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*The development of indirect co-perpetration by the International Criminal Court and the extent to which its development accords with the principle of legality and the principle of individual culpability*

**Master of International and European Public Law Thesis**

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## INTRODUCTION

International criminal law is a field of law that can be traced back to the establishment of the Nuremberg Tribunal in 1945 to prosecute individuals guilty of committing atrocities in the Second World War. In subsequent years, temporary Tribunals were established by means of Resolutions by the United Nations Security Council to deal with crimes in specific geographical regions.<sup>1</sup> The International Criminal Court was established on the 1st of July 2002, after 120 States adopted the Rome Statute (hereinafter “the Statute”) as the legal basis for the establishment of a permanent International Criminal Court.<sup>2</sup> The International Criminal Court (hereinafter the “ICC”) has jurisdiction over international crimes committed by nationals of State Parties to the Statute as well as crimes committed within the territory of State Parties.<sup>3</sup> In terms of Article 21(1) of the Statute, the main source of law to be applied by the Court is the Statute, the Elements of Crimes and its Rules of Procedure and Evidence.<sup>4</sup>

International criminal law targets high-level perpetrators who are usually far removed from the actual direct commission of the crime but play an essential role by ordering, planning, coordinating or facilitating its implementation. International crimes usually occur in the context of widespread atrocities perpetrated by a group of people, there is thus a “collective element” to international criminal law. As noted by the ICTY in *Prosecutor v Tadic*:<sup>5</sup>

“Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.”<sup>6</sup>

International criminal law has therefore had to develop theories of liability which are distinct from those applied at the domestic level to account for this collective nature.

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<sup>1</sup> The International Criminal Tribunal for the former Yugoslavia was set up to deal with atrocities committed in the former Yugoslavia after 1991.

<sup>2</sup> Statute of the International Criminal Court, A/Conf.183/9, 1 July 2002.

<sup>3</sup> Ibid (Article 12).

<sup>4</sup> Ibid.

<sup>5</sup> *Prosecutor v Tadic*, IT-94-1A, 15 July 1999 at Para 191.

<sup>6</sup> Ibid.

Theories of liability also referred to as “modes of liability” can be best understood as linking principles, which link the conduct of an individual to the commission of the crime.<sup>7</sup> Article 25(3)(a) of the ICC Statute enshrines the modes of liability to be applied by the ICC. The provision includes various modes of liability. Article 25(3)(a) provides for “principal liability” which applies when an individual “commits” a crime either individually, through another person or jointly with another person.<sup>8</sup> An individual “commits” a crime as required by Article 25(3)(a) where he exercises control over the commission of the crime.<sup>9</sup> Article 25(3)(b)-(d) consists of accessorial modes of liability where the individual contributes to the commission of the crime by either ordering, soliciting or inducing its commission,<sup>10</sup> aiding or abetting or otherwise assisting the commission of the crime.<sup>11</sup>

The doctrine of indirect co-perpetration is a mode of principal liability which has been applied recently by the International Criminal Court, famously in the *Katanga and Chui* decision,<sup>12</sup> the *Bemba* decision,<sup>13</sup> the *Al Bashir* decision<sup>14</sup> and most recently in the *Kenyatta and Muthaura* decision.<sup>15</sup> This mode of liability appears to be an amalgamation of joint commission and commission through another person. The Defense in the above cases argued that the doctrine neither exists in terms of a strict textual interpretation of Article 25(3)(a). Justice Christine Van Wyngaert described the doctrine as a “radical expansion” of Article 25(3)(a).<sup>16</sup> The development of the doctrine of indirect co-perpetration highlights the key challenges faced by the International Criminal Court when interpreting and applying the modes of liability in Article 25(3)(a) of the Statute.

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<sup>7</sup> Jens Ohlin ‘Second Order Linking Principles: Combining Horizontal and Vertical Modes of Liability: International Law and Practice’ in *Leiden Journal of International Law* (2013) at 2.

<sup>8</sup> Gerhard Werle ‘*Principles of International Criminal Law*, T.M.C. Asser Press (2009) at 170.

<sup>9</sup> Ibid; This concept will be elaborated on in Chapter 1.

<sup>10</sup> Article(25)(3)b).

<sup>11</sup> Article 25(3)(c) –(d).

<sup>12</sup> Situation in the Democratic Republic of Congo in the case of the *Prosecution v Germain Katanga and Mathieu Ngujolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/0, 30 September 2008.

<sup>13</sup> Situation in Central African Republic, *Prosecutor v Jean Pierre Bemba*, Decision on the Confirmation of Charges, ICC-01/05/01/08, 15 June 2009.

<sup>14</sup> Situation in Sudan, Decision of the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, ICC-02/05-01/09, 4 March 2009.

<sup>15</sup> Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta, Francis Kirimi Muthaura and Mohammed Hussein Ali*, Decision on the Confirmation of Charges, ICC-01/09-02/11, 23 January 2012.

<sup>16</sup> *Prosecutor v Francis Kirimi Muthaura and Uhuru Kenyatta*, ICC-01/09/11, Prosecutions Submissions on the Law of Indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the individual’s individual criminal responsibility, 3July 2012 at 3.

The first challenge faced by the ICC relates to upholding the principle of legality when interpreting the modes of liability. The principle of legality in the context of this thesis refers to the maxim *nullum crimen sine lege* which entails the *lex stricta* principle requiring the definition of crimes be construed strictly.<sup>17</sup> This principle has been enshrined in Article 22(2) of the Statute.

The principle also entails the *lex certa* principle which requires a crime to be clearly enshrined in law before an individual can be convicted of the crime. The latter principle is also enshrined in Article (22)(1) of the Statute.<sup>18</sup> The difficulty in regard the doctrine of indirect co-perpetration is that it is not expressly included as a mode of liability in terms of Article 25(3)(a), it is a by-product of a combination of two existing modes of liability in Article 25(3)(a) of the Statute. The question therefore is whether the development of the doctrine is in line with the *lex stricta* and the *lex certa* principle.

The second challenge relates to the doctrine's consistency with the principle of culpability. The principle of individual culpability is not specifically mentioned in the ICC Statute, but is considered to be a general principle of law which constitutes a source of applicable law before the ICC.<sup>19</sup> The principle of individual culpability is defined as the notion that a person should not be held criminally responsible for a particular act if he was not "personally engaged in or participated in some other way."<sup>20</sup> An individual is "personally engaged" if he has the requisite "intent and knowledge" of the act as defined in Article 30 of the ICC Statute.<sup>21</sup> Additionally, an individual is held to be "personally engaged" if he has requisite control over the commission of the crime, this control can be either direct or indirect.<sup>22</sup> As a form of "double vicarious liability,"<sup>23</sup> the doctrine of indirect co-perpetration potentially creates uncertainty in regard whether the individual has the requisite control for principal liability in terms of Article 25(3)(a). In turn,

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<sup>17</sup> Kenneth Gallant '*The Principle of Legality in International and Comparative Criminal Law*,' Cambridge University Press (2009) at 11; Kai Ambos 'Remarks on the General Part of International Law' in *Journal of International Criminal Justice* (2006) at 669; Article 22 of the ICC Statute.

<sup>18</sup> Ibid.

<sup>19</sup> George Fletcher and Ohlin 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' in *Journal of International Criminal Justice* (2005) at 671.

<sup>20</sup> Antonio Cassese, '*The Oxford Companion to International Criminal Justice*' Oxford University Press (2009) at 229.

<sup>21</sup> Fabian Ramindo '*General Principles of Law in the Decisions of the International Criminal Court*' Martinus Nijhoff Publishers (2008) at 80; Kai Ambos (Note 17) at 671; *Prosecutor v Tadic*, IT-94-i-T at 187, 7<sup>th</sup> May 1997; Kai Ambos 'General Principles in the Rome Statute' in *Criminal Law Forum* (1999) at 2.

<sup>22</sup> The notion of "Control over crime will be elaborated further in Chapter I."

<sup>23</sup> Ohlin (Note 7) at 10.

creating uncertainty as to whether he was “personally engaged” in the commission of the crime.

The importance of both the abovementioned principles in the domain of international criminal law must be emphasized. They are embedded in most domestic criminal law systems and are in place to protect individuals from arbitrary convictions for crimes which they did not in fact commit.<sup>24</sup> A conviction is arbitrary where it is secured through the retroactive application of a particular law or through an expansive interpretation of existing law.<sup>25</sup> Ambos argues that these principles ensure that the rights of individuals indicted before International Criminal Court are respected.<sup>26</sup> It is argued that individuals should be granted the same protections they would be granted before domestic courts.<sup>27</sup> Fletcher and Ohlin argue further that the International Criminal Court not only serves to hold those who have committed egregious crimes to account but also has an exemplary function.<sup>28</sup> In this regard, they state:

“If the ICC deviates from principles of due process and legality, it will become a teacher that will bring great harm to the world. The ICC must not only conform to the rules of fair trial; it must also exceed conventional practices of nation states and set a model for the world of how a criminal court should function.”<sup>29</sup>

Therefore, in order to maintain credibility and respect, the International Criminal Court has to uphold and respect these fundamental principles which exist to ensure the integrity and fairness of any criminal law system.<sup>30</sup>

In light of the importance of the principle of legality and the principle of individual culpability and the questions raised above in regard the doctrine of indirect co-perpetration, the research goal of this thesis is to determine firstly, how the doctrine of indirect co-perpetration was developed by the International Criminal Court and, to determine the elements of the doctrine and their scope. Secondly, having tracked the development of the doctrine and established the elements, this thesis aims to determine the extent to which the doctrine complies with the principle of legality and the

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<sup>24</sup> Mohammed Shahabuddeen ‘Does the Principle of Legality Stand in the Way of Progressive Development of Law’ in *Journal of International Criminal Justice* (2004) at 1008.

<sup>25</sup> Ibid.

<sup>26</sup> Ambos (Note 17) at 669.

<sup>27</sup> Ibid.

<sup>28</sup> Fletcher and Ohlin (Note 19) at 540.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid; Albin Eser ‘The Need for a General Part’ in M.C Bassioni ‘*Commentaries on ILC Commissions 1991 Draft Code of Crimes*,’ Martinus Nijhoff Publishers (2002) at 43.

principle of individual culpability.

The central research question of this thesis is as follows: How has the doctrine of indirect co-perpetration been developed in the case law of the ICC and to what extent does the construction and application of the doctrine of indirect co-perpetration accord with the principle of legality requirement enshrined in Article 22 of the ICC Statute and the principle of individual culpability in international criminal law?

The central research question will be determined by answering the following sub-questions:

- 1) How has the doctrine of indirect co-perpetration been developed in the case law of the ICC?
- 2) To what extent is the construction and adoption of the doctrine of indirect co-perpetration by the ICC and its elements consistent firstly, with a strict interpretation<sup>31</sup> of Article 25(3) of the Statute of the ICC and secondly, with Article 21 of the Statute?
- 3) To what extent the construction and application of the doctrine of indirect co-perpetration may compromise principle of individual culpability?

This research is theoretical and will require a desk study analysis. It involves an examination of the relevant case law on the doctrine of indirect co-perpetration in order to determine how the doctrine of indirect co-perpetration was developed by the ICC.

Chapter I of this thesis aims to firstly, unpack and outline the legal doctrines that underpin the doctrine of indirect co-perpetration namely Roxin's doctrine of co-perpetration and doctrine of indirect perpetration. Secondly, through a close examination of the case law, this Chapter will outline how these underlying doctrines were used to construct the doctrine of indirect co-perpetration.

Chapter II will determine, the extent to which the construction and adoption of the doctrine of indirect co-perpetration is consistent with the principle of legality. Chapter III will determine the

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<sup>31</sup> Article 22(2) of the Statute of the International Criminal Court provides that "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted,

extent to which the doctrine of indirect co-perpetration may compromise principle of individual culpability.



## **CHAPTER I: THE FOUNDATIONS AND DEVELOPMENT OF THE DOCTRINE OF INDIRECT CO-PERPETRATION**

This Chapter seeks to outline and explain the development of the doctrine of indirect co-perpetration in the case law of the International Criminal Court. The doctrine of indirect co-perpetration is a combination of two modes of liability of collective crimes. In order to ensure a clear understanding of the theory, this Chapter will therefore briefly outline and describe what will be termed “the foundational blocks” of the doctrine. The first Section will thus introduce the notion of collective crimes in international criminal law and briefly and simply state how the liability of principals of these collective crimes was previously regulated in international law. The Section will proceed to introduce Roxin’s “control over crime” theory which forms the basis of how collective crimes are dealt with under the Statute of the ICC. The second Section will discuss Roxin’s horizontal theory of control and the third Section will deal with the vertical theory of control.

