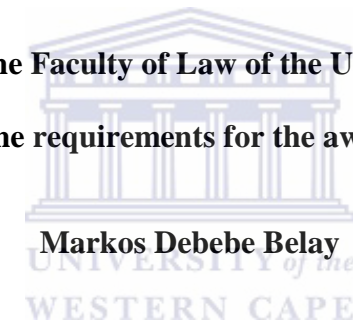


LLM and PhD Programme

**Transnational Criminal Justice and Crime Prevention- An International and African
Perspective**

**SCRUTINISING THE MODES OF RESPONSIBILITY UNDER THE ROME STATUTE:
SETTLING THE DUST**

**Research Paper submitted to the Faculty of Law of the University of the Western Cape, in
partial fulfilment of the requirements for the award of the LLM degree**



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Table of Contents

DECLARATION	vi
ACKNOWLEDGMENT	vii
LIST OF ACRONYMS AND ABBREVIATIONS	viii
KEY WORDS	ix
CHAPTER ONE	1
1. INTRODUCTION	1
1.1 Abstract	1
1.2 General Overview	1
1.3 Research Problem	4
1.4 Objectives of the Study	4
1.4.1 General Objective	4
1.4.2 Specific Objectives	4
1.5 Research Questions	5
1.6 Literature Review	5
1.7 Research Methodology	6
1.8 Significances of the Study	6
1.9 Delimitation of the Study	7
1.10 Organization of the Thesis	7

CHAPTER TWO	8
2. MODES OF RESPONSIBILITY UNDER THE INTERNATIONAL CRIMINAL COURT LEGAL FRAMEWORK	8
2.1 Pre-Rome Statute	8
2.2 Rome Statute	11
2.2.1 Perpetrator/Commission	11
2.2.1.1 Direct Perpetration	11
2.2.1.2 Co-Perpetration	12
2.2.1.3 Indirect Perpetration	12
2.2.1.4 Indirect Co-Perpetration	13
2.2.2 Secondary Participants	13
2.2.2.1 Solicits, Induces or Orders	13
2.2.2.2 Aiding, Abetting, or Otherwise Assists	16
2.2.2.3 Contribution to a Group Crime	17
CHAPTER THREE	19
3. A COMPARATIVE STUDY OF THE MODES OF RESPONSIBILITY UNDER SELECTED COUNTRIES	19
3.1 A General Glimpse of the Models of Criminal Participation	19
3.1.1 Unitary Model	19
3.1.2 Differentiation Model	20

3.2 A Comparative Study.....	22
3.2.1 Civil Law Legal Tradition	23
3.2.1.1 Germany.....	23
3.2.1.2 Ethiopia.....	27
3.2.2 Common Law Legal Tradition.....	32
3.2.2.1 United Kingdom.....	32
3.2.2.2 United States of America	34
3.2.3 Trends in Domestic Legal Systems: In Search of a Common Dimension and Its Applicability to International Criminal Law.....	37
CHAPTER FOUR.....	40
4. SCRUTINISING AND SETTLING THE DUST: THE MEANS OF DISTINGUISHING THE MODES OF RESPONSIBILITY AND DEGREE OF BLAMEWORTHINESS IN THE ROME STATUTE	40
4.1 Establishing the Contemporary Outlooks on the Means of Distinguishing the Modes of Responsibility and Degree of Blameworthiness	40
4.1.1 The Relevance of Making Distinction	40
4.1.2 Establishing the Current views on Approaches of Distinguishing the Modes of Responsibility	45
4.1.3. Establishing the Contemporary outlooks on Degrees of Blameworthiness.....	47
4.2 Settling the Dust: The Means of Distinguishing the Modes of Responsibility and Degrees of Blameworthiness	50

4.2.1 Discerning the Modes of Responsibility: Unearthing the Apt Theory	50
4.2.2 Degrees of Blameworthiness: The Conundrum of <i>Raison D'etre</i>	55
4.2.2.1 Degree of Blameworthiness: Principals versus Secondary Participants.....	56
4.2.2.2 Degrees of Blameworthiness: Between Secondary Participants	58
4.2.2.3 Degree of Blameworthiness: Within the Same Sub-articles.....	62
CHAPTER FIVE	64
5. CONCLUSION AND RECOMMENDATION.....	64
5.1 Conclusion	64
5.2 Recommendation	69
LIST OF REFERENCES.....	70



DECLARATION

I, Markos Debebe Belay, declare that 'Scrutinising the Modes of Responsibility under the Rome Statute: Settling the Dust' is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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However, none of the persons mentioned above should be responsible for any error or mistake possibly manifested in this thesis. This author takes full responsibility.

