I thank the organizers for inviting me. I must admit, it is a challenge to speak about Modes of Liability in 12-15 minutes. It is one of the most complex topics in substantive ICL; a topic that has generated much debate amongst practitioners and commentators, on blogs, in scholarly writing and dissenting opinions. The judgments themselves, in particular the Pre-Trial Chamber Decisions confirming charges in *Lubanga, Katanga & Ngdjo*, and the TC judgment in *Lubanga* are not easy to digest because of the complex meanderings on criminal law theory. All in all, it is a complex subject. Because of the time I will not go into details of the case law and keep it general and somewhat abstract to make my point. Hopefully, specific issues can be addressed in Q&A.

I wish to make 5 observations

1. If you had to capture in one word, *ten years ICC law on modes of liability*, you could use the German word: Alleingang. Ever since the PTC ruling in *Lubanga*, the ICC has forged a distinct path, away from the law of the *ad hoc* Tribunals. The ICC has not applied ICTY law on Modes of Liability in the same way as other international and internationalized Courts have.
   
   I can think of - at least - two reasons why the ICC has not done that. First of all, because of the much-criticized theory of Joint Criminal Enterprise (JCE). Despite its usefulness as a tool fighting systemic and
masterminded criminality, JCE has been controversial for its broad scope and for its weak legal basis.

A second reason for the ICC not to apply principles drawn from ICTY and ICTR law, is the ICC Statute itself. Article 25, subparagraph (3)(a) suggests a different approach to criminal participation than that of other international courts. This provision is unique in international law in that it explicitly recognizes the criminal mastermind as perpetrator. According to Article 25(3)(a) a joint and indirect perpetrator is a ‘principal’ despite the fact that he does not physically commit these crimes. He is liable in his own right; liability is not derived from the person who physically committed crimes.

The ICC has relied on the theory of German scholar Klaus Roxin, which provides the theoretical grounding for intellectual perpetration. Principals are those who control the will and the act of physical perpetrators whose crimes are imputed to him or her. Roxin’s theory - referred to as ‘Control of the Act’ - has been adopted in other parts of the world, mainly Spanish-speaking countries, where German scholars have assisted in criminal law reforms. Given that the Spanish approach is German-influenced, this essentially means that one legal system lies at the basis of the ‘control of the act’ approach. Just like JCE, it does not have a firm international legal basis. Still, it is a useful approach in that it captures the liability of criminal masterminds and it fits the wording of subparagraph 3(a).

2. My second observation relates to how the ICC liability scheme, inspired
by Roxin, differs from traditional, derivative, theories on MoL. This requires me to discuss two approaches to criminal participation and MoL.

Article 25(3)(a) is an expression of what has been called a ‘normative approach’ to criminal participation: the principal is the one who is ‘most responsible’ in the sense that he or she has decisive influence on the commission of the crime, without necessarily physically committing it. This contrasts to what can be termed the ‘naturalistic approach’ to liability, which takes as starting point the natural world and the reality of cause and effect. In the naturalistic approach the principal is the one who most immediately causes the actus reus/the offence. The accessory is the one who contributes to causing the actus reus. Anglo-American complicity law is the classic example of a naturalistic approach and has been applied by the ad hoc Tribunals, certainly in the initial stages.

The naturalistic system has been referred to as a bottom-up system. If you apply it to a complex structure of criminal cooperation, say an army, you start with the soldier who killed a civilian upon orders of his superior who implemented a policy issued by a government minister. The normative approach on the other hand, is a top-down system. You start with the person who has the main responsibility, the minister in our army-example, and work your way down to the smaller fry in the lower echelons of the military unit. Thus, in the Anglo-American scheme the government minister is an accessory while on the basis of a normative system like ‘Control of the Act’, he is a principal.
3. To my mind, the ICC is overdoing its Alleingang – this is my third point. The ICC has embraced ‘Control of the Act by exclusion of other theories of liability. The normative approach in Article 25(3)(a) has been taken to govern the whole of Article 25, including subparagraphs (b-d). A rigorous distinction is made between principal liability in subparagraph 3(a) and accessorial liability in paragraphs (b-d). The latter forms are regarded as less blameworthy.