### **i. The emergence of “control over crime”**

The nature of international crimes is such that they are not usually committed by a single actor but are usually committed by a group of people acting together sharing the same criminal goal. In such cases, not all the members of the group will have physically committed the crimes, some may have contributed in other ways such as by devising the criminal plan, financing the commission of the crime or providing weapons for the commission. International criminal law has therefore had to grapple with this phenomenon by developing modes of liability that deal with the collective nature of these crimes. Such a mode of liability has to mechanize the attribution of criminal conduct to members of the group that may not have actually physically committed the crime but were part of a common plan that entailed or resulted in the commission of an international crime.<sup>32</sup>

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<sup>32</sup> Situation in the Democratic Republic of Congo, *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803 5/157, 14 May 2007 at Para 330: “Principals to a crime are not limited to those who physically carry out the objective elements of the crime but also includes those who despite being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.” Antonio Cassese *International Criminal Law*, Oxford University Press (2007) at 176; Mahmoud C. Bassiouni *International Criminal law: Sources, Subjects and Contents*, Martinus Nijhoff Publishers (2008) at 100; Werle (Note 8) at 169.

The Pre-Trial Chamber in Lubanga held that the concept of perpetration under the Statute of the International Criminal Court is based on the “control over crime” approach propagated by German scholar, Claus Roxin.<sup>33</sup> In terms of this approach, an individual has “control over the crime” if he or she is the physical perpetrator of the crime, exercises joint control of the crime with others or has control over an organization through which he commits the crime through a subordinate.<sup>34</sup> The “control over the crime” distinguishes a principal from a mere accessory. The discussion below will focus on joint control which forms the basis of the doctrine of co-perpetration and control over an organization which is the basis of the doctrine of indirect perpetration.<sup>35</sup>

It has already been noted that the doctrine of indirect co-perpetration is a combination of two modes of liability in Article 25(3)(a) of the Statute of the International Criminal Court, namely the doctrine of co-perpetration and the doctrine of indirect perpetration. These modes of liability are therefore the foundational blocks of the doctrine of indirect co-perpetration thus in order to understand the development of indirect co-perpetration, a clear outline and description of the doctrine of co-perpetration and the doctrine of indirect perpetration is necessary. As such, the first two sections of this Chapter will describe both doctrines and the respective elements of these modes of liability.

## **ii. Control exercised horizontally: doctrine of co- perpetration**

The Statute of the International Criminal Court codifies co-perpetration as a mode of liability in Article 25(3)(a), where the Statute states that a person will be held individually responsible under the Statute where they commit a crime “jointly with another person.”<sup>36</sup>

In the *Prosecutor v Thomas Lubanga Dyilo*, the International Criminal Court dealt extensively with the issue of co-perpetration. In this regard the held:

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<sup>33</sup> Ibid at Para 338 referred to Roxin’s work: ‘Carl Roxin, *Straftaten im Rahmen organisatorischer Machtsapparate*’, *Goldammer’s Archiv für Strafrecht* (1963) translated to English: Carl Roxin, ‘Crimes as Part of Organized Power Structures,’ in *Journal of International Criminal Justice* (2011) 193–205. Also referred to in ‘Gerhard Werle ‘Individual Criminal Responsibility in Article 25 of the ICC Statute’ in *Journal of International Criminal Justice* (2007) at 962; Jens Ohlin ‘Assessing the Control Theory’ in *Leiden Journal of International Law* (2012) at 2; George P Fletcher ‘New Court Old Dogmatik’ in *Journal of International Criminal Justice* (2011) at 190.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> ICC Statute Part 4 General Principles of Criminal Law.

“The Chamber is of the view that the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realization of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all others and as a result, can be considered as a principal to the whole crime.”<sup>37</sup>

In this case the ICC made it clear that co-perpetration under the Article 25(3(a) of the ICC Statute although sharing similarities with the joint criminal enterprise (hereinafter JCE) doctrine is a distinct doctrine.<sup>38</sup>

This concept moves away from the purely subjective focus of JCE where the shared criminal intent of the members of the JCE is the basis of liability, to a mixed subjective/ objective approach centered on the essential contribution by each member of the group to the crime and the awareness of the circumstances relating to joint control over the crime.<sup>39</sup> The essence of the doctrine is that none of the members of the group singularly control the commission of the crime but that the objective elements of the crime are fulfilled through the division of essential functions between them; they thus possess joint control over the commission of the crime.<sup>40</sup>

The Pre- Trial Chamber held that, an individual will have joint control over a crime where the individual makes an essential contribution to the commission of the crime.<sup>41</sup> Such contribution is made where a member of a group has “the power to frustrate the commission of the crime by not performing their tasks.”<sup>42</sup> Therefore, according to this doctrine, the distinction between primary liability as a co- perpetrator and forms of secondary liability listed under Article 25(3)(b)-(d) of the Statute, is the existence of such an essential contribution by the individual.<sup>43</sup>

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<sup>37</sup> Lubanga (Note 32) at Para 326.

<sup>38</sup> Ibid.

<sup>39</sup> Further information on joint criminal enterprise available in Alexander Zahar and Goran Sliuter *‘International Criminal Law: A Critical Introduction,’* Oxford University Press (2007) at 221; Lubanga (Note 32) at Para 330

<sup>40</sup> Hector Olasolo ‘The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes,’ Hart Publishing (2008) at 266; Kriangsak Kittichaisarre *‘International Criminal Law,’* Oxford University Press (2001) at 236; Werle (Note 8) at 172; Kai Ambos ‘Article 25:Individual Criminal Responsibility’ in Otto Triffterer, C.H. Beck, Kai Ambos, *‘Commentary on the Rome Statute of the ICC: Observer’s Notes Article by Article,’* Oxford University Press (2008) at 750; Albin Eser ‘Individual Criminal Responsibility’ Cassese, Gaeta Jones *‘The Rome Statute of the International Criminal Court’* Oxford University Press (2002) at 789.

<sup>41</sup> Lubanga (Note 32) at Para 332; Cassese ( Note 32) at 176; Werle ( Note 8) at 170.

<sup>42</sup> Lubanga (Note 32) at Para 346.

<sup>43</sup> Ibid at Para 340.

The doctrine of co-perpetration consists of both objective and subjective elements which can be summed as follows:

*1) The existence of an agreement between a plurality of persons<sup>44</sup> and a coordinated essential contribution by each co-perpetrator:*

The theory is rooted in the idea of liability through the division of essential tasks, as such, the existence and implementation of a coordinated common plan forms one of the core objective elements of the doctrine.<sup>45</sup> The common plan need not be specifically aimed at the commission of a crime but “contain an element of criminality.”<sup>46</sup>

According to Roxin, the essential contribution has to be made at the execution stage of the crime because it is at this stage that the objective elements of the crime are fulfilled. This is to say that leaders who make contributions at the preparatory stages cannot be said to exercise joint control over the crime.<sup>47</sup> This view has however been disputed by a number of scholars who argue firstly that the dividing line between the preparatory stage and the execution stage is often blurred. Roxin acknowledged this problem and proposed a set of flexible guidelines to distinguish between the execution stage and the preparatory stage.<sup>48</sup> Secondly, although a leader may only participate in the preparatory stage but his contribution at that stage nevertheless has “the power to frustrate the commission of the crime,” thus fulfilling the key element of joint control.<sup>49</sup> The Pre-Trial Chamber in *Lubanga and Katanga* took note of these criticisms and departed slightly from a purely rigid application of Roxin’s theory by stating:

“Although some authors have linked the essential character of a task and hence the ability to exercise joint control over the crime to its performance at the execution stage of the crime, the Statute does not contain any such restriction. Designing the attack, supplying weapons, and ammunitions, exercising the power to move the previously recruited and trained troops to the fields; and/or coordinating and monitoring the activities of those troops, may constitute

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<sup>44</sup> Ibid at Para 343.

<sup>45</sup> Ibid; J. Vogel ‘How to determine Individual Criminal Responsibility in Systemic Contexts,’ in *Cahiers Defense Sociale* (2002) at 1.

<sup>46</sup> Ibid; Werle (Note 12) at 172; Casesse (Note 12) at 176);

<sup>47</sup> Eser (Note 30) at 790; Olasolo (Note 40) at 277. The plans could be certain legal policy objectives whose implementation, in certain circumstances will result in the commission of an international crime or which is undoubtedly and inevitable part of implementation.

<sup>48</sup> Ibid at 279; Neha Jain ‘The Control Theory of Perpetration’ in *Chicago Journal of International Law* (2011) at 169.

<sup>49</sup> Katanga and Chui (Note 12) at Para 491.

contributions that must be considered essential regardless of when they are exercised before or during the execution stage of the crime.”<sup>50</sup>

Indeed, a purely mechanical application of Roxin’s theory would lead to problematic consequences particularly for the doctrine of indirect co-perpetration. It would have been difficult to hold leaders at the horizontal level accountable who do not themselves exercise direct vertical control but are liable for the conduct of the subordinates of other co-perpetrators. This is because, their participation is typically only at the preparatory stages and the objective elements are necessarily carried out by the co-perpetrator with direct control and his subordinate who physically commits the crime.

2) *The individual acts with requisite mens rea of the crime as encapsulated in Article 30 of the Statute:*

Article 30 of the ICC Statute requires that an individual act with both “intent and knowledge” which includes *dolus directus* in the first degree where the individual actually meant to commit the crime this is to say that he “actually of bringing about the criminal result.”<sup>51</sup> *Dolus directus* in the second degree is where the individual “sees the criminal result as being virtually certain or highly probable.”<sup>52</sup>

A contentious issue is whether *dolus eventualis* is included within the scope of “intent and knowledge.” The definition of *dolus eventualis* is not agreed upon internationally because of its different interpretations and application domestically. The general understanding however is that it entails liability based on foreseeing the possibility of a crime occurring.<sup>53</sup> The case law is not uniform on the applicability of *dolus eventualis* under the Statute. The Pre-Trial Chamber in *Lubanga*<sup>54</sup> held that where an individual is aware of the possibility of the commission of crime and reconciles himself with this possibility by going ahead with the plan, he is considered to have the requisite *mens rea* under Article 30 of the ICC Statute.<sup>55</sup>

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<sup>50</sup> Lubanga (Note 32) Para 350.

<sup>51</sup> Knut Dorman ‘*Elements of War Crimes of the Rome Statute of International Criminal Law*’ Cambridge University Press (2003) at 491.

<sup>52</sup> Ibid.

<sup>53</sup> Ohlin (Note 32) at 9.

<sup>54</sup> Lubanga (Note 32) at 356.

<sup>55</sup> Lubanga (Note 31) at 587; Wirth (Note 8) at 990; Thomas Lieflander, ‘The Lubanga Judgment of the ICC: More than just the First Step?’ *Cambridge Journal of International Law* (2012) at 204-206; Bemba (Note 13) at Para 366.

The Pre-Trial Chamber in *Bemba*<sup>56</sup> on the other hand rejected its application under the Statute stating that merely foreseeing the possibility does not suffice.<sup>57</sup> The Prosecution would have to prove that the individual was virtually certain that the commission of the crimes would occur and reconciled himself to that possibility.<sup>58</sup>

3) *The individual and the other members of the group “must be mutually aware and mutually accept that implementing their common plan may result in the in the realization of the objective elements of the crime.”*<sup>59</sup>

4) *The individual “must be aware of the factual circumstances enabling him to jointly control the crime.”*<sup>60</sup>

### **iii. Control exercised vertically: doctrine of indirect perpetration**

The notion of indirect perpetration also referred to as “perpetration by means” or “commission through another person” was unregulated by international criminal law before the establishment of the International Criminal Court. It was however a recognized mode of liability in certain national jurisdictions.<sup>61</sup> Article 25(3)(a) of the Statute of the International Criminal Court establishes indirect perpetration as the third mode of principal liability where it states that a person will be held individually responsible where they commit a crime “through another person.”<sup>62</sup>

The doctrine is based on the idea that although leaders may not physically fulfill the objective elements of the crime, they can be held liable as a perpetrator- by- means because they use a subordinate as a “tool” or “instrument” through whom they commit the crime.<sup>63</sup> They do so by

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<sup>56</sup> Bemba (Note 13) at Para 366-9.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid at Para 360.

<sup>60</sup> Lubanga (Note 31) at Para 366.

<sup>61</sup> Ambos (Note 40) at 750- The German Supreme Court applied this mode of liability in the East German Border Trials where they held generals of the National People’s Army and members of the National People’s Army liable as indirect perpetrators. This mode of liability has also been applied by Courts in Argentina, Spain, Peru and Chile.

