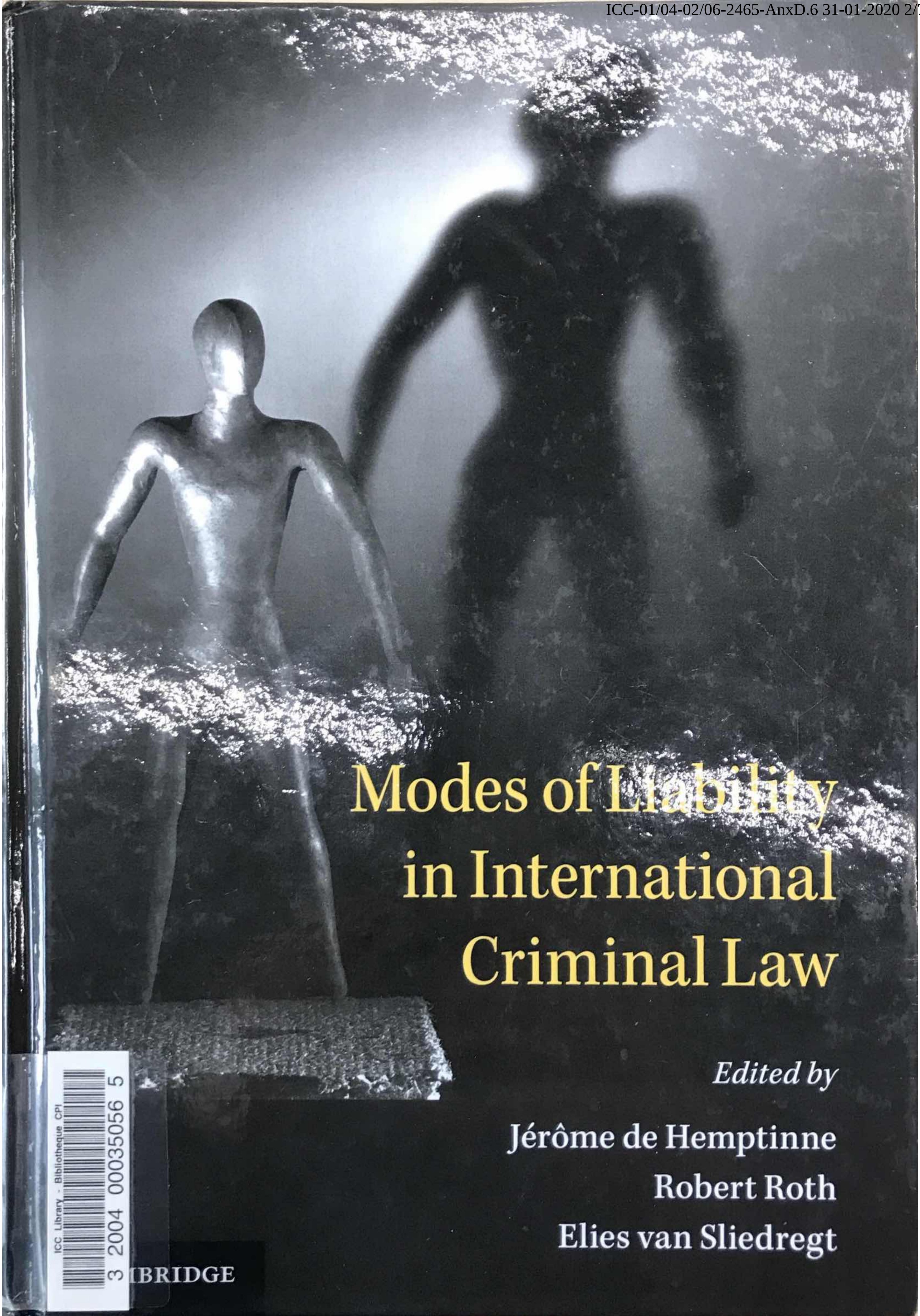
Annex D.6


Modes of Liability
in International
Criminal Law
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MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW

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5

Co-Perpetration Based on Joint Control over the Crime

ELIES VAN SLIEDREGT AND LACHEZAR YANEV

1. This chapter examines the concept of co-perpetration, as defined and developed in the jurisprudence of the ICC. To this end, the research contained herein is divided into two separate, yet interrelated, parts that focus on the two distinct forms of co-perpetration, which the Court has recognized in its case law: 'direct' and 'indirect' co-perpetration.[1] As the Pre-Trial Chamber explained in the *Ongwen* case:

> '[I]ndirect co-perpetration' or 'joint indirect perpetration' … still rests on the notion of reciprocal imputation of co-ordinated actions performed by each co-perpetrator. The only difference with 'direct' co-perpetration is that the objective elements of the crime are executed by other persons who are utilised by the co-perpetrators for the commission of the crime.[2]

2. Following a general introduction to the theory of co-perpetration based on joint control over the crime (Section 5.1), the concept of 'direct' co-perpetration is examined. In particular, the following issues pertaining to this form of criminal responsibility will be analysed: its meaning and scope of application (Section 5.2), its constitutive elements (Section 5.3) and its legal basis under ICL (Section 5.4).