LIST OF ACRONYMS AND ABBREVIATIONS

1. AC _____ Appeal Chamber
2. ICC _____ International Criminal Court
3. ICL _____ International Criminal Law
4. ICTR _____ International Criminal Tribunal for Rwanda
5. ICTY _____ International Criminal Tribunal For The Former Yugoslavia
6. IMT _____ International Military Tribunal
7. IMTFE _____ International Military Tribunal for the Far East
8. JCE _____ Joint Criminal Enterprise
9. PTC _____ Pre-trial Chamber
10. RPE _____ The Rules of Procedures and Evidence
11. TC _____ Trial Chamber
12. UNGA _____ United Nations General Assembly
13. UNSC _____ United Nations Security Council

KEY WORDS

Article 25

Commission

Comparative study

Crimes under international criminal Law

Degree of blameworthiness

Individual criminal responsibility

Modes of responsibility

Principal

Secondary participants

The ICC Statute



CHAPTER ONE

1. INTRODUCTION

1.1 Abstract

Under international criminal law (ICL), there are factual and legal intricacies. Of these intricacies, the issues concerning the modes of responsibility, which are enshrined under Article 25(3) of the ICC Statute, have been the preponderant focus. Specifically, besides the incongruity on the approaches of distinguishing among each other, there is no unanimity on the question of degrees of blameworthiness. Put differently, under ICL, there is uncertainty on how to draw a line among the modes of responsibility and the *raison d'être* behind their enumeration. These ambivalences have caused various arguments both in and outside the ICC.

Hence, this thesis scrutinises these disputatious issues of modes of responsibility under the ICC Statute and strives to come up with an ameliorating solution. To this end, besides the ICC Statute, the study is backed up by a comparative study of selected common and civil law countries.

1.2 General Overview

Whenever there is a criminal conduct, the state uses its criminal law as a means and stabilises the situation. However, the effect of all crimes is not limited within the geographical boundary of one state. There are crimes that affect the entire international community.¹ Moreover, owing to reasons such as the nature of the commission of international crimes, offenders of such crimes have greater chance of left unpunished. Accordingly, ICL developed with the aim of curbing

¹ Rome Statute of the International Criminal Court (1998) Preamble 3 and 9.

such impunity. Unlike the domestic jurisdiction, the ‘clienteles’ of ICL are those persons who alleged to have committed heinous crimes and bear the greatest responsibility.² Irrespective of this aim, ICL developed in the twentieth century. Before this time, its birth was hampered by two factors.³ First, the scope of classical international law was limited to State-to-State relationship. Thus, the issue of individual offenders were within the exclusive jurisdiction of domestic legal systems.⁴ Secondly, it was related with the principle of the Westphalian Sovereignty System. This system argues for the legal equality of states, and the abstention of one state in the domestic affairs of another state.⁵ Because of this, any international intervention was considered as a violation of states’ sovereignty.

Whatever these reasons may, under international law, the first unsuccessful attempt to establish individual criminal responsibility was made by the Versailles Peace Treaty in 1919.⁶ However, it was firmly established by the Nuremberg charter,⁷ which is correctly depicted as ‘a birth certificate of ICL’.⁸ In the Nuremberg trial it was stated that ‘*Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.*’⁹ This oft-cited statement of the trial was adopted by the UNGA¹⁰ and has been serving as a fundamental principle of ICL. In general, this trial marked the end of the time when individuals shield behind an entity and went unpunished for their dreadful conduct.

² Cryer, Friman & Robinson *et al An Introduction to International Criminal Law and Procedure* 2ed (2010) 361.

³ Werle & Jessberger *Principles of International Criminal Law* 3ed (2014) 1.

⁴ Tomuschat C ‘The Legacy of Nuremberg’ (2004) 4 *JICJ* 837.

⁵ Shaw M *International Law* 5ed (2003) 25.

⁶ Versailles Peace Treaty (1919) Arts. 227-231. See also, Tomuschat C (2004) 831.

⁷ Principles of International Law, the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950) principle 1.

⁸ Werle & Jessberger (2014) 14.

⁹ IMT, Judgement (1946) 447.

¹⁰ United Nation General Assembly Resolution 95(I) (1946).

However, since the crimes that fall under the jurisdiction of the ICC¹¹ are committed by a systematised and networked group of persons¹² who might be supported by gigantic hand of oligarchical governments,¹³ the actual implementation of this principle has been difficult. Briefly, in the commission of core crimes, there could be plurality of persons that make the plan, give order, and/or provide weapons, round up detainees and at the end of the chain someone who pulls the trigger.¹⁴ Consequently, identifying the individual's contribution and weighting it is a herculean task. It is difficult to establish the mode of responsibility that the person have participated and tell the implication behind it. Indeed, these issues were not a serious problem during the military and their follow up trials.¹⁵ They got momentum when the *ad hoc* tribunals came up and provided the modes of responsibility in a relatively nuanced way.¹⁶ Albeit the ICC Statute has a more detailed provision than both the military and *ad hoc* tribunals,¹⁷ the above bewildering issues on modes of responsibility reached their zenith following its Article 25(3).

Hence, in this thesis, the author scrutinises the modes of responsibility stipulated under Article 25(3) of the ICC Statute in view of the approaches of making distinction among each other and the existence or otherwise of degree of blameworthiness. To this end, the author carries out a comparative study in light of selected common and civil law countries.

¹¹ Art. 5, the ICC Statute.

¹² Jain N 'The Control Theory of Perpetration in International Criminal Law' (2011) 12 *CJIL* 159.

¹³ Werle G 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *JICJ* 953.