<sup>62</sup> ICC Statute Part 4 –General Principles of Law.

<sup>63</sup> Ambos (Note 40) at 750; Gerhard Werle and Burghardt ‘Indirect Perpetration: A perfect fit for International Prosecution of Armchair Killers’ in *Journal for International Criminal Justice* (2011) at 87; Gerhard Werle ‘Individual Criminal Responsibility in Article 25 of the ICC Statute’ in *Journal of Internal Criminal Justice* (2007) at 986; Werle (Note 8) at 178; Cassese(Note 32) at 177; Floria Jessberger and Julia Geneuss ‘On the Application of a Theory of Indirect Perpetration in Al Bashir’ in *Journal of International Criminal Justice* (2008) at 859.

means of exercising control over the will of the tool.<sup>64</sup> The doctrine was propagated by Roxin under the “control over crime” umbrella.<sup>65</sup> He asserted that the basis for the principal’s liability is that he/she controls the will of the tool as such he is termed the “perpetrator behind the perpetrator (*Tater Hinter dem Tater*).”<sup>66</sup> In the sphere of international criminal law, this mode of liability typically applies to government and military leaders, rebel leaders or leaders of political parties who commit international crimes through subordinates in their respective organizations.<sup>67</sup> As such, under this mode of liability, the perpetrator exercises “control over the crime” by means of “control over the organization.”<sup>68</sup> (*organizationsherrschaft*)

The Pre-Trial Chamber in Katanga and Chui held that such “control over the organization” is the primary objective element of indirect perpetration.<sup>69</sup> The second and third objective elements constitute the pre-requisites for such control.<sup>70</sup> Firstly, the organization must be predicated on a clear hierarchical structure whereby subordinates act on orders and instruction from the leaders of the organization.<sup>71</sup> Secondly, the hierarchal relations must be such that orders from the superiors are “secured by an almost automatic compliance with orders.”<sup>72</sup> In this regard, the leader’s control is such that if one subordinate does not comply, they can be easily replaced with another.<sup>73</sup> This type of control over the organization distinguishes an Article 25(3)(a) principal from an accessory who is also a leader of an organization in Article 25(3)(b).<sup>74</sup> Roxin further asserted that the organization must be one that frequently “acts outside the law” this is to say that criminal orders to subordinates have been made on more than one occasion.<sup>75</sup> This element seems to have been ignored by the ICC who perhaps was wary of including such a requirement since typically

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<sup>64</sup> Ibid

<sup>65</sup> Roxin (Note 32)

<sup>66</sup> Katanga and Chui (Note 29) at Para 495.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid at Para 499; Thomas Weigend ‘Perpetration through an Organization’ in *Journal of International Criminal Justice* (2011) at 93.

<sup>69</sup> Ibid at Para 500.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid at Para 511.

<sup>72</sup> Ibid at Para 515.

<sup>73</sup> Ibid.

<sup>74</sup> See Roxin (Note 32) above: Claus Roxin, ‘Crimes as Part of Organized Power Structures,’ in *Journal of International Criminal Justice* (2011), 193–205 referred to in: Casesse (Note 12) at 177 as well as by Pre-Trial Chamber in Katanga and Chui at 577.

<sup>75</sup> Olasolo (Note 40) at 120.

international crimes are committed by governments and or political organizations that may not previously given criminal orders but then do so to fulfill a particular political objective.<sup>76</sup>

The subjective elements of this mode of liability were not clearly specified by the International Criminal Court in neither the *Katanga and Chui* case nor the *Al Bashir* case in which the mode was discussed. This is because in these cases indirect perpetration was then infused with co-perpetration, hence, the objective elements of indirect perpetration were clearly stipulated in the theoretical discussion but the subjective elements seem to have been subsumed in the application of the combined theory making it difficult to ascertain what exactly the subjective elements are. Presumably, fulfillment of the general subjective element in Article 30 of the Statute and of any *dolus specialis* suffices for this mode liability.<sup>77</sup> Olasolo adds that additionally:

“The individual must be aware of the hierarchical structure of his organization, his position within such a hierarchical structure and the replaceable character of the physical perpetrators”<sup>78</sup>

A key criticism of this doctrine is its potential implications on the principle of culpability in cases where the conduct of a subordinate in an organization is attributed to a senior leader who does not have sufficient direct control over that subordinate.<sup>79</sup> Such a situation may, in the context of a complex organization with several intermediaries between the top echelon and the low level physical perpetrators.<sup>80</sup> It could be argued the senior leaders who constitute the top echelon do not actually have sufficient control because of the intermediaries in-between who actually give the physical perpetrators the orders.<sup>81</sup> This criticism is an important one as it takes form in the context of indirect co-perpetration where in some cases there is no link between the senior leader and the actual physical perpetrator instead liability as an indirect perpetrator is attributed through the

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<sup>76</sup> Ibid; Weigend (Note 40) at 93.

<sup>77</sup> “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge, that is: i. if the person is aware that a circumstance exists or a consequence will occur in the ordinary course of events, and ii. If the person means to engage in the relevant conduct and means to cause the relevant consequence or is aware that it will occur in the ordinary course of event.”

<sup>78</sup> Olasolo (Note 40) 125.

<sup>79</sup> Ambos (Note 33) at 751.

<sup>80</sup> In response to these type of criticisms, Roxin asserted that both the top echelon and the intermediary leaders can be held liable as indirect perpetrators. The senior leaders exercised control over the intermediaries who automatically comply with their orders by ordering the lower subordinates to commit the crime. In turn, the intermediary is liable because his orders are automatically complied with thus exercising sufficient control in Olasolo (Note 14) at 122.

<sup>81</sup> Ibid;



doctrine of co-perpetration. This difficulty will be discussed further below and its legality implications elaborated in Chapter II.

**iv. Combining Roxin’s horizontal and vertical control theories: doctrine of indirect co-perpetration**

In the context of crimes committed in an organization whereby a senior leaders jointly control the commission of a crime through use of subordinates who physically perform the tasks, neither the doctrine of joint control nor the doctrine of indirect perpetration correctly capture the combined vertical and horizontal elements of these factual circumstances.<sup>82</sup> This is the prime policy reason for the development of the doctrine of indirect co-perpetration. It is important firstly to distinguish the doctrine of indirect co-perpetration based on the “control over crime approach” and the concept of JCE at the leadership level.<sup>83</sup> The latter is a variant of JCE and is based on the subjective notion of shared intent. The focus on this thesis is the doctrine of indirect co-perpetration as applied by the ICC based on the abovementioned “control over crime approach.”

The doctrine of indirect co-perpetration was introduced by the International Criminal Court in *Katanga and Chui* in 2008, where it was first discussed and applied by the International Criminal Court. The case concerned Germain Katanga, a military chief of the *Force de Resistance en Ituri* “FRPI” a Ngiti combatant group<sup>84</sup> in the Democratic Republic of Congo. Mathieu Ngudjolo Chui was a colonel in the *Front des Nationalsites ET Integriationniste* “FNI.” Katanga and Chui adopted a common plan to take over Bogoro village; whose residents were of predominantly Hema ethnicity, in order to topple the provincial government in the area.<sup>85</sup>

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<sup>82</sup> Olasolo (Note 40) at 329; Ohlin (Note 7) at 2; Shahar Eldar ‘Indirect Co-Perpetration’ in *Criminal Law and Philosophy* (2013) at 2; Werle (Note 8) at 180; Cassese (Note 13) at 177; Wirth (Note 8) at 984; Harmen G van der Wilt ‘The Continuous Quest for Proper Modes of Liability’ in *Journal of International Criminal Justice* (2009) at 312.

<sup>83</sup> Ibid.

<sup>84</sup> *Katanga and Chui* (Note 12) at Para 6; Please note that the doctrine of indirect co-perpetration was applied by the ICTY in *Prosecutor v Stakic* IT-92-24-T, 31 July 2003. The applicability of this mode of liability was later overturned by the Appeals Chamber IT-97-24-A at 23, the Appeal Chamber’s reasoning was simply that indirect co-perpetration under the umbrella of Roxin’s control theory was not in line with customary international law, rather ‘jce’ was the appropriate form of liability for the case. The details of the Appeals Chamber’s reasoning are beyond the scope of this thesis since the focus here is indirect co-perpetration under the Statute and case law of the ICC.

<sup>85</sup> *Katanga and Chui* (Note 12) at Para 5 and 11.

Katanga and Chui implemented their common plan by means of exercising vertical control over the subordinates of their respective organizations whom they ordered to attack the village of Bogoro. The contribution of each was essential because the Ngiti combatant group would only take orders and commands from Katanga who was Ngiti and the Lendus would only take orders from Chui who was Lendu.<sup>86</sup> As such if either had refused to give orders to their respective combatant group, the plan would have been frustrated; they thus greatly depended on each other for the implementation of the common plan. Given the horizontal and vertical dynamic of their participation, the Pre-Trial Chamber therefore determined that the doctrine of indirect co-perpetration was the most appropriate mode of liability in this case.<sup>87</sup>

In response to the Defense's argument that the doctrine of indirect co-perpetration does not exist under the Statute of the International Criminal Court, the Pre-Trial Chamber presented a teleological argument stating:

“The Chamber noted that Article 25(3)(a) uses the connective “or”, a disjunction (or alternation). Two meanings can be attributed to the word “or”-one known as weak or inclusive and the other strong or exclusive. An inclusive disjunction has the sense of “either one or the other, but not both” whereas an exclusive disjunction has the sense of “either one or the other but not both. Therefore, to interpret the disjunction in Article 25(3)(a) of the Statute as either “inclusive” or “exclusive” is possible from a strict textual interpretation. In the view of the Chamber, basing a person's criminal responsibility upon the joint commission of a crime through one or more persons is therefore a mode of liability in accordance with the Statute.”<sup>88</sup>

The Pre-Trial Chamber further substantiates its arguments by stating that there are no legal reasons to prohibit the application of the doctrine, if anything, it is the most appropriate way of holding senior leaders in these factual circumstances accountable.<sup>89</sup>

The Chamber then outlines the objective and subjective elements of this mode of liability. These elements are simply a combination of the elements of both the doctrine of co-perpetration and the doctrine of indirect perpetration. In sum, the elements of this mode of liability are as follows: i) control over the organization; ii) organized and hierarchical apparatus of power; iii) execution of

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<sup>86</sup> Ibid at Para 493.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid at Para 492.

<sup>89</sup> Ibid at Para 492.

the crimes secured by almost automatic compliance with orders; iv) the existence of a common plan or agreement; v) the coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime; vi) the suspects must carry out the subjective elements of the crimes vii) the suspects must be mutually aware and mutually accept that implementing their common plan will result in the realization of the objective elements of the crimes; viii) the suspects must be aware of the factual circumstances enabling them to control the crimes jointly.<sup>90</sup>

The Pre-Trial Chamber also noted that the doctrine of indirect co-perpetration may apply in the following situation:

“An individual who has no control over the person whom the crime would be committed cannot be said to commit the crime by means of that other person, However, if he acts jointly with another individual-one who controls the person used as an instrument -these crimes can be attributed to him on the basis of mutual attribution.”<sup>91</sup>

The doctrine was similarly applied in the *Bemba* Warrant of Arrest case.<sup>92</sup> In this case Jean Pierre Bemba, commander-in-chief of the rebel movement, *Mouvement pour la Liberation du Congo* “MLC.” Bemba and Angel-Felix Patasse concluded an agreement whereby Patasse would support Bemba logistically in his fight against the President of the Democratic Republic of Congo. In return, the MLC would support Patasse in his fight against the President of the Central African Republic.<sup>93</sup> There was a clear common plan which was to be implemented by means of orders to their subordinates, as in *Katanga and Chui* they were mutually dependent on each other. The doctrine of indirect co-perpetration was thus applied.<sup>94</sup>

In the cases discussed above, the co-perpetrators were indirect perpetrators in the sense that they exercised control over their respective organizations and were also co-perpetrators in the sense that they were part of a common plan with other indirect perpetrators to commit a crime. The conduct committed by the subordinates of each individual was attributed to the other on the basis of the existence of the common plan and their contribution to the common plan.

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<sup>90</sup> Ibid at Para 495.

<sup>91</sup> Ibid.

<sup>92</sup> Bemba (Note 13).

<sup>93</sup> Ibid at Para 45.

<sup>94</sup> Ibid at 320.

