.*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/09-01/11-373, 23 January 2012, para. 289; ICC, Dissenting Opinion of Judge Kaul to the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation of the Republic of Kenya', ICC-01/09-19-Corr, 31 March 2010, para. 30. See also Stahn and van den Herik, supra n. 33, at 38.

[35] R. Cryer, 'Royalism and the King Article 21 of the Rome Statute and the Politics of Sources', 12 *New Criminal Law Review: An International and Interdisciplinary Journal* (2009) 390, at 394. See also van Sliedregt, supra n. 18, at 16.

[36] See for instance, the disputes over the nature of JCE, and in particular JCE III. All forms of JCE – including JCE III – have consistently been qualified by the ad hoc Tribunals as forming part of 'customary international law' (ICTY, *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999, para. 220). However, the ECCC has found that post-World War II case law and practice did not establish sufficient evidence that JCE III was of a customary nature between 1975 and 1979 (ECCC, Decision of the Trial Chamber on the Applicability of Joint Criminal Enterprise, 002/19-09-2007/ECCC/TC, 12 September 2006, para. 26).

[37] See the disputes over the notion of aiding and abetting examined in Ch. 7 of the Study.

among national systems.[38] Second, certain provisions of the ICC Statute differ from their counterparts in the founding documents of the ad hoc and hybrid Tribunals. For instance, Article 25(3)(a) of the ICC Statute introduces the concepts of 'co-perpetration' and 'indirect perpetration'. While the former may be regarded as equal or similar to a certain category of JCE,[39] the latter is a novel concept in ICL, especially since the indirect perpetrator can use non-innocent agents to commit crimes. Moreover, Article 25(3)(d) of the ICC Statute provides for the criminal responsibility of members of a group acting with a common purpose. This, at first blush, seems similar to JCE, but differs from the latter on conspicuous points. Article 28 of the ICC Statute also differs from other international provisions on command responsibility. It makes an explicit distinction between superior responsibility of military commanders and non-military superiors, introducing a higher *mens rea*-threshold for the latter category.[40] Third, despite the relatively detailed provision on criminal responsibility in Article 25(3), the ICC Statute still contains *lacunae*, requiring judicial interpretation, which in itself has led to contention.[41] This is even more so when we bear in mind that Article 10 of the ICC Statute has left the door open for extra-statutory considerations by allowing for the progressive development of customary norms outside the ICC Statute.

16. All these factors create a certain degree of uncertainty and disharmony within ICL, as rightly observed by Stahn and Van den Herik: '[t]he interrelationship among the different international criminal courts and tribunals is . . . far from uniform. Each institution relates to another entity in a different manner, ranging from the almost symbiotic relationship between the two *ad hoc* tribunals to a more cautious approach towards reception and judicial interaction in the case of the ICC.'[42] Van Sliedregt has referred to the pluralist system of international criminal justice as united in a 'shared belief in functioning within a broader structure or system of law, like an island belonging to one and the same archipelago'.[43]

17. This situation could ultimately threaten the legitimacy of the system of international criminal justice. The ICTY Appeals Chamber stated in this regard that: '[t]he experience of many domestic jurisdictions over the years has been that . . . public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that punishments imposed would, in justice, be excepted to be also generally similar'.[44] Although this

[38] See I. Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law', 6 *International Criminal Law Review* (2006) 121–136; A. Borda, 'Precedent in International Criminal Courts and Tribunals', 2 *Cambridge Journal of International and Comparative Law* (2013) 287–313.

[39] M. Cupido, 'Common Purpose Liability versus Joint Enterprise: A Practical View on the ICC's Hierarchy of Liability Theories', 29 *Leiden Journal of International Law* (2016) 897–915.

[40] Ch. Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior', 5 *Journal of International Criminal Justice* (2007) 619–637. See also H. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', 8 *International Criminal Law Review* (2008) 229, at 242.

[41] See, for instance, the absence of a provision governing 'commission by omission'. See Ch. 4 of the Study.

[42] Stahn and van den Herik, supra n. 33, at 38–39.

[43] van Sliedregt, 'Pluralism in International Criminal Law', 25(4) *Leiden Journal of International Law* (2012) 847–855, at 853.

[44] ICTY, *Delalić et al.*, Appeals Chamber Judgment, IT-96-21-A, 20 February 2001, para. 756.

reasoning, strictly speaking, focuses mainly on sentencing, it can just as easily be transposed to modes of liability.[45] The fundamental principle of legality enshrined in several IHRL[46] and IHL[47] conventions and the ICC Statute requires clarity in the law and militates in favour of the establishment of a more unified and coherent body of ICL, which would at the same time promote legal certainty; all prerequisites to fairness and equality before the law.