¹⁴ Cryer, Friman & Robinson *et al* (2010) 361. See also, Wirth S 'Committing Liability in International Criminal Law' in Stahn & Sluiter (eds) *The Emerging Practice of The International Criminal Court* (2009) 329.

¹⁵ Finnin S *Elements of Accessorial Modes of Liability: Article 25 (3)(B) and (C) Of the International Criminal Court* (2012) 12.

¹⁶ Werle & Jessberger (2014) 195.

¹⁷ Eser A 'Individual Criminal Responsibility: Mental Element – Mistake of Fact and Mistake of Law' In Cassese, Gaeta & Jones *The Rome Statute of the International Criminal Court: A Commentary* (2002) 786. See also, Stephens P 'Collective Criminality and Individual Responsibility: The Constraints of Interpretation' (2014) 37 *FordhamIntlLJ* 2 517.

1.3 Research Problem

In this paper, the author focuses on the following problems:

- I. Since one among the unsettled issues under the jurisprudence of ICL is how to distinguishing the modes of responsibility, it is the first focus of the thesis; and,
- II. The implication behind Article 25(3) of the ICC Statute, if any, is also uncertain. It is perplexing whether there is degree of blameworthiness amongst the modes of responsibility. Hence, ascertaining the question of degree of blameworthiness under the ICC jurisprudence is the second focus of the thesis.

1.4 Objectives of the Study

1.4.1 General Objective

The general objective of this study is to scrutinise the modes of responsibility envisaged in Article 25 of the ICC Statute with a special emphasis on the approaches of differentiating them, and the *raison d'etre* behind their listing, if any.

1.4.2 Specific Objectives

The following are the specific objectives of this thesis:

- I. It aims to scrutinise the means of drawing a line between the modes of responsibility.
- II. It targets to examine the existence or otherwise of degree of blameworthiness among those modes of responsibility.



III. It seeks to conduct a comparative study on the above issues in light of both civil law and common law legal traditions.

1.5 Research Questions

The research questions that this thesis pursues to answer are:

I. What is the proper way of understanding Article 25 of the ICC Statute?

II. What is the right approach to distinguishing the modes of responsibility, if there is a need to do so? and,

III. What is the nexus between Article 25(3) of the ICC Statute and degree of blameworthiness, if any?

1.6 Literature Review

Under ICL, modes of responsibility are not an untouched or exhaustively discussed area. There are several scholarly works. For example, Werle in his work titled, 'Individual Criminal Responsibility in Article 25 ICC Statute'; and, Ohlin, Sliedregt & Weigend in their work entitled, 'Assessing the Control-Theory' has discussed some issues of individual criminal responsibility. Moreover, Ambos has made his commentary on Article 25 of the ICC Statute. However, irrespective of the presence of such works, the issues on modes of responsibility are not settled.

Consequently, none of the existing works can be a bar for this thesis. They will all enrich it. Because, besides this thesis is aimed to find an ameliorating solution which can ease the existing tension; first, most of the existing works were not written in light of comparative study which

comprises both civil and common law countries. Secondly, the issues selected for this thesis are still unsettled both in and outside the court. Hence, the author believes that there is still a need to make further research and settle the jurisprudence.

1.7 Research Methodology

This thesis is a qualitative desktop research. Accordingly, in order to meet its objective, the author primarily approaches the research questions in the following ways:

- I. Analysis of primary sources such as the ICC's legal texts, cases, domestic laws, etc.
- II. Analysis of secondary sources like books, journal articles, internet sources, etc.

1.8 Significances of the Study

This thesis has the following main significances:

- I. Since the issues on modes of responsibility are not settled under international criminal justice system, this study plays a particular importance in the attempt to resolve the problems. Specifically, it will address the question of approaches of making distinction, and degrees of blameworthiness among the modes of responsibility under the ICC Statute.
- II. It serves as a reference material on individual criminal responsibility in general and modes of responsibility in particular.



1.9 Delimitation of the Study

As the nomenclature of the thesis signifies, its focus is on the unsettled issues of modes of responsibility under Article 25(3) of the ICC Statute. Thus, its realm confines on the means of discerning the modes of responsibility, and degree of blameworthiness. Moreover, besides issues related with *mens rea*, the military trials, *ad hoc* tribunals, and hybrid courts are out of the ambit of this paper. These jurisprudences are consulted only for the sake of clarification.

1.10 Organization of the Thesis

The thesis has five chapters, this first chapter being this introductory part. The second chapter explains modes of responsibility under the ICC legal framework. This chapter started by assessing the status of the modes of responsibility during the pre-ICC period in view of the main issues of the thesis. The third chapter has two parts. While the first section delves with the main models of criminal participation, the second section is devoted to a comparative study of selected common and civil law countries. The fourth chapter, having the previous chapters as a background, scrutinises the uncertainties on the modes of responsibility. Finally, the fifth chapter provides the conclusion and recommendations.