The *Kenyatta and Mathura*<sup>95</sup> and *Al Bashir*<sup>96</sup> cases where the doctrine was also applied presented different factual circumstances. In the former, Kenyatta and Muthaura, established a common plan to keep their political party (PNU) in power.<sup>97</sup> The plan necessarily entailed the commission of crimes against humanity as they sought to intimidate members of the opposition party (ODM). Kenyatta and Muthaura did not directly commit the crimes but concluded an agreement with the Mungiki, a Kenyan militia group.<sup>98</sup> The Pre-Trial Chamber found that the objective elements were satisfied in that firstly, there was a common plan between the two individual and others.<sup>99</sup> Secondly, they both made an essential contribution through “exercising the authority over the Mungiki,” such that their actions led to the automatic compliance of the Mungiki militiamen who were the actual physical perpetrators.<sup>100</sup>

The set of facts in *Kenyatta and Mathura* and *Al Bashir* are unique in that both co-perpetrators were exercising vertical control over the same organization unlike in *Katanga and Chui*, and *Bemba*. In these cases there is thus “joint control” over the organization, what has been termed the “junta model” in scholarly literature.<sup>101</sup> The individuals are both co-perpetrators and indirect perpetrators, their conduct therefore fulfills the elements of both the doctrine of co-perpetration and the doctrine of indirect perpetration, and the latter need not be imputed.

An analysis of the above case law according to Jens Ohlin determines the existence of three possible manifestations of this doctrine.<sup>102</sup> The first manifestation is where an individual is both an indirect perpetrator and a co-perpetrator in the “joint control” type of cases as in *Kenyatta and Al Bashir*. This is to say that the doctrine will apply when the requirements of both “foundational modes liability” are satisfied namely “the doctrine of co-perpetration” and the “doctrine of indirect perpetration.” The individual in these types of cases controls either another person or an organization in terms of *organisationsherrschaft* and uses either the person or the organization to

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<sup>95</sup> Kenyatta (Note 15).

<sup>96</sup> Ibid.

<sup>97</sup> Ibid at Para 288.

<sup>98</sup> Ibid at Para 289.

<sup>99</sup> Ibid at Para 398.

<sup>100</sup> Ibid at Para 416.

<sup>101</sup> Olasolo (Note 40) at 330; Ohlin (Note 7) at 6.

<sup>102</sup> Ibid at 3; It should be noted that Shahar Eldar in his article ‘Indirect Co-perpetration’ in *Criminal Law and Philosophy Journal* (2013) identified four manifestations. This thesis will follow Ohlin’s approach because Ohlin writes about the manifestations in the framework of International Criminal Law, as opposed to Eldar who writes about the doctrine in the context of domestic law.

make an essential contribution to a common plan and is thus a co-perpetrator.<sup>103</sup> The latter manifestation will be termed “Version A.”<sup>104</sup>

The second manifestation is where the individual has control of an organization or another person and acts together with another indirect perpetrator to implement a common plan. The conduct of the subordinates of the co-perpetrator’s organization will be attributed to him as in *Katanga and Chui* and *Bemba*.<sup>105</sup> The third manifestation is where the individual does not exercise control over an individual or organization but is an indirect co-perpetrator because he exercises joint control with another who exercises control of an individual or organization.<sup>106</sup> The latter two situations in which the individual is not an indirect perpetrator in the strict sense but becomes one through attribution will be termed “Version B.”

Both manifestations of the doctrine of indirect co-perpetration give rise to issues affecting the principle of legality and the principle of individual culpability. The next Chapter will elaborate on the extent to which both manifestations are consistent the principle of legality as enshrined in Article 21 and 22 of the ICC Statute.

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<sup>103</sup> These are the “junta” type cases discussed in Chapter 1. See the facts of *Al Bashir*.

<sup>104</sup> Ohlin (Note 32) at 2; Eldar (Note 80) at 2; Van der Wilt (Note 80) at 312; Stefano Manacorda and Chantal Meloni ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law’ in *Journal of International Criminal Justice* (2011) at 174.

<sup>105</sup> *Katanga and Chui* (Note 12); *Bemba* (Note 13).

<sup>106</sup> *Katanga and Chui* at Para 495.

## CHAPTER II: THE CONSISTENCY OF THE DOCTRINE OF INDIRECT CO-PERPETRATION WITH THE PRINCIPLE OF LEGALITY

This Chapter seeks to determine the extent to which the construction and adoption of the doctrine of indirect co-perpetration by the ICC and its elements are consistent firstly, with a strict interpretation<sup>107</sup> of Article 25(3) of the Statute of the ICC. Secondly, it seeks to determine the extent to which the doctrine is consistent with Article 21 of the Statute. The latter provision provides a hierarchical description of the sources of law to be applied by the Court.

### i. Consistency of the doctrine of indirect co-perpetration with Article 25 of the Rome Statute

As established in Chapter I, the Pre-Trial Chamber in *Katanga and Chui* advanced a teleological argument in support of the development of the theory.<sup>108</sup> They held that the word ‘or’ between “commission jointly with another” and “commission through another” in Article 25(3)(a) constitutes an inclusive disjunction.<sup>109</sup> The discussion below will determine the relative consistency of “Version A” and “Version B” with Article 25 of the Statute separately.

#### a. Version A

The combination of Roxin’s doctrine of co-perpetration and indirect co-perpetration in Version A type situations is generally undisputed. Ohlin argues that the combination is justified when the individual satisfies the requirements for both doctrines.<sup>110</sup> In this regard, Weigend says:

“Indirect co-perpetration is not a new legal invention but simply a factual coincidence of two recognized forms of perpetration.”<sup>111</sup>

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<sup>107</sup> Article 22(2) of the Rome Statute provides that “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.” Statute of the International Criminal Court, A/Conf.183/9, 1 July 2002; William Schabas ‘*The International Criminal Court: A Commentary on the Rome Statute*,’ Oxford University Press (2010) at 74; Kai Ambos ‘Commentary on Article 22,’ in Otto Triffeter, Kai Ambos, C.H.Beck ‘*Commentary on the Rome Statute: Observer’s Notes Article by Article*,’ Oxford University Press (2008) at 74.

<sup>108</sup> Situation in the Democratic Republic of Congo in the case of the Prosecution v Germain Katanga and Mathieu Ngujolo Chui, Decision Confirming Charges, ICC-01/04-01/07, 30 September 2008.

<sup>109</sup> Ibid.

<sup>110</sup> Jens Ohlin, ‘Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability’(2013) in *Leiden Journal of International Law* at 5 and 6; Mansui Sgenyojo ‘The International Court Arrest Warrant Decision for President Al Bashir of Sudan’ in *Journal of International Criminal Justice* (2011) at 215; Shane Darcy ‘*Collective Responsibility and accountability under International Law: Procedural Aspects of International Law Monograph Series*,’ Transnational Publishers (2007) at 179.

Judge Van Wyngaert in a Concurring Opinion in *Ndudjolo Chui*<sup>112</sup> argues that different modes of liability under the Statute may be combined provided that the elements of each mode are proven by the Prosecution.<sup>113</sup> The issue that arises is whether the combination of the two modes of liability as a form of judicial development through a teleological interpretation of Article 23(3)(a) is permitted under the *lex stricta* principle. If so, then the development of the doctrine by the ICC is consistent with a strict interpretation of Article 25(3)(a).<sup>114</sup>

Prominent legal jurist H.L.A Hart found that every legal rule consists of a “core” and a “penumbra.”<sup>115</sup> The former consists of cases where the rule is clear and certain.<sup>116</sup> The penumbra constitutes the unclear area being the areas where judicial interpretation is required.<sup>117</sup> Hart gives an example of a rule stating that “all vehicles are prohibited from the park.”<sup>118</sup> It is clear that no cars would be allowed so the prohibition of cars is part of the “core” of the rule. It is not as clear whether skateboards would fall under the rule, this would therefore fall under the penumbra of doubt so the judges would have to develop the law to include skateboards.<sup>119</sup> The point being illustrated is that there are always “grey areas” in any piece of law, leaving room for judicial development. This argument is further substantiated by the following quote by the following quote in *K.H.W v Germany* before the European Court of Human Rights:

“However clearly drafted a provision of criminal law may be, in any legal system, 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.”<sup>120</sup>

In *C.R v United Kingdom*, the European Court of Human Rights held:

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<sup>111</sup> Thomas Weigend ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’ in *Journal of International Criminal Justice* (2011) at 110; Gerhard Werle ‘Principles of International Criminal Law’ (2<sup>nd</sup> ed), T.M.C. Asser Press (2009) at 180.

<sup>112</sup> Judge Van Wyngaert Concurring Opinion in *Prosecutor v Mathhieu Ngudjolo Chui* ICC-01/04-02/12-4 1/34 SL T, 18 December 2012.

<sup>113</sup> *Ibid* at Para 62.

<sup>114</sup> Mohamed Shahabuddeen ‘Does the Principle of Legality Stand in the Way of Progressive Development of Law’ in *Journal of International Criminal Justice* (2004) at 1012.

<sup>115</sup> H.L.A. Hart ‘Positivism and the Separation of Law and Morals,’ (1958) *Harvard Law Review* (cited in Anthony D Amato ‘*Jurisprudence: A Descriptive Normative Analysis of Law*,’ Martinus Nijhoff Publishers (1984) at 133.

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*.

<sup>120</sup> *K.H.W.v Germany*, 372001/97, 22 March 2001 at 85; Shahabuddeen (Note 123) at 1012.

“The principle of *nullum crimen lege* cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case provided the resultant development is consistent with the essence of the offence and could be reasonably foreseen.”<sup>121</sup>

Similarly, in *Prosecutor v Alsovski* the ICTY held:

“The principle of *nullum crimen sine lege* does not prevent a Court either national or international from determining an issue through a process of interpretation and clarification as to the elements of a particular crime.”<sup>122</sup>

In line with the above reasoning, it can be argued because judicial development is inevitable; the *lex stricta* principle therefore does not preclude the development of the law through judicial interpretation provided it does not radically transform the elements of the mode liability.<sup>123</sup> Version A as a form of judicial development through teleological interpretation therefore does not pose any severe threat to the principle of legality as it still applies the elements of the recognized modes of liability under Article 25(3) (a) of the Statute.<sup>124</sup>

The above finding however is based on the assumption that the “foundational blocks” of the doctrine namely the doctrine of co-perpetration and the doctrine of indirect perpetration constructed in terms of the “control over crime approach” are consistent with Article 25 of the Statute. Therefore, in order to provide a thorough determination of whether Version A is consistent with the Statute it is necessary to determine whether the “foundational blocks” and the premise upon which they are based “the control over crime approach” are consistent with a strict interpretation of the Statute.

### ***The doctrine of co-perpetration***

The elements of this doctrine have already been outlined in Chapter I. Several arguments have been advanced in regard the consistency of the doctrine with Article 25(3)(a) of the Statute. The first argument relates to the common plan as an objective element under the doctrine.<sup>125</sup> In terms

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<sup>121</sup> Ibid; *C and R v the United Kingdom*, A.335-C, 22 November 1995 at 34.

<sup>122</sup> Ibid; *Prosecutor v Aleksovski*, I.T-95-14/1-A, 24 March 2000 at 127.

<sup>123</sup> Joseph Powderly ‘Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos’ in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (2010).

<sup>124</sup> Stefano Manacorda and Chantal Meloni ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law in *Journal of International Criminal Justice* (2011) at 176.

<sup>125</sup> Trial Chamber in Lubanga held “Whether the particular contribution of the individual results in liability as a co-perpetrator is to be based on an analysis of the common plan and the role that was assigned to, or was assumed by the



of Article 25(3)(a) of the Statute, an individual is criminally responsible when he “commits a crime jointly with another.”<sup>126</sup> Judge Van Wyngaert argues that on a strict reading of Article 25(3)(a) together with Article 30 of the Statute<sup>127</sup> an individual is criminally responsible for committing a crime “jointly with another” when firstly, his conduct is linked to the fulfillment of the material elements of the crime. Secondly, he is aware of his contribution to the fulfillment of the material elements of the crime.<sup>128</sup>

A mode of liability is a linking principle; it is intended to link the conduct of an individual to the commission of a crime.<sup>129</sup> The doctrine of co-perpetration is problematic to the extent that it shifts focus from the link with the material elements of the crime to the common plan.<sup>130</sup> This shift in focus is evidenced by the fact that the doctrine requires as an objective element that the individual’s essential contribution to the fulfillment of the material elements be in the framework of a common plan.<sup>131</sup>

Judge Van Wyngaert argues that the existence of a common plan should not be an objective element but rather a subjective element proving shared intent to commit a crime between the co-perpetrators.<sup>132</sup> This view is echoed by Judge Fulford in a Separate Opinion in *Lubanga*.<sup>133</sup> It is important to point out that this is not a problem to the extent that the plan is a criminal one because in such case the plan itself consists of the fulfillment of the material elements of the crime.<sup>134</sup> The problem arises where the plan is a non-criminal one as in *Lubanga* where it was held that although the plan was not a criminal one; the implementation of the plan entailed an objective risk that a crime would be committed.<sup>135</sup> In such a case, the “*mens rea* and *actus reus*

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co-perpetrator, according to the division of tasks, what is decisive is whether the co-perpetrator performs an essential role in accordance with the common plan.” *Prosecutor v Lubanga* (Trial Chamber) ICC-01/04-01/06, 14 March 2012 at Para 1000.