3. Section 5.5 of this chapter studies the notion of 'indirect' co-perpetration liability in the ICC's case law. In doing so, it will endorse the same structure of providing a brief introduction to this form of responsibility (Section 5.5.1), reviewing its meaning and scope of application (Section 5.5.2), as well as its constitutive elements (Section 5.5.3) and analysing the basis for this form of liability at the ICC (Section 5.5.4).

4. This chapter concludes with a review of the evidentiary factors to be considered when proving the legal elements of (direct and indirect) co-perpetration responsibility (Section 5.6) and a summation of the legal principles distilled from the above analysis of this mode of liability (Section 5.7).

[1] ICC, *Katanga and Chui*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, paras. 521, 525; ICC, *Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, paras. 159–160; ICC, *Ongwen*, Pre-Trial Chamber II, Decision on the Confirmation of Charges, ICC-02/04-01/15-422-Red, 23 March 2016, paras. 38–39.

[2] The judges further defined the notion of 'indirect' co-perpetration as 'a particular form of co-perpetration'. *Ongwen* Decision on the Confirmation of Charges, supra n. 1, paras. 38–39. Similarly, Weigend explained that 'in German understanding, indirect co-perpetration is not a novel creation but simply a sub-category of joint perpetration'. T. Weigend, 'Problems of Attribution in International Criminal Law: A German Perspective', 12 *Journal of International Criminal Justice* (2014) 253, at 260.

presupposes a more limited number of co-perpetrators, which in turn can be used to argue that, at variance with the ad hoc Tribunals' JCE jurisprudence, their identity has to be individually stated in the document containing the charges against the accused.[144] Naturally, from the accused's perspective, it is vital that he/she be informed as specifically as possible of the identity of his/her alleged co-perpetrators so he/she can properly build his/her defence and dispute the links in the chain of causation that qualify him/her as a co-perpetrator of crimes committed by others.

40. Concerning the disputes on the nature of the 'common plan' element as an objective or a subjective legal requirement,[145] one plausible reading of the problematic 'element of criminality' test is to find that it simply requires the plan to entail an *objective* risk that the said crime will be committed in the ordinary course of events. Such a finding that – in view of the facts of the case – the crime was generally in line with the agreed plan is made independently from the subsequent inquiry into the accused's *mens rea* towards the charged crime. In other words, whether *the accused* foresaw the charged crime as a 'virtually certain' consequence of executing the common plan/agreement is a separate and distinct inquiry from whether the said common plan involved a high objective risk of resulting in the commission of that crime.[146] Adopting this reading of the 'common plan or agreement' element would allow to properly qualify it as an 'objective', rather than a 'subjective' (or mixed) element.

41. This interpretation is akin to the ad hoc Tribunals' approach to the 'extended' form of JCE, where some chambers have specified, as stated in Chapter 6, that:

> There are two additional requirements for [JCE III], one objective, the other subjective. The objective element does not depend upon the accused's state of mind. This is the requirement that the resulting crime was a natural and foreseeable consequence of the JCE's execution. It is to be distinguished from the subjective state of mind, namely that the accused was aware that the resulting crime was a possible consequence of the execution of the JCE, and participated with that awareness.[147]

42. The more challenging issue is whether it is doctrinally sound to ascribe co-perpetration responsibility based on a common plan/agreement that merely contains 'an element of criminality'.[148] As already noted above, the doctrinal problem with this construction of the 'common plan' element is that it allows assigning co-perpetration responsibility for crimes that are not specifically agreed upon by the confederates, provided that they are a 'virtually

[144] As explained in Ch. 6 of this Study, the ICTY and ICTR have found that, under JCE law, the Prosecutor need not name individually all JCE participants as it suffices if they are identified by reference to the categories or groups to which they belonged. See *Krajišnik* Appeal Judgment, supra n. 36, para. 156; ICTY, *Brđanin*, Appeals Chamber Judgment, IT-99-36-A, 3 April 2007, para. 430; ICTY, Appeals Chamber Judgment, *Đorđević*, IT-05-87/1-A, 27 January 2014, para. 141; ICTY, *Karadžić*, Trial Chamber Judgment, IT-95-5/18-T, 24 March 2016, para. 562; ICTR, *Simba*, Appeals Chamber Judgment, ICTR-01-76-A, 27 November 2007, paras. 63, 69–75; ICTR, *Munyakazi*, Appeals Chamber Judgment, ICTR-97-36A-A, 28 September 2011, para. 161. See Ch. 6 of this Study, para. 27 (text accompanying notes 146–147).