CHAPTER TWO

2. MODES OF RESPONSIBILITY UNDER THE INTERNATIONAL CRIMINAL COURT LEGAL FRAMEWORK

ICL proscribes some conducts as crimes and hold their perpetrators individually responsible. The ICC Statute, besides such serious crimes of concern, provides the modes via which the offenders could participate in the commission of such crimes and liable for punishment.¹⁸ The focus of this thesis is the modes of responsibility under the ICC Statute specifically in view of the approaches of making distinction and degrees of blameworthiness. Accordingly, this chapter first provides the groundwork by elaborating the various modes of responsibility under the Statute. However, for the sake of better understanding and to have a full picture of the issues, the author also found it apposite to make a generic discussion of the pre-ICC Statute period. Therefore, while the first section explores the modes of responsibility's status in the pre-ICC Statute, specifically in light of the above main issues, the second section discuss them under the ICC Statute.

2.1 Pre-Rome Statute

Modes of responsibility denote the connecting principles that relate the conduct of an offender to the execution of a crime.¹⁹ They are not about the elements of the crimes. They are about how the offenders participate in the commission of the crimes. Concerning such international crimes, the first unsuccessful prosecution was for 'a supreme offence against international morality and the sanctity of treaties'²⁰ against the German Kaiser Wilhelm II, following the 1919 Versailles Peace Treaty. Albeit this treaty can be a starting point for discussing the development of ICL, it

¹⁸ Art. 25(3), the ICC Statute

¹⁹ Ohlin J 'Second Order Linking Principles: Combining Horizontal and Vertical Modes of Liability: International Law and Practice' (2013) *LJIL* 2.

²⁰ Art. 227, the Versailles Peace Treaty.

stated nothing about the possible modes of responsibility that the perpetrators could have been charged. It provided only about the establishment of a 'High Tribunal'.²¹ Hence, by extrapolation, it is possible to say that the treaty gave less attention to modes of responsibility. Proceeding to the military trials, unlike the Versailles Peace Treaty, they had provisions on the modes of responsibility.²² However, their rules were only 'rudimentary and fragmentary'.²³ In other words, they were not systematic but mere enumerations and intertwined with the definition of the crimes.²⁴ What is more, the military trials did not make a distinction among the modes of responsibility.²⁵ The other related legal instrument was the Control Council Law No. 10. This law provided a uniform legal basis for the trials conducted in the four occupation Zones of Germany.²⁶ Under this law, by contrast with the IMT and its sibling IMTFE, albeit no separate importance accorded to the modes of responsibility and some rules were still part of the definition of the crimes,²⁷ the modes were better systematised and elaborated. For the first time, there were specific provisions devoted to regulate the principal and accessorial responsibilities under ICL.²⁸

Moving to the *ad hoc* tribunals, compared to the aforementioned laws, they have presented nuanced modes of responsibility and have made distinction among the modes of responsibility.²⁹ Moreover, though it was controversial, the JCE notion was developed³⁰ whereby distinction

²¹ Arts. 227-231, the Versailles Peace Treaty.

²² IMT Charter (1945) Art. 6. See also, IMTFE Charter (1946), Art. 5.

²³ Werle & Jessenberg (2014) 194. See also, Werle G (2007) 955.

²⁴ Art. 6(a)(c), IMT Charter & Art. 5(a)(c), IMFFE Charter. See also, Werle & Jessenberg (2014) 194.

²⁵ Werle & Jessenberg (2014) 195.

²⁶ The Allied Control Council Law No. 10 (1945).

²⁷ Art. II(1)(a), the Control Council Law No. 10.

²⁸ Art. II(2), the Control Council Law No. 10.

²⁹ The Statute of the ICTY (1993) Art. 7(1). See also, The Statute of the ICTR (1994) Art. 6(1).

³⁰ The *Prosecutor v. Dusko Tadic*, ICTY (AC) IT-94-1-A, Appeal Judgement (15 July 1999).

among the co-participants is made based on the parties' *mens rea*.³¹ Interestingly, though inconsistent,³² there were also questions on the degree of blameworthiness. For example, in *Mitar Vasiljević* case, the Appeals Chamber stated that '*aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator*'.³³ Accordingly, the chamber mitigated the punishment from 20 to 15 years. In *Radislav Krstic* case too, the appeal chamber reduced the sentence from 46 to 35 for aiding and abetting genocide.³⁴ Akin to the hierarchy made between the principals and secondary participants in the *Vasiljević* and *Krstic* cases, in the case of secondary participants, there was also a trend of considering ordering and instigating higher in responsibility than aiding and abetting.³⁵

To sum up, during the pre-ICC period, moving from the Versailles Peace Treaty to the *ad hoc* tribunals, better emphasis have been given to the modes of responsibility in a progressive way. Concisely, though contentious, specifically during the *ad hoc* tribunals, there was question how to make a distinction and degrees of blameworthiness among the modes of responsibility, especially between the principals and the secondary participants as well as among the secondary participants themselves. However, there were no similar discussions on the modes of responsibility found under the same category in a single sub-article: among aider and abetter, among the direct perpetrator and joint perpetrator, etc.

³¹ *Tadic* Appeal Judgement (1999) 191-192. See also, Olasolo H 'Developments in the Distinction between Principal and Accessorial Liability In Light Of the First Case of the International Criminal Law' in Stahn & Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) 349.