<sup>126</sup> Article 25(3) (a) Rome Statute.

<sup>127</sup> Judge Van Wyngaert Concurring Opinion (Note 112); Article 30 provides that “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”

<sup>128</sup> Ibid; Neha Jain ‘The Control Theory of Co-Perpetration’ in *Chicago Journal of International Law* (2011) at 167.

<sup>129</sup> Ohlin (Note 110) at 2.

<sup>130</sup> Judge Van Wyngaert Concurring Opinion (Note 112) at Para 34.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid at Para 32. This view is shared by Jens Ohlin in ‘Joint Intentions to Commit International Crimes’ (2010) in *Chicago Journal of International Law* (2011) at 694-752.

<sup>133</sup> Judge Fulford in *Prosecutor v Lubanga*, at Para 15.

<sup>134</sup> Judge Van Wyngaert Concurring Opinion (Note 112) at Para 34.

<sup>135</sup> *Prosecutor v Lubanga* (Pre-Trial Chamber) ICC-01/04-01/06 , 14 May 2007 at Para 377.

are linked to the common plan,”<sup>136</sup> as opposed to the material elements of the crime. The doctrine of co-perpetration is thus arguably inconsistent with a strict interpretation of Article 25(3)(a) to the extent that it shifts emphasis from linking the individual with the material elements of the crime.<sup>137</sup>

The second argument advanced in regard the consistency of the doctrine with Article 25(3)(a) of the Statute is that there is nothing in the Statute to suggest that an “essential contribution” is required. Judge Fulford argues that on a strict interpretation of the provision a simple *conditio sine qua non* is required.<sup>138</sup> The latter requires that it be proven that the crime would not have been committed but for the conduct of the individual, this is also known as the “*but for*” test in common law jurisdictions.<sup>139</sup> Ambos disputes this argument and instead argues that essentiality is embedded in the framework of Article 25(3)(a). The basis of his argument is that essentiality is necessary to distinguish between principals and accessories in Article 25.<sup>140</sup> He argues that principals make a greater contribution than accessories, who make a lesser contribution. In line with reasoning, he argues that because principals make a greater contribution, their contribution is necessary for the successful implementation of the common plan, as such, their contribution is essential.<sup>141</sup>

A further criticism in regard the essential contribution requirement is that it results in hypothetical judicial creativity.<sup>142</sup> When a case is before the Court, in determining *ex post facto* whether the crime would have been frustrated if the individual had not made his contribution, the Court necessarily engages in speculation.<sup>143</sup> This is particularly problematic when the essential contribution requirement is combined with the doctrine of indirect perpetration in terms of

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<sup>136</sup> John D.Cioriari ‘Liberal Legal Norms and Collective Criminality,’ in *Michigan Law Review* (2011) at 1114.

<sup>137</sup> Jens Ohlin ‘Assessing the Control Theory’ in *Leiden Journal of International Law* (2013) at 4.

<sup>138</sup> Judge Fulford (Note 127) Para 15. This is to say that ‘All that must be shown is a simple operative link between the individual’s contribution and the commission of the crime.’

<sup>139</sup> The Legal Dictionary <http://legal-dictionary.thefreedictionary.com/Conditio+sine+qua+non>; Factual Causation in English Criminal Law [http://en.wikibooks.org/wiki/English\\_Criminal\\_Law#Factual\\_Causation](http://en.wikibooks.org/wiki/English_Criminal_Law#Factual_Causation).

<sup>140</sup> Kai Ambos ‘*The Treatise on International Criminal law Volume 1: The Foundations and General Part*,’ Oxfors University Press (2013) at 147.

<sup>141</sup> Ibid.

<sup>142</sup> Ohlin (Note 110) at 2; Judge Van Wyngaert Concurring Opinion at 33; *Prosecutor v Kenyatta* Public Document Prosecution’s Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the individuals’ individual criminal responsibility ICC - 01/09-02/11-444 03 07-2012 1/25 RHT at Para 10; Thomas Weigend ‘Intent Mistake of Law and Co-perpetration in the Lubanga Judgment’ in the *Journal of International Criminal Justice* (2008) at 480.

<sup>143</sup> Ibid.

Version A. This is apparent in junta type situations where several individuals exercise control over an organization. It becomes difficult to prove whether the absence of one of their contributions would have frustrated the commission of the crime assuming they all wield control over the organization, this is to say that they each have power to secure automatic compliance with orders.<sup>144</sup>

A third argument advanced is that on the application of the doctrine of co-perpetration in *Lubanga*, an individual who is far away from the commission of the crime can still be held responsible as a co-perpetrator in terms of Article 25(3)(a) as long as they provide an essential contribution.<sup>145</sup> This is to say that those who provide an essential contribution at both the planning stage and the execution stage can be held responsible as co-perpetrators. Ohlin argues that such an approach provides no limit to the potential remoteness of the contributions and makes the accessory modes of liability enshrined in Article 25(3) (b)-(d) redundant.<sup>146</sup> The latter modes are designed for those who participate at a distance. Jain further argues that “there is merit in the argument that since perpetration is tied to the realization of the elements of the offense, co-perpetration must consist of joint domination of the implementation of these elements and thus must exist during the execution stage.”<sup>147</sup>

It has been repeatedly stated that on a strict interpretation of Article 25(3)(a) an individual is responsible as a co-perpetrator when his conduct is linked with the fulfillment of the material elements of the crime. To the extent that the doctrine of co-perpetration allows for an individual that is so far removed from the commission of the crime that his conduct is not directly linked to the fulfillment of the material elements of the crime to be considered a co-perpetrator, the doctrine is inconsistent with a strict interpretation of Article 25(3)(a).

### ***The doctrine of indirect perpetration***

The main arguments in regard the consistency of the doctrine of indirect perpetration with Article 25(3)(a) of the Statute pertain to the *organisationsherrschaft* aspect of the doctrine. It has been

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<sup>144</sup> Hector Olasolo ‘The Criminal Responsibility of Senior Political and Military leaders as principals to international crimes’ (2010) at 266; See Objective elements of indirect perpetration requirements in Chapter I; Harmen Van Der Wilt ‘The Continuous Quest for Proper Modes of Liability’ in *Journal of International Criminal Justice* (2009) at 313.

<sup>145</sup> Lubanga Trial Chamber (Note 135) at Para 1003 and 1004.

<sup>146</sup> Ohlin (Note 110) at 6.

<sup>147</sup> Jain (Note 128) at 168.

argued that Article 25(3)(a) clearly stipulates that an individual will be criminally responsible if they “commit a crime through another person” and not “through an organization.” There is nothing in the Statute to suggest that the drafters intended ‘person’ to be expansively interpreted so as to include commission through an organization.<sup>148</sup>

Some scholars challenge this argument by arguing that the organization is merely a tool. Indeed, in terms of Roxin’s theory, the individual’s control of the direct perpetrator’s will is secured through his control of a hierarchical organization in which automatic compliance is secured.<sup>149</sup> This may be true, but on a plain and strict reading of Article 25(3)(a), in order for an individual to be held responsible as an indirect perpetrator the Prosecution must prove that he “controlled the will of another.”<sup>150</sup> It is not enough therefore that he exercised control over an organization albeit that automatic compliance could be secured through that organization.

Furthermore, the drafters of the Statute of the ICC explicitly excluded the criminal responsibility of organizations.<sup>151</sup> They further rejected the individual criminal responsibility of a leader of a corporation who acted on behalf of an organization and in the course of its activities.<sup>152</sup> Ambos points out that the main reason the drafters rejected this type of responsibility, is that it would shift focus from the individual.<sup>153</sup> It is therefore clear that the drafters were wary of any liability based on the collective. The application of *organisationsherrschaft* in Article 25(3)(a) thus arguably constitutes an expansive interpretation of “commission through another” and is thus inconsistent with Article 25(3)(a) of the Statute.

### ***The premise of the doctrine***

Thus far, this Chapter has discussed arguments raised against the consistency of the two “foundational blocks” of the Version A doctrine of indirect co-perpetration with Article 25(3)(a). This section will look at the consistency of the premise upon which the doctrine was developed.

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<sup>148</sup> Justice Van Wyngaert (Note 112) at Para 52; Ohlin (Note 110) at 9; Florian Jessberger and Julia Geneuss ‘On the Application of a Theory of Indirect Perpetration in Al Bashir German Doctrine at The Hague?’ in *Journal of International Criminal Justice* (2008) at 867.

<sup>149</sup> Kai Ambos ‘Kai Ambos *The Treatise on International Criminal law Volume 1: The Foundations and General Part*’ Oxford University Press (2013) at 154.

<sup>150</sup> Ohlin (Note 137) at 8.

<sup>151</sup> Ambos (Note 149) 144.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

If it is determined that the premise upon which the doctrine is based is flawed, then the adoption of the doctrine is necessarily flawed and arguably inconsistent with a strict interpretation of Article 25.

As noted in Chapter I, both the doctrine of co-perpetration and the doctrine of indirect perpetration fall under the Roxin's "control over crime approach."<sup>154</sup> In *Lubanga*, the Pre-Trial Chamber held that the reason for adopting this approach is that it entails a necessary distinction between principals and accessories.<sup>155</sup> This distinction they argued was built into the legal framework of Article 25(3) which consists of a hierarchical construction of the modes of liability ranging from the gravest form in Article 25(3)(a) to the least grave form in Article 25(3)(d).<sup>156</sup> This approach has been supported by many scholars who agree that the hierarchical construction of Article 25(3) represents this distinction.<sup>157</sup> They argue that such a hierarchical construction and the adoption of the "control over crime approach" to support this construction is necessary to ensure that the masterminds or intellectual authors of international crimes are appropriately labeled as principals and those whose participation was less serious are correctly labeled as accessories.<sup>158</sup>

This policy argument is convincing and in line with the moral desire to hold the masterminds of the most heinous crimes accountable. The argument does not however determine that such a hierarchical construction actually exists and thus whether the premise upon which the control over crime approach is based is indeed consistent with a strict interpretation of Article 25(3). The desirability to interpret Article 25(3) in terms of a normative approach is not necessarily synonymous with the intention of the drafters.<sup>159</sup>

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<sup>154</sup> See Chapter I.

<sup>155</sup> *Lubanga* (Note 135) at Para 330.

<sup>156</sup> *Ibid.*

<sup>157</sup> Hector Olasolo 'The Criminal Responsibility of Senior and Military Political Leaders as Principals to International Crimes' (2009) at 13; Werle (Note 135) at 168; Albin Eser 'Individual Criminal Responsibility' in *The Rome Statute of the International Criminal Court* Vol I at 770; Kai Ambos (Note 149) at 144; George Fletcher 'Rethinking Criminal Law' in *California Law Review* (1980) at 180; JC Smith and B Hogan '*Criminal Law*' Oxford, Oxford University Press (2002); Elies Van Sliedregt '*The Criminal Responsibility for of Individuals for Violations of International Humanitarian Law*,' T.M.C Asser Press (2003) at 53.

<sup>158</sup> *Ibid.*

<sup>159</sup> Judge Van Wyngaert (112) at Para 29.

There is nothing in either the Statute itself or *the travaux preparatoires*,<sup>160</sup> which suggests that a principal under Article 25(3)(a) bears greater responsibility than an accessory under Article 25(3)(b)-(d).<sup>161</sup> Judge Van Wyngaert notes that despite the intuitive desire to label masterminds as principals, to do so simply entails an expansive interpretation of the Statute inconsistent with Article 22.