18. Having said that, there must be room for progress and development. Unification of ICL at the international level should not be interpreted as arguing in favour of modes of liability that remain frozen in time. On the contrary, they should be reassessed on a 'case-by-case' basis, and, when necessary, adapted to changing circumstances.[48] This idea has been clearly affirmed by the ECtHR in *Jorgić* v. *Germany*:

> In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[49]

19. Regarding the ambition to propel homogeneity in national criminal law as to modes of liability, the authors of the Study are more modest when it comes to domestic criminal law. As said, it is not a given that national systems would set aside time-honoured domestic law and adhere to sometimes contrived and unclear international law standards.[50] Moreover, here, the search for consistency and uniformity as described above is less justified. Domestic courts and tribunals are generally free to interpret and apply their own legislation, subject to the applicable standards and limitations to the exercise of discretion.[51] While some national courts have followed the standards developed by international courts when establishing responsibility for international crimes,

[45] Greenawalt, supra n. 26, at 1063–1130.
[46] Art. 15 ICCPR; Art. 11 UDHR; Art. 40(2)(a) Convention on the Rights of the Child; Art. 7 ECHR; Art. 49 EU Charter of Fundamental Rights; Art. 9 ACHR; Art. 7 ACHPR.
[47] Art. 99(1) Geneva Convention III; Art. 67 Geneva Convention IV; Art. 75(4)(c) Additional Protocol I; Art. 6(2)(c) Additional Protocol II.
[48] van der Wilt, supra n. 40, at 271. See also A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. II, Chapter 5, 1056.
[49] ECtHR, *Jorgić* v. *Germany*, Application No. 74613/01, 12 July 2007, para. 101.
[50] In the same vein, van Sliedregt points out that: '[t]hese [international] concepts are an expression of the will to widen the category of possible offenders and to create jurisdiction over them. They have no constitutive value in creating new forms of liability, requiring implementation at the national level. Indeed, most of the modes of liability in international statutes have a national pedigree; they are not 'true' forms of international criminal responsibility. That is why the United Kingdom, when it incorporated the Genocide Convention in its domestic law, did not include a provision dealing with complicity' (van Sliedregt, supra n. 18, at 11). See also with regard to the draft ILC Convention on Crimes against Humanity: E. van Sliedregt, 'Criminalization under National Law', *Journal of Interntional Criminal Justice* (2018) forthcoming.
[51] See Stahn and van den Herik, supra n. 33, at 41. See also van Sliedregt and Vasiliev, supra n. 26, 3–39; P. Gaeta, 'International Criminalization of Prohibited Conducted', in Cassese, *The Oxford Companion*, supra n. 11, 63, at 73.

many others have adhered to domestic law.[52] As concluded by Satō from an analysis of domestic systems, '[s]uch State practices could be understood to indicate that those States do not recognize international rules, either the law of the ICC Statute or customary international law, as binding national proceedings on general principles of criminal responsibility'.[53] This argument is particularly compelling when courts try cases on the basis of universal jurisdiction.

20. In contrast, the definition of international crimes is mainly 'constructions of international law'.[54] When implementing the international crimes contained within the ICC Statute, national institutions should therefore take all necessary measures to preserve the essence of such crimes and to implement their basic elements, as they exist in international law, into their domestic legal orders.[55] They should not alter the content of international crimes substantially.

21. That said, a minimum homogeneity might still be required for modes of liability. First, certain modes of liability – such as command responsibility – find their origin in the realm of international law. As most national systems recognize and apply these modes of liability with minor differences, their domestic application may justify compliance with international standards.[56] Second, it has been argued that specific modes of liability that are, in reality, inchoate offences – such as direct and public incitement to commit genocide or conspiracy – 'form part of the essence of the definition of the crime ... under international law'.[57] This would leave less room for national courts to exercise discretion.[58] One may also contend that this argument is equally valid for other forms of responsibility – such as JCE – which are 'specially tailored to confront problems of mass criminality that are a central focus of ICL offenses'.[59] We will see, however, that the 'JCE

[52] van der Wilt, supra n. 40, at 243–247.
[53] H. Satō, 'Modes of International Criminal Justice and General Principles of Criminal Responsibility', 4 *Goettingen Journal of International Law* (2012) 765, at 779–780.
[54] van der Wilt, supra n. 40, at 271–272.
[55] Ibid. As stated by Greenawalt, '[m]y framework accepts that ICL properly establishes universally binding requirements. Principal among these are the basic elements of ICL offenses. Consistent with the enforcement-based approach to ICL, the elements of genocide, crimes against humanity, war crimes and other ICL offenses delimit the sphere of criminal activity that triggers special international concern and gives rise to unique jurisdictional consequences. Gravity considerations also play a role, as the elements of crimes often serve to emphasize the unique gravity of the offenses in [*sic*] questions' (Greenawalt, supra n. 26, at 1122).
[56] Satō, supra n. 53, at 786–791. It should also be recalled in this regard that command responsibility is enshrined in Articles 86 and 87 of Additional Protocol I. According to the Protocol, state parties thereto are obliged to ensure effective repression of such behaviour at the national level. This forms part of the general obligation imposed on states to enact a comprehensive legal framework for effective prosecution and punishment of serious violations of IHL. Indeed, almost all IHL conventions require that prosecutions be made possible for some, or all, serious violations of their provisions; a step that normally requires the adoption of appropriate legislation. However, as rightly observed by van der Wilt, 'international conventions [including Additional Protocol I] set minimum standards which state parties are obliged to observe, but do not preclude those states from enacting further reaching legislation. In that sense, international law does not, at least not explicitly, dictate uniform application of international standards by the national jurisdictions that, in the implementation of those standards, have gone beyond of what is required under international law' (van der Wilt, supra n. 39, at 256). It is interesting to note that Article 16 of the Law establishing the Kosovo Specialist Chambers directs judges to apply domestic modes of liability for charges of domestic crimes, and international modes of liability for charges of international crimes.
[57] Stahn and van den Herik, supra n. 33, at 43.
[58] Ibid.
[59] Greenawalt, supra n. 26, at 1124–1125.