³² Werle & Burghardt 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute' in Slidregt & Vasiliev (eds) *Pluralism in International Criminal Law* (2014) 309. See also, Slidregt E 'Perpetration and Participation in Article 25(3)' in Stahn C (ed) *The Law and Practice of the International Criminal Court* (2015) 514.

³³ The *Prosecutor v Mitar Vasiljević*, ICTY (AC) IT-98-32-A, Appeal Judgment (25 February 2004) 182.

³⁴ The *Prosecutor v Radislav Krstic*, ICTY (AC) IT-98-33-A, Appeal Judgment (19 April 2004) 275.

³⁵ See, Werle & Burghardt in Slidregt & Vasiliev (eds) (2014) 310.

2.2 Rome Statute

Under the ICC Statute, the modes of responsibility are provided under Article 25(3). This provision lists the modes of responsibility under four sub-articles. In the Statute, nothing is said concerning the reason for listing them or how to distinguishing among each other. As explained subsequently, these modes of responsibility can be categorised as referring to perpetrators and secondary participants.

2.2.1 Perpetrator/Commission

As discussed below, under the ICC legal framework, direct perpetration, joint perpetration, indirect perpetration, and as argued in different cases indirect co-perpetration are the principal modes of responsibility.

2.2.1.1 Direct Perpetration

Direct perpetrator,³⁶ the classical mode of responsibility, occurs when the offender execute the *actus reus* element of the crime in person with the required *mens rea*.³⁷ However, if the person failed to discharge the *actus reus* in person, the next immediate options are commission as co or indirect perpetration. This signifies that commission is not exclusively about direct perpetration. There can be commission even when the person participated in an indirect way.

³⁶ Art. 25(3)(a), the ICC Statute.

³⁷ Schabas W *An Introduction to the International Criminal Court* 4ed (2011) 226.

2.2.1.2 Co-Perpetration

Co-perpetration³⁸ requires the presence of a plurality of persons who share a common plan and contribute to the consummation of the crime.³⁹ In co-perpetration, there is an imputation of the *actus reus* of the crime. The *actus reus* committed by one member among the group ascribed to all. However, there is no similar attribution of the *mens rea* of the crime.⁴⁰ All of the joint participant must fulfil the *mens rea* provided for the crime.

Co-perpetration is different from the *ad hoc* tribunals' JCE. While the former gives much emphasis to the objective element of the crime and require an essential contribution (the JCE requires a significant contribution), the latter gives high emphasis to the subjective element; i.e., only intent in the sense of purpose suffices (the co-perpetration simply requires the same one that is also sufficient for individual commission).⁴¹

2.2.1.3 Indirect Perpetration

Indirect perpetration⁴² presupposes the existence of a witting or unwitting person via whom the *actus reus* element of the crime is committed.⁴³ The rationale behind this mode is that 'the perpetrator behind the perpetrator is responsible because s/he controls the will of the direct perpetrator'.⁴⁴ Accordingly, the indirect perpetrator is criminally responsible as if he/she has committed the *actus reus*.⁴⁵ Further, for the liability of the indirect perpetrator, the liability of the

³⁸ Art. 25(3)(a), the ICC Statute.

³⁹ Ambos K 'Article 25- Individual Criminal Responsibility' in Triffterer O (eds) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2ed (2008) 479.

⁴⁰ Werle & Jessberger (2014) 207.

⁴¹ See, Wirth S 'Co-perpetration in the Lubanga Trial Judgment' (2012) 10 *JICJ* 974-976.

⁴² Art. 25(3)(a), the ICC Statute.

⁴³ Ambos in Triffterer O (eds) (2008) 478.

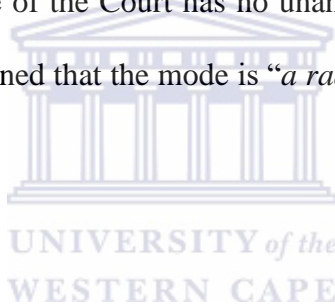
⁴⁴ The *Prosecutor v Germain Katanga and Mathieu Ngujolo Chui*, ICC (PTC) 01/04-01/07-717, Confirmation of Charges (30 September 2008) 497.

⁴⁵ Ambos in Triffterer O (eds) (2008) 478.

agent is immaterial.⁴⁶ The responsibility of the indirect perpetrator is independent of the agent. However, the use of a criminal agent in an indirect perpetration makes it confusing with other modes such as instigation, and ordering.

2.2.1.4 Indirect Co-Perpetration

The ICC Statute does not expressly stipulate indirect co-perpetration. Indirect co-perpetration, besides relying on the Roxin's theory of 'dominance over an organisation',⁴⁷ is an eclectic of co and indirect perpetration. In *Katanga and Chui* case, the PTC reads the word 'or' between the last two expressly provided alternative modes of commission under Article 25(3)(a) as 'inclusive'.⁴⁸ However, this edifice of the Court has no unanimous acceptance. For example, in the same case, Judge Wyngaert opined that the mode is "*a radical expansion*" of Article 25(3)(a) and are not acceptable.