Judge Fulford supports this argument stating that on a strict interpretation of Article 25(3), no such hierarchy exists.<sup>162</sup> Secondly, there is nothing in the Statute to suggest that the conduct of a person who is criminally responsible for ordering in terms of Article 25(3)(b) is less morally reprehensible than the conduct of a person who commits mass atrocities “through another” in terms of Article 25(3)(a).<sup>163</sup>

In favor of the perceived hierarchy in Article 25(3) some would argue that this interpretation is supported by a combined reading of Article 78 of the Statute together with Rule 155(1)(c) of the Rules of which require the Court to take into account the degree of participation of the convicted person when “sentencing.”<sup>164</sup> This argument can be rejected on the grounds that these provisions do not stipulate that the mode of participation automatically mandates a reduced sentence. Furthermore, the individual’s mode of participation is simply one of several factors that must be taken into account by the Court when sentencing the individual.<sup>165</sup>

On the basis of the above arguments it can be concluded that there is nothing in the Statute to support the view that Article 25(3) is hierarchically constructed. Therefore, the normative approach which forms the premise of the control over crime approach and thus the basis of the doctrine of indirect co-perpetration is arguably inconsistent with a strict interpretation of Article 25(3) of the Statute. The implication of this conclusion is that the application of the control over crime approach by the ICC is based on a flawed premise and is thus an inappropriate and expansive means of interpreting Article 25(3).

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<sup>160</sup> This refers to the notes made by the drafters during the period in which the Statute was being negotiated; Mahmoud C. Bassiouni ‘*The Legislative History of the International Criminal Court: Article by Article, Evolution of the Statute from 1994-1998*’ Transnational Publishers (2005).

<sup>161</sup> Justice Van Wyngaert (Note 112) at Para 23.

<sup>162</sup> Judge Fulford (Note 133) at Para 7.

<sup>163</sup> Ibid.

<sup>164</sup> Weigend (Note 111) at 102; Rules of Procedure and Evidence at the ICC, ICC-PIDS-LT-02-002/13.

<sup>165</sup> Ibid; Judge Van Wyngaert (Note 112) at Para 27.

This Section of the Chapter has determined that Version A of the doctrine of indirect co-perpetration can be considered to be inconsistent with a strict interpretation of Article 25 of the Statute to the extent that firstly, the first foundational block the “doctrine of co-perpetration,” shifts focus from the link with the material elements of the crime to the common plan. Secondly, to the extent that an “essential contribution” is required as there is nothing in the Statute to suggest that such a contribution must be made. Thirdly, to the extent the doctrine of co-perpetration allows for an individual, who is so far removed from the commission of the crime that his conduct is not directly linked to the fulfillment of the material elements of the crime to be considered a co-perpetrator. Fourthly, in respect to the second foundational block “the doctrine of indirect perpetration,” the doctrine is inconsistent with a strict interpretation of the Statute to the extent that it provides an expansive interpretation of “commission through another person” in Article 25(3)(a) to include control of an organization. Finally, it has been argued that the premise upon, which the doctrine of indirect co-perpetration is based, the “control over crime approach” is not consistent with a strict interpretation of the Statute

This Section has established that the development and application of the doctrine of indirect co-perpetration constitutes an expansive interpretation of Article 25. In the ICC’s defense, it could be argued that neither Article 25(3) nor the *travaux préparatoires* provide any guidance on how to interpret the modes of liability in Article 25(3).<sup>166</sup> The drafters therefore left it to the Court to determine which approach to take. Presuming the validity of the argument that there was a gap in the Statute, the next section will determine whether the approach taken to fill the perceived gap in the Statute is in accordance with Article 21 of the Statute.

#### **b. Version B**

Version B of the doctrine of indirect co-perpetration is generally the most problematic. Version B consists of cases where the “foundational blocks” do not apply mechanically, this is to say that the, the individual’s conduct does not fulfill the elements of both the doctrine of co-perpetration and the doctrine of indirect perpetration. The following discussion will determine firstly, the extent to which the construction of the doctrine is consistent with a strict interpretation of Article

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<sup>166</sup> Eser (Note 157) at 170; Werle (Note 111) at 137.

25. Secondly, this Section will look at how the application of the doctrine crystallizes and exacerbates some of the key challenges raised in the above section.

### *Creation of a new mode*

To the extent that the “doctrine of co-perpetration” and the “doctrine of indirect perpetration” do not apply mechanically in Version B cases, a new mode of perpetrator liability in Article 25(3)(a) is created. Due to the fact that this mode is not explicitly in the Statute, its creation constitutes a form of judicial development, one that requires justification in order to be consistent with Article 25.<sup>167</sup> Unlike in Version A, this justification is not based on the fulfillment of the elements of both the doctrine of co-perpetration and the doctrine of indirect perpetration.<sup>168</sup>

Ohlin advances a theory that provides a justification for attributing the conduct of what he terms the members of the “vertical organization”<sup>169</sup> to members of the “horizontal organization” who do not exercise control over the vertical organization.<sup>170</sup> This justification he calls a “second order linking principle,” a principle which provides reason for linking the conduct of the members of the vertical organization to Version B members.<sup>171</sup> This “second order linking principle” he calls the “personality principle,” which views the horizontal organization as a collective or “joint agent,” in a sense as a legal person.<sup>172</sup> In this regard, he argues that attribution to the horizontal organization is justified because the group is tight-knit and makes decisions together as a single unit. Essentially, Ohlin applies a theory similar to Roxin’s *organisationsherrschaft* but at the horizontal level to justify the attribution of the conduct of the members of the vertical organization to a co-perpetrator at the horizontal level who does not personally control that vertical organization.<sup>173</sup>

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<sup>167</sup> Ibid; Elies Van Sliedregt ‘The Curious Case of International Criminal Liability’ in *Journal of International Criminal Justice* (2012) at 1183.

<sup>168</sup> Kai Ambos ‘Critical Issues in the Bemba Decision’ in *Leiden Journal of International Law* (2009) at 715. Ohlin (Note 110) at 8.

<sup>169</sup> This refers to the subordinates of the indirect perpetrator to whom the co-perpetrator exercises joint control with.

<sup>170</sup> Ohlin (Note 110) at 4.

<sup>171</sup> Version B members as stated above are those who are not indirect perpetrators in the strict sense because they do not have control over the vertical organization.

<sup>172</sup> Ohlin (Note 110) at 8.

<sup>173</sup> The theory is similar but not the same because he does not indicate whether it is “collective control”, “collective intention” or “collective reason” that justifies attribution to members of the horizontal organization.



Ohlin further supports the “personality principle” concept by advancing a substantiating policy argument. He argues that the “personality principle” ensures that individuals who participate in the horizontal organization but do not have control over the organization do not use their lack of control of the vertical organization to escape criminal responsibility.<sup>174</sup> Ohlin’s “personality principle” argument and the supporting policy argument are indeed sophisticated and do provide the necessary justification for Version B type indirect co-perpetration cases.

However, the problem with Ohlin’s approach is that it comes dangerously close to introducing a concept of collective responsibility. This concept shifts focus away from the individual as required by a strict interpretation of Article 25(3) of the Statute.<sup>175</sup> Furthermore, as it has been established in the above Section, the drafters of the ICC statute were wary of including criminal responsibility based on membership of an organization. It can be argued therefore that such a justification is not in line with a strict interpretation of Article 25(3) of the Statute.

It can be concluded that on the basis of the above findings there is nothing on a strict interpretation of the Statute that justifies the construction of Version B type indirect co-perpetration cases.

### ***Challenges presented by the application of the new mode***

The implication of the construction of a new mode is that there is uncertainty as to which objective and subjective elements apply in these types of cases. In *Katanga and Chui*, the Pre-Trial Chamber simply listed the objective and subjective elements of the “foundational blocks” namely the doctrine of co-perpetration and the doctrine of indirect perpetration.<sup>176</sup> The simple “copy and paste” of the elements is insufficient because it doesn’t take into account the fact that Katanga was held liable for the conduct of Chui’s subordinates and vice versa. To this extent, neither was an indirect perpetrator in the strict sense because they did not exercise control over

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<sup>174</sup> His argument is supported by Alette Smeulders ‘*Collective Violence and International Criminal Justice: An Inter-disciplinary Approach*,’ Intersentia (2010) at 88; Shahar Eldar ‘Exploring International Criminal Law’s Reluctance to Resort to Modalities of Group Responsibility’ in *Journal for International Criminal Justice* (2013) at 339; Olasolo at 340; Jens Ohlin ‘Is the Concept of Person Necessary for Human Rights?’ *Columbia Law Review* (2005) at 209; Mark Oisel ‘*Making Sense of Mass Atrocity*,’ Cambridge University Press (2009) at 188.

<sup>175</sup> Sliedregt (Note 167) at 1186; George Fletcher and Ohlin ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ in *Journal of International Criminal Justice* (2005) at 940.

<sup>176</sup> *Katanga and Chui* (Note 108) at Para 518.

the subordinates whose conduct was attributed to them. This reasoning is supported by the Trial Chamber in *Multinovic*<sup>177</sup> who argued that the physical elements of the doctrine of indirect co-perpetration find no support in Roxin's control over crime approach.<sup>178</sup> The creation of such a legal gap serves to illustrate the inconsistency of the doctrine with Article 25(3) of the Statute.

The application of the objective and subjective elements of the doctrine of co-perpetration and the doctrine of indirect perpetration to Version B cases crystallize some of the challenges raised above in regard their consistency with a strict interpretation of Article 25. Firstly, in regard the criticism that the doctrine of co-perpetration under the control over crime approach shifts focus from the link with the material elements of the crime to the common plan.<sup>179</sup> The crystallization of this criticism can be best explained by way of example:

X and Y conclude a common plan to take over District A. X uses subordinates to implement the common plan; Y contributes to the implementation of the common plan by providing logistical support to facilitate the takeover.

In line with the doctrine of co-perpetration, X and Y are co-perpetrators because of their respective essential contributions to the implementation of the common plan. The problem is that the doctrine of indirect co-perpetration does not actually link Y to the fulfillment of the material elements of the crime which are actually fulfilled by X's subordinates. Y is held criminally responsible as an indirect co-perpetrator because of his participation in the common plan and his essential contribution to the fulfillment of the common plan. This is problematic not only in regard consistency with Article 25(3) but also in regard the principle of individual culpability, a point which will be elaborated in Chapter III.

Secondly, in relation to the criticism that under the doctrine of co-perpetration those who provide an essential contribution at both the planning stage and the execution stage can be held responsible as co-perpetrators. In Version B cases, the individual would typically participate at the preparatory stage because the execution is fulfilled by the actual indirect perpetrator who orders his subordinates, the direct perpetrator. He does not therefore exercise control over the

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<sup>177</sup> *Prosecutor v Multinovic*, Decision on Motion, IT-0587-PT, 6 May 2003 at 37, 39, 40-42; Jain (Note 128) at 180.

<sup>178</sup> *Ibid*; See Roxin's theory Chapter I.

<sup>179</sup> Ambos (Note 168) at 715.

fulfillment of the material elements of the crime as required by a strict interpretation of Article 25(3).<sup>180</sup>

In light of the above findings, it can be concluded that firstly, to the extent that Version B creates a legal gap, it is thus inconsistent with a strict interpretation of Article 25(3). Secondly, the Court's continued mechanical application of the elements of the foundational modes of liability exacerbates the key problems of the foundational modes in doing so highlighting their inconsistency with a strict interpretation of Article 25(3) of the Statute.

**ii. Consistency of the adoption of the doctrine of indirect co-perpetration with Article 21 of the Statute**

The principle of legality in Article 22 of the Statute requires that a law exist at the time an individual is charged with a crime.<sup>181</sup> Article 21 of the Statute obliges the Court to apply the Statute as the primary source of law. In terms of the provision where there is a gap in the Statute, the Court shall apply “applicable treaties and the principles and rules of international law.”<sup>182</sup> In the last resort, if the Court is unable to apply general principles of international law they may resort to “general principles of law derived by the Court from national laws of legal systems of the world.”<sup>183</sup> If a crime or legal doctrine is not in any of these mentioned applicable sources of law, then it cannot be said “to exist” as required by Article 22.<sup>184</sup>

In order to determine whether the application of the doctrine of indirect co-perpetration is consistent with Article 21 of the Statute, it must be determined if it was either a general principle of international law or a “general principle of law derived by the Court from national laws of legal systems of the world.”<sup>185</sup>

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<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Article 21 Statute of the International Criminal Court (Note 1).

<sup>183</sup> Ibid.

<sup>184</sup> Theresa Giamanco ‘The Perpetrator: A Critical Analysis of the Theory of Prosecution of Omar Al Bashir’ in *Temple International and Comparative Law Journal* (2011) at 217; Similar reasoning applied by Kai Ambos in regard JCE, he argued that the concept of JCE violates lex stricta principle because there is no ‘explicit basis for it in ICL instruments.’ Kai Ambos ‘Joint Criminal Enterprise and Command Responsibility’ *Journal of International Criminal Justice* (2011) at 55.