[145] See para. 30.

[146] This interpretation of the 'common plan' requirement, and its 'element of criminality' test, as requiring proof of an 'objective risk' that the plan's implementation will result in the commission of the charged crime can be distinguished in the *Lubanga* Decision on the Confirmation of Charges, supra n. 8, paras. 377 and 404 et seq.

[147] ICTY, *Stanišić & Simatović*, Trial Chamber Judgment, IT-03-69-T, 30 May 2013, Vol. II, para. 1257. See Ch. 6, paras. 40–41.

[148] See para. 31.

region, which the Chamber found to have existed between Lubanga, Ntaganda and other co-perpetrators.[227] The Chamber held that, in relation to the 'Second Attack', Ntaganda contributed 'essentially' to its execution because he 'assumed a coordinating role before the execution stage of the crimes'[228] and while away from the crime scene, he:

> (i) was in contact with the troops through a manpack and a Motorola; (ii) received updates on the situation in the field; and (iii) issued operational orders concerning the fighting.[229]

75. Whether the offences charged in relation to the said 'Second Attack' would have been committed by the UPC/FPLC troops absent Ntaganda's above said contributions could be a matter of some debate. What is quite telling is that the Pre-Trial Chamber did not elaborate in a single sentence *why* it considered these acts to have been *essential* for the commission of the alleged crimes. Listing a range of contributions in one paragraph and then immediately finding in the subsequent paragraph that they were essential – without in-between properly motivating this determination – is hardly the line of reasoning that demonstrates that the control approach to co-perpetration leaves less room for judicial discretion or bias. It presents a rather flexible approach to determining the 'essentiality' of contributions provided by high-ranking accused.

5.11 Concluding Principles

76. The following concluding principles can be drawn from the above analysis: first, co-perpetration based on joint control over the crime is a mode of liability, which assigns principal liability to a person who provides a coordinated essential contribution to the effecting of a common plan or agreement that results in the commission of an offence. Second, there are two forms of co-perpetration: 'direct' co-perpetration, where the concerted crime is physically perpetrated by at least one of the co-perpetrators pursuant to a common plan, and 'indirect' co-perpetration, where the co-perpetrators execute their common plan by exercising control over an organized, hierarchical power apparatus that allows them to use other individuals as tools to commit the crime. Third, co-perpetration requires the co-perpetrators to share a common plan that contains 'an element of criminality' and to provide coordinated *essential* contributions to the plan's execution. Fourth, indirect co-perpetration additionally requires the existence of a hierarchical, organized structure of power (OSP), which is controlled by the said co-perpetrators and which ensures the commission of the charged crime(s) by automatic compliance with their orders. The requisite 'automatic compliance' with orders can be secured by fungibility (replaceability) of the rank-and-file members of the hierarchical power apparatus, as well as through intensive, strict and violent training regimes. Fifth, the common plan does not have to be specifically directed at the commission of a crime but has to contain 'an element of criminality'; viz. its execution is 'virtually certain' to result in the commission of the charged crime(s). Sixth, the accused's 'essential' contribution does not have to be provided at the execution stage of the plan but it must be of such importance that its withdrawal would lead to the collapse of the plan and the non-commission of the charged

227 Ibid., paras. 105–106.
228 Ibid., para. 113.
229 Ibid., para. 114.

Presently, many of the greatest debates and controversies in international criminal law concern modes of liability for international crimes. The state of the law is unclear, to the detriment of accountability for major crimes and of the uniformity of international criminal law. The present book aims at clarifying the state of the law and provides a thorough analysis of the jurisprudence of international courts and tribunals, as well of the debates and the questions these debates have left open. Renowned international criminal law scholars analyse in discrete chapters the modes of liability one by one; for each mode, they identify the main trends in the jurisprudence and the main points of controversy. An introduction addresses the crosscutting issues, and a conclusion anticipates possible evolutions we may see in the future. The research on which this book is based was undertaken with the Geneva Academy.

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