2.2.2 Secondary Participants

2.2.2.1 Solicits, Induces or Orders

Though the ICC Statute does not define the concepts of inducing and soliciting, both refer the idea of causing a specific person to commit a specified criminal conduct.⁴⁹ They also contain intellectual element of persuading another person and element of force.⁵⁰ Hence, it is difficult to draw a borderline between them. In the ICC context, they fall under a generic notion called instigation and defined as '*prompting another person to commit a crime*'.⁵¹ However, for the

⁴⁶ Art. 25(3)(a), the ICC Statute.

⁴⁷ Slidregt E. in Stahn C (ed) 509.

⁴⁸ *Katanga and Chui* Confirmation of Charges (2008) 491.

⁴⁹ Timmermann W *Incitement in International Law* (2015) 228.

⁵⁰ Timmermann W (2015) 228. See also, Ambos in Triffterer O (eds) (2008) 480-481.

⁵¹ The *Prosecutor v. Germain Katanga*, ICC (TC) 01/04-01/07-3436, Judgment (7 March 2014) 1396.

academia, inducement is broader than solicit.⁵² In both cases, however, subordinate-superior relationship is not a necessary requirement.⁵³ Further, the instigator is different from the indirect perpetrator for the reason that while the former always use a responsible person, the latter may use both witting and unwitting persons.⁵⁴ Unlike the *ad hoc* tribunals,⁵⁵ under the ICC jurisprudence, as an *actus reus* element, the one who instigates another person is not required to make an ‘essential contribution’; similarly, as a *mens rea*, it is sufficient for the instigator to be cognisant of the ‘substantial likelihood’ that a crime would result from her/his conduct.⁵⁶

Besides the above modes, the ICC Statute recognises ordering.⁵⁷ In ordering, the superior uses the subordinate as a means to commit a crime.⁵⁸ It signifies the situation when the subordinate is treated as a direct perpetrator in Article 25(3)(a) and the superior grouped in Article 25(3)(b) as secondary mode. Owing to this, ordering has provoked a debate. For example, Ambos contends that commission of a crime by ordering another to do something, in a situation where a person can commit an act through a guilty as well as an innocent agent, is an example of perpetration ‘through another person’.⁵⁹ Therefore, for him, ordering should have been categorised under Article 25(3)(a) of the ICC Statute in particular as ‘commission through another person’.⁶⁰ Eser, in support of Ambos, opines that the inclusion of ordering under Article 25(3)(b) is superfluous and degrades perpetration to mere complicity.⁶¹ On the other hand, there is an argument that

⁵² Eser in Cassese, Gaeta & Jones (eds) (2002) 797. See also, Ambos in Triffterer O (eds) (2008) 480-481.

⁵³ Cryer R ‘General Principles of Liability in International Criminal Law’ in McGoldrick, Rowe & Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 245.

⁵⁴ Weigend T ‘Indirect Perpetration’ in Stahn C (ed) *The Law and Practice of the International Criminal Court* (2015) 538.

⁵⁵ *The Prosecutor v Dario Kordic and Mario Cerkez*, ICTY (AC) IT-95-14/2-A, Appeal Judgement (17 December 2004) 27. See also, *The Prosecutor v Limaj et al*, ICTY (TC) IT-03-66-T, Judgement (30 November 2005) 514.

⁵⁶ Werle & Jessberger (2014) 214.

⁵⁷ Art. 25(3)(b), the ICC Statute.

⁵⁸ Art. 25(3)(b), the ICC Statute.

⁵⁹ Ambos in Triffterer O (eds) (2008) 480 & 491.

⁶⁰ Ambos in Triffterer O (eds) (2008) 480 & 491.

⁶¹ Eser in Cassese, Gaeta & Jones (eds) (2002) 797.

what is provided under Article 25(3)(b) of the ICC Statute is an ‘ordinary cases of criminal ordering’ wherein there is no ‘automatic compliance’.⁶² The ordering in the sense of ‘automatic compliance’ is within the preview of ‘commission through another person’.⁶³ Though by no means it is easy to decide, the author accepts the second line of argument and supports the inclusion of ordering under Article 25(3)(b) instead of Article 25(3)(a). This approach rightly explains the scenarios where someone could be when s/he received an order from a superior. Put differently, the mental state of the person who accepts the order under Article 25(3)(b) is different from Article 25(3)(b). While in the latter case the person has the option to say ‘NO/YES’, under the first scenario there is only one option which is ‘YES’ and act.

Finally, it is worth considering that ordering in Article 25(3)(b) is different from responsibility pursuant to Article 28 of the Statute. Under Article 28, unlike Article 25(3)(b), responsibility depends on effective control and require a lower *mens rea*.⁶⁴ Furthermore, while Article 28 is about omission, Article 25(3)(b) does not necessary require a formal superior-subordinate relationship.⁶⁵

Generally, all the above three secondary modes have in common that the participants do not execute the crime by themselves, but solicits, induces or order another person to do it. Besides, the blurry situation of soliciting and inducing, the inclusion of the orderer in the same group with secondary participants trigger the need to have an apt approach of making distinction.

⁶² *Katanga and Chui Confirmation of Charges* (2008) 517. See also, Werle G (2007) 968.