<sup>185</sup> Article 21 of the Rome Statute (Note 1).

Article 21(1)(b) “general principles of international law” has been interpreted to mean customary international law and general principles of law as recognized by Article 38 of the ICJ Statute, namely “general principles of law recognized by civilized nations.”<sup>186</sup> In the context of international criminal law, principles of customary international law develop through consistent application by the International Criminal Tribunals. The concept of joint criminal enterprise applied by the ICTY and ICTR Tribunals is generally considered to be customary international law.<sup>187</sup> As mentioned above, the *Mutinovic* Trial Chamber held that the doctrine of indirect co-perpetration is not a principle of customary international law, having not been applied by any International Criminal Tribunals.<sup>188</sup>

In the alternative, the doctrine of indirect co-perpetration can be said to be either a general “principle of law of civilized nations” in terms of Article 21(1)(b) or a “general principle of law derived by the Court from the national laws of legal systems of the world.” In order to be deemed such a principle, naturally, it must be a principle recognized and applied by a majority of countries.<sup>189</sup> In *Katanga and Chui*<sup>190</sup> the Pre-Trial Chamber justifies its introduction of the doctrine of indirect co-perpetration on the basis that “it has been increasingly used in national jurisdictions.”<sup>191</sup> Weigend points out that the doctrine has only been applied in four countries namely Germany, Argentina,<sup>192</sup> Peru and Spain.<sup>193</sup> The application can therefore hardly be deemed universal thus making it difficult for it to be considered as a general principle of law. To the extent the principle is neither a principle of customary international law nor a general principle of law, it is inconsistent with Article 21(1)(b) and (c).

In line with the above reasoning, it can be argued that to the extent that there is an inconsistency with Article 21, there is also an inconsistency with Article 22 because the doctrine did not exist in

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<sup>186</sup> Ambos (Note 149) at 74 and McAuliffe de Guzman ‘Article 21,’ in Otto Triffeter, Kai Ambos, C.H.Beck ‘*Commentary on the Rome Statute*,’ Oxford University Press (2008) at 650.

<sup>187</sup> Alison Martson Danner ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law’ in *California Law Review* (2005) at 98.

<sup>188</sup> *Mutinovic* (Note 65).

<sup>189</sup> Kai Ambos (Note 1) at 79 ‘International general principles must be comprehensible and accessible to lawyers from all legal traditions and not trained in specific legal tradition. The General Part of International Criminal Law must not derive from the general part of a given national legal system but from autonomous sources of International Criminal Law provided for in Article 21 of the Statute.’ Jain (Note 128) at 187.

<sup>190</sup> *Katanga and Chui* (Note 22) at Para 498.

<sup>191</sup> *Ibid* at Para500; Weighend-perpetration through an organization (Note 111) at 105.

<sup>192</sup> *Ibid* at 105; The theory was applied by a lower Court in Argentina and then overturned by the Supreme Court

<sup>193</sup> *Ibid*.

terms of the Statute at the time the individual was brought before the Court. Furthermore, in terms of the hierarchical order in this provision, if there was indeed a gap in Article 25(3), the Court should have first sought to fill the gap with existing customary international law before any resort to general principles of national legal systems of the world.<sup>194</sup>

In conclusion, this Chapter has found that the doctrine of indirect co-perpetration may compromise the principle of legality to the extent that the doctrine of indirect co-perpetration is inconsistent with a strict interpretation of Article 25(3). It has also found that to the extent that the Court tried to fill in the perceived gap in Article 25(3) by applying the doctrine of indirect co-perpetration which has its roots in Roxin's theory, its application is inconsistent with Article 21 of the Statute.

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<sup>194</sup> Giamanco (Note 184) at 234.

### **CHAPTER III: THE IMPACT OF THE DOCTRINE OF INDIRECT CO-PERPETRATION ON THE PRINCIPLE OF INDIVIDUAL CULPABILITY**

This Chapter will focus on the extent to which the doctrine of indirect co-perpetration may compromise principle of individual culpability, which, as determined in Chapter I is considered to be a rule of international law.<sup>195</sup> The principle of individual culpability requires that a person only be held responsible for acts “in which he has been personally engaged or in some way participated.”<sup>196</sup> Therefore, to the extent that the doctrine creates a situation where an individual is held responsible for an act from which he is so far removed that it cannot be said that he was either “personally engaged” or “participated” in the act.<sup>197</sup> In order to make this determination, it is necessary to analyze both the *actus reus* elements and the *mens rea* elements of the doctrine of indirect co-perpetration.

Following the structure of the previous Chapter, this Chapter will begin with a discussion of the extent to which the principle may be compromised under Version A type indirect co-perpetration cases. The second section will look at the extent to which the principle may be compromised by Version B type indirect co-perpetration cases.

#### **i. Version A type doctrine of indirect co-perpetration cases and the principle of individual culpability**

As determined in Chapter II, Version A type cases are cases in which both the *actus reus* and the *mens rea* elements of the two “foundational blocks” are present namely the doctrine of co-perpetration and the doctrine of indirect perpetration. The individual is therefore both a co-perpetrator and an indirect perpetrator in terms of Article 25(3)(a) of the Statute.

Version A requires the individual to be part of a common plan and provide an essential contribution to the fulfillment of this common plan.<sup>198</sup> The plan need not be criminal in itself but

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<sup>195</sup> See Introduction page 5.

<sup>196</sup> *Prosecutor v Tadic*, ICTY (Appeals Chamber), IT-94-1A, 15 July 1999, at Para 191.

<sup>197</sup> Kai Ambos ‘Remarks on the General Part’ in *Journal of International Criminal Justice* (2006) at 669-672; Elies Van Sliedregt ‘The Curious Case of International Criminal Liability’ (2012) in *Journal of International Criminal Justice*.

<sup>198</sup> See Chapter 1 page 9.

must contain an “element of criminality.”<sup>199</sup> It is however difficult to determine when there is an “element of criminality” when the common plan is not in itself criminal, at most, criminality is perhaps foreseeable but this begs the question as to what exactly foreseeability is and when the commission of a criminal act is in fact foreseeable, the determination is very subjective.<sup>200</sup> This criticism can be illustrated by way of a hypothetical example:

X, Y and Z are the leaders of a liberation movement in the K region of the Congo which is under foreign occupation. They enter into a common plan to “liberate” the region by mobilizing their forces to launch an attack on the foreign forces. In the process of gaining control over the area, their forces commit widespread human rights violations which amount to crimes against humanity. The plan to “liberate” the region is not in itself a criminal plan. Looking at the plan *ex ante*, it is difficult to determine that there is an “element of criminality.” It is the *ex post facto* consequences of the implementation of the common plan which therefore establish the basis for liability. On the basis of this reasoning it can be argued that the individual indeed is “personally engaged” in the common plan, as the leader co-ordinates and facilitates the implementation of the plan but it cannot be so easily asserted that he is “personally engaged” in a criminal act.<sup>201</sup>

This problem can be seen in the case law. In the *Lubanga* case, Lubanga was said to have entered into a common plan to further the war effort in the Ituri Region of the Democratic Republic of Congo by recruiting young people into the FPLC forces.<sup>202</sup> The Pre-Trial Chamber noted that this plan was not in itself criminal in that the plan was not to specifically recruit children under the age of 15 in contravention of the Statute,<sup>203</sup> but “in the normal course of events its implementation entailed the objective risk that it would result in the recruitment of children under the age of 15.”<sup>204</sup> Similarly, in *Bemba*<sup>205</sup> the plan entailed the provision of logistical support in the fight against the MLC, again, which is not a criminal plan in and of itself.<sup>206</sup>

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<sup>199</sup> “The common plan must include an element of criminality. Although it does not need to be specifically directed at the commission of a crime ‘It suffices: (i) That the co-perpetrators have agreed to the implementation of the common plan to achieve a non-criminal goal and aware of the risk of implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of a crime and accept such an outcome.’ Situation in Democratic Republic of Congo, *Prosecutor v Lubanga*, ICC-01/04-01/06-803, 14 May 2007 at Para 330-335.

<sup>200</sup> Allison Danner and Jenny Martinez ‘Guilty Associations: Joint Criminal Enterprise Command Responsibility and the Development of International Criminal Law’ in *California Law Review* (2005) at 106.

<sup>201</sup> Vincenzo Militello ‘The Personal Nature of Individual Criminal Responsibility and the ICC Statute.’ in the *Journal of International Criminal Justice* (2007) at 950.

<sup>202</sup> *Lubanga* (Note 198) at 337.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

The Defense in *Lubanga* argued in line with the view that is being presented in this thesis. They argued that principal liability in Article 25(3)(a) requires an individual to “personally” and “directly” participate in the crime this requires evidence of a positive act of participation in the crime.<sup>207</sup> They submit that by its very nature, the doctrine co-perpetration in international criminal law requires the existence of a criminal plan. The notion that the common plan merely requires an “element of criminality” created ambiguity and legal uncertainty as to the *actus reus* of this mode of liability.<sup>208</sup> In furtherance of this submission they argue that participation in the non-criminal common plan creates conditions conducive the commission of the criminal acts. The latter conduct may be wrongful and blameworthy but it is simply does not meet the threshold required for perpetrator liability in Article 25(3)(a).<sup>209</sup>

The principle of individual culpability is also put under strain in Version A cases to the extent the individual can be held liable as an indirect co-perpetrator despite lack of sufficient evidence to prove he has the control necessary to secure automatic compliance. This problem was raised by Judge Ulsacka in her dissent in the *Al Bashir*, Warrant of Arrest where Omar Al Bashir, as President of the Government of Sudan and Commander and Chief of the Army is said to have acted together with other leaders in his government to implement the common plan to counter the insurgency in the South. Judge Ulsacka argued as follows:

“I do not find any evidence which addressed the issue of the locus of control, whether such control indeed rested fully with Omar Al Bashir, or whether it was shared by others such that each person had the power to frustrate the commission of the crime.”<sup>210</sup>

The doctrine does not take into account the different roles and the varying levels of involvement. It focuses on the collective and loses sight of the individual. In order to avoid compromising the principle of individual culpability, in cases where control of the organization is exercised with others, the control is diffused; it becomes vital to look specifically at the conduct of the

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<sup>205</sup> Situation in Central African Republic, *Prosecutor v Jean Pierre Bemba*, ICC-01/05/01/08, 15 June 2009 at 45.

<sup>206</sup> *Ibid.*

<sup>207</sup> Closing Submissions for the Defense in *Prosecutor v Lubanga Dyilo*, ICC-01/04-01/06, 15 July 2011 at 66.

<sup>208</sup> *Ibid* at Para 79.

<sup>209</sup> *Ibid*; Thomas Weigend ‘Intent, Mistake of Law and Co-Perpetration in Lubanga’ in *Journal of International Criminal Justice* (2008) at 478; H. van der Wilt ‘Joint Criminal Enterprise and Functional Perpetration’, in P.A.Nollkaemper and H. van der Wilt, ‘*System Criminality in International Law*,’ (2009).

<sup>210</sup> Situation in Sudan, Decision of the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, ICC-02/05-01/09, 4<sup>th</sup> March 2009 at 193.



individual, specifically, whether the individual has the ability to secure automatic compliance.<sup>211</sup> To the extent Version A type indirect co-perpetration cases allows for the contrary, the principle of individual culpability may be compromised.<sup>212</sup>

It can be argued that *Al Bashir*, as both President and Commander and Chief, had the power and requisite control over the subordinates in government to secure automatic compliance with his orders. The contribution of the other leaders was arguably not “essential,” as such; there was no “joint control.”<sup>213</sup> Rather, as Judge Ulsacka says, indirect perpetration instead of indirect co-perpetration would have been the more appropriate mode of liability. Raising the same issue but arguing in the converse, some scholars have argued that the Pre-Trial Chamber could not sufficiently prove that Al Bashir as a sitting President and not a Military leader as in the other Cases applied by the ICC had the ability to exercise the requisite control over the military.<sup>214</sup> It is clear that this evidentiary challenge of the application of the doctrine, the implication is that individuals who do not have a “high degree of control” may still be held liable as principals thereby compromising the principle of individual culpability.<sup>215</sup>

## **ii. Version B type doctrine of indirect co-perpetration cases and the principle of individual culpability**

Version B type cases as described in Chapter II, are those cases in which not all the elements of the “foundational blocks” co-perpetration and indirect perpetration respectively are present.<sup>216</sup> As already determined in the previous Chapter, Version B type cases create an awkward situation where a co-perpetrator who does not exercise control over an individual or an organization

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<sup>211</sup> Jens Ohlin ‘Three Conceptual Problems with the Problems of the Doctrine of Joint Criminal Enterprise,’ in *Journal of International Criminal Justice* (2007) at 88; ‘The problem with imposing equal culpability is that it ignores internal structure of the group agent i.e. seeing the group as a group entity ignoring the different roles taken by people in the group .Not all parts of the group agent are equal.’

