

Contents

<i>Acknowledgements</i>	v
<i>Table of Cases</i>	xi
<i>Table of Statutes and International Instruments</i>	xix
1 Introduction	1
I. Distinctive Features of International Crimes	2
II. The Need for an Account of Modes of Participation	6
III. Structure and Methodology	9
Part One: Modes of Participation in International Criminal Law	13
2 The Origins of Individual Responsibility in International Criminal Law	15
I. Introduction	15
II. Responsibility for Collective Participation at the IMTs	18
A. Formulating Principles of Liability at Nuremberg	18
B. The Prosecutions' Grand Vision	21
C. The IMT Judgments	23
i. Criminal organisations	23
ii. Conspiracy at the IMT and the IMFTE	25
II. The Apocalyptic Moment: <i>Tadić</i>	28
A. Brief Factual Background	28
B. Interpretative Stance	29
C. JCE Category I	32
D. JCE Category II	35
E. JCE Category III	37
F. <i>Tadić's</i> Conclusions on JCE	40
G. The Muddled Legacy of <i>Tadić</i>	41
3 Elements of Joint Criminal Enterprise at the ICTY	45
I. <i>Actus Reus</i>	45
A. Plurality of Persons	45
B. The Existence of a Common Plan, Design or Purpose	46
C. The Participation of the Accused in the Common Plan	55
II. <i>Mens Rea</i> for JCE I	56
A. Voluntary Participation	57
B. Shared Intent	57

III. <i>Mens Rea</i> Requirements for JCE II	58
A. Personal Knowledge of the System	58
B. Intent to Further the Criminal Purpose	60
IV. <i>Mens Rea</i> Requirements for JCE III	61
A. Intent to Participate in and Further Criminal Purpose	61
B. The Accused's Foresight and Voluntary Assumption of Risk	61
4 Variants of JCE and Other Forms of Commission at the <i>Ad Hoc</i> Tribunals	66
I. The Evolution of JCE at the <i>Ad Hoc</i> Tribunals	66
A. Special Court for Sierra Leone	66
B. Extraordinary Chambers in the Courts of Cambodia	69
C. Special Tribunal for Lebanon	73
II. New Forms of Commission at the <i>Ad Hoc</i> Tribunals	75
A. Co-perpetration and Indirect Perpetration at the ICTY and ICTR	75
B. Commission Through 'Integral' Participation at the ICTR and ICTY	78
5 'Perpetration' at the International Criminal Court	81
I. The Rome Statute and Modes of Participation	81
II. The ICC's Jurisprudence on Perpetration	85
A. Indirect Perpetration and Co-perpetration	85
B. Direct Contribution to the Crime	94
III. Conclusion	98
Part Two: The Principal in International Criminal Law	101
6 The Principal in English Criminal Law Theory	103
I. Causation and the Concept of the Principal	103
II. The Problem of the Accessory's Greater Liability	105
III. A Broader Conception of Derivative Liability	107
IV. Innocent and Semi-innocent Agency	108
V. Outcome Responsibility and Principals	113
VI. Conclusion	115
7 The Principal in German Criminal Law Theory	116
I. Forms of Participation in German Criminal Law	116
II. Theories on Parties to a Crime	117
A. Objective Theories	117
B. Subjective Theories	118
C. Act Domination or Control Theory	119

III. Categories of Perpetration	121
A. Direct Perpetration (<i>Die unmittelbare Täterschaft</i>)	121
B. Indirect Perpetration (<i>Die mittelbare Täterschaft</i>)	121
C. Co-perpetration (<i>Mittäterschaft</i>)	122
IV. <i>Organisationsherrschaft</i>	125
A. Roxin's Formulation of <i>Organisationsherrschaft</i>	125
B. Alternative Versions of <i>Organisationsherrschaft</i>	127
V. Elements of <i>Organisationsherrschaft</i>	129
A. Taut Hierarchical Organisational Structure	129
B. Fungibility of the Act Intermediaries	130
C. Detachedness from the Legal Order	132
VI. Alternatives to <i>Organisationsherrschaft</i>	134
A. Instigation	134
B. Co-perpetration	136
8 A Theory of Perpetration for International Crimes	138
I. Lessons from Domestic Criminal Law	138
II. A Theory of Perpetration for International Crimes	141
A. Rationale and Framework	141
B. Objective/ <i>Actus Reus</i> Elements	142
C. Subjective/ <i>Mens Rea</i> Elements	145
III. <i>Organisationsherrschaft</i> and Other Modes of Participation	146
A. <i>Organisationsherrschaft</i> Distinguished from Instigation	146
B. <i>Organisationsherrschaft</i> Combined with Co-perpetration	147
C. Scope for the Application of JCE	148
IV. Conclusion	150
Part Three: The Limits of Accessorial Responsibility for International Crimes	153
9 The Accessory in English Criminal Law Theory	155
I. Participation in Crime, Complicity and Causality	155
II. Distinct Modes of Secondary Liability	159
A. Aiding	159
B. Abetting and Counselling	159
C. Procuring	160
III. The Mental Element for Complicity	161
A. Requirement of Purpose	161
B. Knowledge/ Foresight of Essential Matters	163
IV. Joint Enterprise Liability	166
A. Elements and Structure of Joint Enterprise Liability	166

B. Scope of the Common Purpose and Fundamentally Different Act	167
C. Conviction for a Different Offence	170
D. Joint Enterprise as a Distinct Mode of Accomplice Liability	171
E. Justification for Joint Enterprise Responsibility	173
V. Conclusion	174
10 The Accessory in German Criminal Law Theory	176
I. The Framework for Secondary Responsibility	176
II. Instigation	180
A. The Instigator Must 'Induce' the Perpetrator	181
B. The Perpetrator Must be Able to be Induced	182
i. The <i>Umstiftung</i>	183
ii. The <i>Abstiftung</i>	184
iii. The <i>Übersteigerung</i> or <i>Aufstiftung</i>	185
C. The Intent of the Instigator	185
D. The Equivalence of the Instigator's Intent and the Perpetrator's Act	187
III. Aid	188
A. Causality and Aid	189
B. The Requirements of a Causal Risk Increase and Psychological Connection	191
C. Means of Aid and Psychological Aid	191
D. The Intent of the Aider and Excess	193
E. Neutral Actions	194
IV. Conclusion	196
11 Joint Criminal Enterprise Liability for International Crimes	197
I. Lessons from Domestic Criminal Law and Theory	197
II. Support for JCE II and JCE III in Domestic Criminal Law	201
III. JCE as a Distinct Mode of Accessorial Responsibility	205
IV. Conclusion	207
12 Conclusion	209
<i>Bibliography</i>	211
<i>Index</i>	223