⁶³ *Katanga and Chui Confirmation of Charges* (2008) 517. See also, Werle G (2007) 964.

⁶⁴ Aksenova M *Complicity in International Criminal Law* (Doctoral Dissertation, the European University Institute, 2014) 101.

⁶⁵ Olasolo & Rojo ‘Forms of Accessorial Liability under Article 25(3)(b) and (c)’ in Stahn C (ed) *The Law and Practice of the International Criminal Court* (2015) 562.

2.2.2.2 Aiding, Abetting, or Otherwise Assists

Though it is common to treat aiding and abetting as one notion, the terms are not similar. For instance, according to ICTR jurisprudence, while aiding refers to ‘*giving assistance to someone*’, abetting denotes ‘*facilitating the commission of an act by being sympathetic thereto*’.⁶⁶ However, there is disagreement as to whether the ICC should adopt the same understanding of these concepts.⁶⁷ The author concurs with the trend of treating the two notions differently as the same as the *ad hoc* tribunals’ jurisprudence. Besides the general *mens rea* requirement, under the ICC Statute, the aider and abettor should perform the *actus reus* with the ‘purpose of facilitating’ the materialisation of the crime.⁶⁸ This additional subjective requirement indicates that the required *mens rea* is beyond the ordinary rule of Article 30. The person must provide the contribution with the purpose of facilitating the commission of the committed or attempted crime. Cassese, alleging that this additional subjective requirement narrowed the concept of aiding and abetting by making the *mens rea* tantamount to shared intent, consider it as ill fated.⁶⁹

Finally, it is worth noting that Article 25(3)(c) does not restrict the modes of responsibility only to aiding and abetting. The phrasing of the provision suggests that aiding and abetting are mere subsets of a wider category of assistance.

⁶⁶ The *Prosecutor v. Semanza*, ICTR (TC) 97-20-T, Judgement and Sentence (15 May 2003) 384.

⁶⁷ See, Olasolo & Rojo in Stahn C (ed) (2015) 579.

⁶⁸ Art. 25(3) (c), the ICC Statute.

⁶⁹ Cassese, Gaeta & Baig *et al* Cassese’s *International Criminal Law* 3ed (2013) 195.

2.2.2.3 Contribution to a Group Crime

This mode of responsibility has no correspondence at international customary law⁷⁰ and enshrined under Article 25(3)(d) of the Statute. The provision started with a connecting phrase ‘in any other way’ which indicates that the provision is intended to govern the situations that do not fall under the previous sub-articles of the provision. It regulates the situation when a group of persons acting with a common purpose contributes to a committed or attempted crime. Nevertheless, what constitute a group is not clear and has been a point of contention within the Court.⁷¹ Moreover, the contribution should be intentional ‘*with the aim of furthering the criminal activity or criminal purpose of the group*’ or ‘*in the knowledge of the intention of the group to commit the crime*’.⁷² Concerning the contribution, in the *Mbarushimana* case, the pre-trial chamber explained that it should be ‘at least significant’.⁷³ Moreover, it is not necessary for the person to be a member of the group. Further, the Court besides considering it as ‘residual form of accessory liability’⁷⁴ alleged that this provision works when a person contributes after the crime has already been committed.⁷⁵

⁷⁰ Werle & Jessberger (2014) 219.

⁷¹ *Katanga* Judgment (2014) 1625. See also, *The Prosecutor v Muthuara et al*, ICC (PTC)-01/09-02/11, Confirmation of Charges (23 January 2012) 422.

⁷² Art. 25(3)(d)(i)(ii), the ICC Statute.

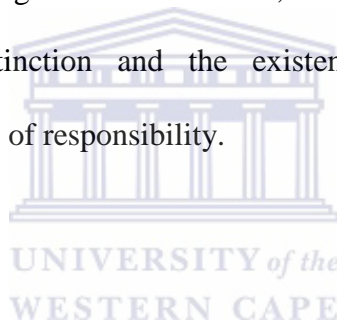
⁷³ *The Prosecutor v Mbarushimana*, ICC (PTC) 01/04-01/10, Confirmation of Charges (16 December 2011) 283.

⁷⁴ *The Prosecutor v Thomas Lubanga Dyilo*, ICC (PTC) ICC-01/04-01/06-803, Confirmation of Charges (29 January 2007) 331, 335–37.

⁷⁵ *The Prosecutor v Mbarushimana*, ICC (PTC) 01/04-01/10, Confirmation of Charges (16 December 2011) 287.

Summary

This chapter, besides showing the journey of the modes of responsibility from the Versailles Peace Treaty to the contemporary ICC Statute, discussed the modes of responsibility under the ICC Statute. Moving from the military tribunals to the ICC Statute, besides adherence to categorisation of modes of responsibility, the ICC Statute is relatively comprehensive and detailed but is still imperfect. Apart from the difficulty to crystallise the exact boundary of some of the modes of responsibility provisions (like Articles 25(3)(c) and 25(3)(d)), akin to the implication behind the listing of Article 25(3), the Statute says nothing on how to distinguishing these modes of responsibility among each other. Hence, there is unwavering need to determine the apt theory of making distinction and the existence or otherwise of degrees of blameworthiness among the modes of responsibility.



