

ACCOUNTABILITY FOR INTERNATIONAL CRIMES

A Preparatory Meeting on Methodology and Scope for a Study of Modes of Responsibility under International Criminal Law

MEETING REPORT

Background

The most senior political and military figures in any given context of international crimes are almost invariably not the people ‘pulling the trigger’. Indeed, today, many of the greatest debates and controversies in international criminal law (ICL) concern modes of liability for international crimes other than direct perpetration. Jurisprudence in the various ICL tribunals and national courts is inconsistent, both internally and across different tribunals, as evidenced by controversies as to the elements for aiding and abetting and the basis under international law for joint criminal enterprise (JCE). This has left the state of the law unclear, to the detriment of accountability and the rights of the accused.

While the corpus of customary international humanitarian law and the existence of war crimes under customary law have largely been clarified by the landmark study by the International Committee of the Red Cross (ICRC), published in 2005, no comprehensive study has yet addressed in detail the different forms of responsibility for international crimes. Accordingly, on 24–25 November 2014 the Geneva Academy convened a meeting of experts to discuss the scope of a possible study of the status under international law of, inter alia, the *actus reus* and *mens rea* elements of planning, instigating, indirect perpetration, co-perpetration, the three forms of joint criminal enterprise, command responsibility, and aiding and abetting.

The meeting was held under the three Villa Moynier rules. Thus, all discussions during, and on the margins of, the experts meeting are strictly confidential. Participants are free to report their own comments but may not cite or summarize remarks by any other participant or refer to another individual’s participation in the meeting. This summary report of the discussions is prepared by the Academy. Once finalized the report may be freely quoted.

Key issues

Discussions focused on the following key issues:

- Study audience
- Study scope
- Implications of the study and related research
- Methodology and intellectual framework.

Differing views were expressed by participants on each of these issues.

Study audience

Potential audiences identified included international tribunals/courts (including the International Criminal Court), regional bodies (i.e. human rights judicial and semi-judicial organs), domestic courts, military tribunals, other international mechanisms (commission of inquiries, other investigation bodies), policy mechanisms established to deal with systematic violations of human rights or international crimes, legal practitioners, legislators, and academia.

A number of participants felt that national legislators and courts would be a primary audience for the study. Others believed that, at least in certain Western European states, the law was sufficiently developed such that the study would not offer significant value and that international tribunals, notably the ICC, should be seen as a primary audience. One participant noted, however, that a number of states – including Western states – have only recently included command responsibility as a result of joining the ICC. In this respect, a study on the elements of command responsibility under customary international law would be particularly helpful.

Study scope

Much discussion focused on whether the study should look at customary law or rather on general principles and/or common approaches as currently developed or capable of being identified in national and international legal systems. The following options were suggested:

- Harmonization of existing norms and practice related to modes of liability
- Categorization of different modes of liability applicable at the international level only
- Identification of customary law in relation to international modes of liability
- Identification of general principles in relation to international modes of liability
- Identification of common approaches in order to attribute criminal responsibility.

While some participants supported the idea to focus research on identifying customary law norms applicable to modes of liability, most underlined the difficulties that might arise in such an exercise. Challenges included:

- the difficulty of identifying customary rules in this area taking into account the existing diversity in today's legal cultures (i.e. common law versus civil law systems)
- the existence and recognition of 'regional' customary law, which could see different customary norms in civil v. common law states
- the difficulty of discerning state practice and *opinio juris* considering the diversity of approaches adopted at international and domestic levels
- the peculiarities of modes of liability *per se* as compared to principles of law (such as principles of IHL) – e.g. the notions of command responsibility and aiding and abetting.

Several participants argued that a more appropriate focus for the study would be to focus on identifying general principles of law and/or, common approaches related to modes of liability. The

provision in Article 21(1)(b) and (c) of the 1998 Rome Statute was specifically cited in this regard.¹ The study may ultimately consider defences under international criminal law² but several participants suggested that this should only be envisaged once the first stage of the study had been completed.

Participants noted that the study would be helpful in order to address current (and prevent future) fragmentation, provide guidance on attribution of criminal responsibility at the international level, and offer guidance on attribution of criminal responsibility at international, regional, and domestic levels.

Implications of the study and related research

Some participants raised the question of possible overlap and even conflicts with existing instruments (primarily the ICC Statute) and related research by, for example, the Max Planck Institute). Concern was also expressed that since such a study might actually result in a 'negative' assessment (i.e. concluding there is no uniformity in the law) the impact of such a conclusion might be detrimental to accountability.

Methodology and intellectual framework

Elaborating an intellectual framework for the study was considered to be an important first step. In this regard, the use of the term 'modes of responsibility' rather than 'modes of liability' was recommended.

Differing proposals for a possible framework were made by participants. A key commonality was that participants felt it would be desirable, at an initial stage, to move away wherever possible from the specific legal labels of, among others, planning and conspiracy, command responsibility, indirect perpetration, joint criminal enterprise, common purpose, and aiding or abetting. Focus should rather be on the principles and approaches underlying the nomenclature.

One proposal was as follows:

- 1) Scene of crime perpetration
- 2) Detached perpetration
 - a. Indirect perpetration
 - b. Ordering
 - c. Instigating

¹ '[The Court shall apply:] ... (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.'

² Possible defences included: superior orders, compulsion (duress/necessity), self-defence, mistake of fact or law, reprisals, insanity, intoxication, provocation, diminished capacity/responsibility.

- 3) Detached participation
 - a. Encouraging
 - b. Assisting
- 4) Responsibility by omission
- 5) Preparatory acts
 - a. Conspiracy
 - b. Attempting
 - c. Planning
 - d. Assistance
- 6) Collective criminality

A second proposal was as follows:

- 1) Preparatory acts
 - a. Planning
 - b. Conspiracy
 - c. Attempting
 - d. Incitement
- 2) Joint commission
 - a. Essential or significant contribution
 - b. Sharing a common purpose/plan
 - c. Nature of plan: criminal
- 3) Indirect commission
 - a. Ordering
 - b. Using as a tool (innocent or culpable)
 - c. Instigation, solicitation, procuring, inducing
- 4) Assistance
 - a. Facilitating with a purpose, with knowledge, with *dolus eventualis*, and awareness of the elements of the crime
 - b. Causation: substantial
- 5) Participating in group activity
 - a. Furthering a common criminal purpose
 - i. As a member
 - ii. As a non-member associating with the group's common criminal purpose
 - iii. Sharing common purpose and accepting crimes as natural and foreseeable consequences
- 6) Omission
 - a. Non-tangible assistance
 - b. Failure to prevent or punish when in a duty to act and in control
 - c. Negligent dereliction of a duty: separate offence.