<sup>212</sup> George Fletcher and Ohlin ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ in *Journal of International Criminal Justice* (2005) at 543.

<sup>213</sup> Harmen G van der Wilt ‘The Continuous Quest for Proper Modes of Criminal Responsibility.’ *Journal of International Criminal Justice* (2009) at 310; <sup>213</sup>Hector Olasolo ‘The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes,’ Hart Publishing (2008) at 329.

<sup>214</sup>Requisite control being the ability to secure automatic compliance;); Mansui Sgenyojo ‘The International Court Arrest Warrant Decision for President Al Bashir of Sudan’ in *Journal for International Criminal Justice* (2011) at 216; Theresa Giamanco ‘The Perpetrator: A Critical Analysis of the Theory of Prosecution of Omar Al Bashir’ in *Temple International and Comparative Law Journal* (2011) at 234.

<sup>215</sup> Ibid.

<sup>216</sup> See Chapter I.

becomes an indirect co-perpetrator through attribution of indirect perpetrator liability. The attribution is on the basis that he is part of a common plan and him providing an essential contribution to the implementation of the plan.

The problem however arises where the crime committed falls outside the common plan. Ohlin argues that when combined with the *dolus eventualis* form of *mens rea*, “indirect co-perpetration as applied by the ICC may not be that different to JCEIII and its Pinkerton<sup>217</sup> like vicarious liability.”<sup>218</sup> There have been many criticisms raised against JCEIII and how it compromises the principle of legality. To the extent a JCEIII type situation is created by a combination of *dolus eventualis* and the doctrine of indirect co-perpetration, the same criticisms raised against JCEIII can also be applied.<sup>219</sup> In order to fully elaborate this argument it is necessary to explain the JCE III mode of and the *dolus evetualis* form of *mens rea*.

JCE III is a variant of the joint criminal enterprise doctrine applied by the ICTY and the ICTR.<sup>220</sup> In terms of this theory, an individual can be held liable for the commission of crimes by a group member, that fall outside the common plan. He will be liable for these crimes if they were:

“a natural and foreseeable consequence of the implementation of the common plan’ and the individual reconciled himself to thus possibility.”<sup>221</sup>

If *dolus eventualis*<sup>222</sup> is applied in this type of situation, an individual can be convicted for the crimes committed by his/her co-perpetrator’s subordinates over whom he has no control and whose actions were not part of the common plan.<sup>223</sup> It is even possible that under this doctrine, that an individual can be convicted where he had no knowledge of the fact that his co-perpetrator would use subordinates to implement the common plan.

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<sup>217</sup> Pinkerton Liability allows an actor to be held liable for substantive crimes committed by co-conspirators in certain circumstances. A defendant can be held vicariously liable for a substantive offense committed by another member of a conspiracy if (1) The defendant was a party to the conspiracy (2) The offense was within the scope of the unlawful project; (3)The offense was committed In furtherance of the conspiracy; (4)The defendant could have reasonably foreseen the offense as a natural and foreseeable consequence [http://www.law.cornell.edu/wex/pinkerton\\_liability](http://www.law.cornell.edu/wex/pinkerton_liability), accessed on 2 December 2013.

<sup>218</sup> Jens Ohlin ‘Assessing the Control Theory’ in *Leiden Journal of International Law* (2012) at 9.

<sup>219</sup> Ibid.

<sup>220</sup> Antonio Cassese ‘*International Criminal Law*, ‘Oxford University Press (2008) at 168.

<sup>221</sup> Ibid; Ohlin (Note 217) at 9.

<sup>222</sup> Please see definition of *dolus eventualis* Chapter I.

<sup>223</sup> Ohlin (Note 217) at 10; Weigend (Note 208) at 485.

The criticisms lodged against the creation of the situation described in the above paragraph, mirror criticisms advanced against JCEIII because under both, a situation is created where liability is based on foreseeability of a risk and not full blown intent. A key criticism in this regard, is that under JCE III and now under Version B combined with the *dolus eventualis* type of intent is that the individual is held liable as a principal despite the fact that he did not actually intend to commit the crime as did the co-conspirator or co-perpetrator who actually used the subordinates to commit the crime and have full blown direct intent to commit that crime and is thus more culpable.<sup>224</sup>

It is argued that the situation created is inconsistent with the requirements of Article 30 of the Statute.<sup>225</sup> The “Intent and Knowledge” requirement enshrined in this provision is there to ensure that the principle of individual culpability is upheld.<sup>226</sup> To the extent the situation created by a combination of Version B and the *dolus eventualis* allows for an individual to be convicted without the requisite knowledge, the principle of individual culpability will be compromised.<sup>227</sup>

This Chapter has found firstly, that in respect to Version A, the doctrine compromises the principle of culpability to the extent that the objective element requires the Prosecution to prove only that there was an “element of criminality” in the common plan. It has also established that the evidentiary challenge of proving the requisite control may also compromise the principle of individuality. In respect to Version B, the impact to the principle of culpability is compromised to the extent that it creates a JCEIII type of situation where a person can be held liable as a principal despite being so far removed from the crime and without the requisite knowledge required by Article 30 of Statute.

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<sup>224</sup> Ibid.

<sup>225</sup> Ibid. Article 30 Requires ‘Intent and Knowledge of the commission of the crime.

<sup>226</sup> Gerhard Werle and Florian Jessberger ‘Unless Otherwise Provided ‘Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law’ in *Journal of International Criminal Justice* (2005)at 36.

<sup>227</sup> Ibid Ohlin (Note 210) at 83; Kai Ambos ‘Remarks on the General Part of International Law’ in *Journal of International Criminal Justice* (2006) at 673; Albin Eser ‘The Need for a General Part’ in MC Bassioni *Commentaries on ILC Commissions Draft Code of Crimes* (2010); Paul Marcus ‘Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever more troubling Area’ in *William and Mary Bill of Rights* (1992) at 7.

## FINDINGS AND CONCLUSION

This thesis has found firstly that the doctrine of indirect co-perpetration was developed by a combination of the doctrine of co-perpetration and the doctrine of indirect perpetration enshrined in Article 25(3)(a). It was first applied in the *Katanga and Chui* case and then subsequently in the *Bashir* case, the *Bemba* case and most recently the *Kenyatta* case.

An analysis of the case law has revealed that there are varying manifestations of the doctrine. The first was termed Version A. The latter consists of cases where the conduct of the individual satisfies both the elements of what was termed the “foundational blocks” namely the doctrine of co-perpetration and the doctrine of indirect perpetration. The individual will thus have control over the will of an individual or of an organization in which he can secure automatic compliance with his orders. The conduct of the fellow indirect co-perpetrators can be attributed to him on the basis of his essential contribution to the implementation of the common plan.

In respect to the principle of legality which requires a strict interpretation of the Statute, it has been found that Version A of the doctrine is consistent with the principle of legality to the extent that it is a factual incidence of the foundational modes of liability. Furthermore, it was found that the Pre-Trial Chamber in *Lubanga* applied a teleological argument to support their construction of the doctrine. In this sense, Version A type cases of the doctrine of indirect co-perpetration constitute a development of the law. A key issue that arose is whether such developments of the law are actually permitted under a Statute that requires strict interpretation. It was found that such developments are inevitable because every legal rule consists of a “grey zone” that is left for judicial interpretation.

As noted in the Introductory Section of this thesis, the primary source of law to be applied by the International Criminal Court is the ICC Statute. The ICC was only established 13 years ago and is still in the process of developing jurisprudence. During this period, the Court should have a certain leeway to interpret the rules and clarify the “grey areas,” in doing so developing their jurisprudence.<sup>228</sup> The question of whether the Statute allows for a combination of the two foundational modes of liability constitutes as a “grey area” which the Court had leeway to clarify.

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<sup>228</sup> Mohammed Shahabuddeen ‘Does the Principle of Legality Stand in the Way of Progressive Development of Law’ in *Journal of International Criminal Justice* (2004) at 1017.

To the extent that Version A constitutes such a clarification of the “grey area” it is an acceptable judicial development in line with the principle of legality.

It was however found that the above conclusion is based on the assumption that the foundational modes themselves are in line with the principle of legality. In this regard, it was found that the doctrine of co-perpetration and doctrine of indirect perpetration respectively pose several challenges to the principle. In respect to the doctrine of co-perpetration it was found to be problematic to the extent that it shifts focus from linking the individual with the fulfillment of the material elements of the crime to the fulfillment of the common plan. This is problematic in cases where the plan was not a criminal one, so essentially the doctrine criminalizes the act of entering into the common plan which is inconsistent with a strict interpretation of Article 25(3)(a) thereby compromising the principle of legality. In respect to the doctrine of indirect perpetration, the main finding was that to the extent the doctrine allows for *organisationsherrschaft*, it shifts focus from the individual. Article 25(3)(a) clearly stipulates that “commission through another person” is required, proving “commission through an organization” is an expansive interpretation of the provision.

The second manifestation of the doctrine of indirect co-perpetration was termed “Version B.” This was found to be the most problematic manifestation of the doctrine because the conduct of the individual does not satisfy the elements of both foundational modes of liability thereby creating a gap in regard the applicable elements. The implication of the gap created is that a new mode of liability is created. The creation of a new mode exceeds the bounds of judicial development which is in line with the principle of legality. Rather, it seems the judges to move the realm of legislation-making, a realm for policy makers, not judges.

A final finding in regard the principle of legality, is that the application of Roxin’s “control over approach” was inconsistent with Article 21 of the Statute which sets out the hierarchical order of applicable sources of law because it was not a principle of customary international law. It could also not be said to be a general rule of law because it is only applied by a few States. In this regard it cannot be said “to exist” in terms of the Statute. Consequently, it contravenes Article 22(1) of the Statute which requires a law to exist in terms of the Statute at the time the crime was committed.

On the basis of the above findings, the doctrine of indirect co-perpetration is inconsistent with the principle of legality firstly to the extent that it applies in Version B type cases. Secondly, to the extent the doctrine upon which it is based “the control over crime approach” and the two doctrines subsumed under this approach, namely, the doctrine of indirect perpetration and the doctrine of co-perpetration are inconsistent with the principle of legality.

In relation to the principle of individual culpability, it was found that in Version A type cases, the principle of individual culpability is compromised to the extent that it allows for an individual to be held liable as principal where the common plan is not criminal. Secondly, to the extent there is uncertainty in regard proving the locus of control over an organization. In respect to Version B, it was found that the principle of individual culpability is compromised to the extent that it creates a situation similar to the controversial JCE III.

What is evident from the findings in regard the principle of individual culpability is that the ICC is struggling to balance the collective nature of international crimes and the fundamental general principles of criminal law such as the principle of culpability. Some scholars indeed support the view that in the horizontal co-perpetrators should be seen as collective.<sup>229</sup> It was found however that there are other scholars who argue that the viewing the group as a collective compromises that individual nature of criminal responsibility. As noted several times in this thesis, Article 25(3)(a) focuses on the individual and the drafters of the Statute, especially excluded liability of juristic entities; this clearly shows that the drafters intended any theories of liability under Article 25(3)(a) to be based on the individual and not the collective.

The manifestations of both Versions of the doctrine of indirect co-perpetration pose grave challenges for the principle of legality and the principle of individual culpability. At the root of the problem is the moral dilemma of holding individuals liable for crimes committed in a collective context and how to adapt existing international criminal law principles to this reality. In this context, it becomes difficult to hold steadfastly firm to fundamental principles of criminal law. It is however apparent from the findings in this thesis that the ICC seems to stretch “principal liability” at all costs, it was found that the view notion that Article 25(3)(a) is hierarchically

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<sup>229</sup> See Chapter II “the personality principle.”

structured in terms of relative blameworthiness is flawed and inconsistent with a strict interpretation of Article 25(3)(a). A solution to the ICC's moral dilemma therefore may be to avoid stretching principal liability in the way it has done in Version B type cases for example, and rather, simply hold these individuals liable in terms of the accessory modes of liability. The latter modes of liability better reflect their participation and ensure that the Court can fulfill its function which is to hold individuals accountable for the atrocities but at the same time uphold the principle of legality and the principle of individual culpability. In doing so, the ICC will be able to maintain their credibility.

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