I respectfully disagree with this interpretation of Article 25. The fact that article 25(3)(a) provides for intellectual perpetration and hence the normative approach, does not make it the sole theoretical grounding for the whole of Article 25. Nor does it ‘reduce’ the modalities in subparagraphs (b-d) to lesser liability. This does not comport with the text and the drafting history of Article 25. As the chairman of the Working Group on General Principles recalls, Article 25(3) posed great difficulties to negotiate; eventually a near-consensus was reached where there would be one provision covering the responsibility of principals and all other modes of participation. It was to provide the court with a range of modalities from which to choose from.

In my view, the modes of liability listed in subparagraphs (b-d) constitute the classic/naturalistic scheme of criminal participation that we find in most national criminal justice systems and at the ad hoc Tribunals. The modalities in (b-d) differ from (a) in that they are derivative or accessorial; liability depends on the principal crime. For some one who orders a crime, to be culpable the crime must have been committed. There is no rule or theory that links accessorial liability to
lesser responsibility. More specifically, there is no reason why indirect perpetrators under 25(3)(a) deserve a more severe punishment than instigators under subparagraph (b).

For that reason, there is no fundamental objection to adopting case-law of the ICTY in interpreting Article 25. The ICC, in forging a distinct path for identifying the responsibility of principals versus accessories, has been too rigorous in sharpening borders on legislative concepts. The better view is to regard article 25 as containing overlapping modalities and as incorporating two approaches to criminal participation: normative and naturalistic.

4. The question arises then why this Alleingang? Why the insistence on distinguishing between principal and accessorial liability and creating a hierarchy of liability? This is a valid question. After all, the practical value of distinguishing between principals and accessories is limited: it does not come with a sentence reduction (this was also Judge Fulford’s point in his dissent to Lubanga). Moreover, accessories are punished as principals: someone who aided and abetted rape is convicted of rape.

The answer lies in the quest for expressive justice. Value is attached to ‘fair labelling’ requiring that liability be branded in a way that it fairly represents the nature and magnitude of the law-breaking. Fair labelling accounts for the advance of the normative approach to criminal participation and the desire to adhere to the distinction between those who are culpable as principals and those who are culpable as accessories. Moreover, stigmatization through the principal status is
important bearing in mind the denunciatory and educational function of punishment. Making clear who masterminded crimes by referring to him/her as ‘principal’ who ‘commits’ crimes is important in communicating to victims and the international community as a whole, who was the ‘real’ culprit. Against this background, the naturalistic approach to criminal participation, referring to masterminds as accessories or secondary participants, seems inadequate. It is interesting to note that also at the ad hoc Tribunals the normative approach has gained ground. Think of the creation of a hierarchy of liability: aiding/abetting –JCE and development of broad, non-physical concepts of ‘commission’ at the ICTR.

5. Fifth and last observation brings me to the title of this conference: Achievements, Impact, and Challenges of the Law & Practice of the ICC. As to achievements, this is no doubt the break-through of the normative approach to criminal participation. Its impact, however, is – to my mind - greater than it should be (the exclusivity of the CoA theory).

As to challenges to the future: two temptations should be resisted. First of all, the temptation to create the perfect liability theory. The ICC Statute with its elaborate statutory definitions, general part, EoC and Article 21 on sources of law, breathes a ‘black letter law’ approach. Practice at the ICC, however, does not comport with this approach. The first decisions by PTCs constitute substantive law-making that to my mind goes well beyond the task of confirming charges. I would expect the court to take a more textual approach, guided by Article 31 of the

The second – related - temptation that should be resisted is to mould the law to fit the facts and to broaden liability theories. Here I think of the contrived findings of the PTC in Katanga & Ngdjolo with regard to the rape and sexual slavery charges that were regarded as ‘collateral crimes’. Accepting that the physical perpetrator can go beyond what is ordered and act on his own initiative, to my mind undermines the central tenet of the Control-theory, at least in its pure form. Under Roxin’s theory of Control over the Organization (a variant of the CoA) the physical perpetrators are mere cogs in the wheel and the leaders, as intellectual perpetrators, dominate their will and acts to such an extent that their compliance with orders is automatic.

Broadening and readjusting Control of the Act this way betrays a result-oriented approach and makes it vulnerable to the exact same critique as that has been voiced with regard to JCE liability.