CHAPTER THREE

3. A COMPARATIVE STUDY OF THE MODES OF RESPONSIBILITY UNDER SELECTED COUNTRIES

Before indulging in a specific discussion of the modes of responsibility under selected common and civil law countries, the author finds necessary to highlight the models of criminal participation as a prelude. Accordingly, the first part of this chapter is devoted to it.

3.1 A General Glimpse of the Models of Criminal Participation

The models of criminal participation are important to determine who is responsible, in what capacity and degree of blameworthiness. Albeit they are several, since they are interrelated and mutually reinforcing, in this thesis, the author discusses the two most important models.

3.1.1 Unitary Model

This model connotes that all participants in the execution of a crime are personally responsible for their respective contribution.⁷⁶ The model does not anticipate the commission of a single offence by a plurality of persons. If there is an involvement of a plurality of persons, what could happen is a commission of a multiplicity of crimes.⁷⁷ Regardless of the weight of their contribution, all of them are principals.⁷⁸ Under the unitary model, there is no derivative liability.⁷⁹ Responsibility does not presuppose the attempt of a criminal conduct by another

⁷⁶ Swart B 'Modes Of International Criminal Liability' 82-93 in Cassese A (ed) *The Oxford Companion to International Criminal Justice* (2009) 87.

⁷⁷ Slidregt E *Individual Criminal Responsibility in International Law* (2012) 66.

⁷⁸ Stewart J 'The End of 'Modes of Liability' for International Crimes' (2012) 25 *LJIL* 169. See also, Werle & Burghardt in Slidregt & Vasiliev (eds) (2014) 303.

⁷⁹ Olasolo in Stahn & Sluiter (eds) (2009) 340.

person.⁸⁰ All participants are answerable for the punishment provided for the proper crime.⁸¹ In light of making distinction as principal and secondary participant, a unitary model can be ‘functional’ or ‘pure’. Though in both cases there is no derivative liability, unlike the pure unitary model, the functional unitary model recognises a formal distinction between the perpetrators and secondary participant.⁸²

Generally, the unitary model provides only the response to the question of who is individually answerable to the crime and does not make any further distinction on modes of responsibility for bearing responsibility. Countries such as Austria, Norway, and Italy recognised this model under their criminal law.⁸³ At the international arena, the military trials did employ it to criminalise the Nazi leadership.⁸⁴

3.1.2 Differentiation Model

Unlike the unitary model, the differentiation model recognises the distinction of the participants in the commission of the crime.⁸⁵ There is distinction between those who actually commit the crime and those involved in supplementary capacity.⁸⁶ While the responsibility of the principal offenders is emanates from their own acts, the secondary participants’ responsibility derives from the consummated or at least attempted criminal act of the principal.⁸⁷ Accordingly, in this model, there is derivative liability. It accepts the possible existence of plurality of people who may have a role in the execution of the crime. Hence, unlike the pure unitary model, under the

⁸⁰ Werle & Burghardt in Slidregt & Vasiliev (eds) (2014) 303.

⁸¹ Swart B (2009) 87.

⁸² See, Olasolo in Stahn & Sluiter (eds) (2009) 340.

⁸³ Militello V ‘The Personal Nature of Individual Criminal Responsibility and the ICC Statute’ (2007) 5 *JICJ* 5 948.

⁸⁴ Werle & Jessberger (2014) 195.

⁸⁵ Slidregt E (2012) 66.

⁸⁶ Slidregt E (2012) 66.

⁸⁷ Slidregt E (2012) 66.

differentiation model, not all of the participants are principals. While some could be principal, the other some could be secondary participants. Likewise, since the liability of the secondary participant is contingent on the principal, unlike the unitary model, there is also an argument for the existence of degree of blameworthiness wherein the latter is more responsible than the former.

Countries such as France, Germany, Spain, Portugal, and Croatia adopted the differentiation model.⁸⁸ At the international level, there is a shift to this model since the *ad hoc* tribunals.⁸⁹

To conclude, both the unitary and differentiation models are accepted. Besides differentiating the participant in the commission of the crime as principal and secondary, their main difference lies on the source of the participants' responsibility. While the unitary model makes the responsibility of all participants independent, the differentiation model, besides distinguishing the principal and secondary participants, implies dependence of the secondary participants' responsibility on the principal's criminal conduct. Consequently, based on this distinction, whilst the unitary model consider the entire participant as perpetrator and argue for them to receive similar punishment, the differentiation model categorises the participants in the commission of crime into principal and secondary and indicates degree of blameworthiness. However, worthy considering that as the author calls *larvae of differentiation model*, the 'functional unitary model' recognises a formal distinction among the principal and the secondary participants. Furthermore, conceptually, it should be worth noting that the degrees of blameworthiness is implicated only among the principals and secondary participants where the secondary participants' liability is derivative of the former.

⁸⁸ Militello V (2007) 948.

⁸⁹ Finnin S (2012) 22.

3.2 A Comparative Study

The purpose of this comparative study is not to oblige the ICC to follow a domestic legal tradition. The Court is not and should not be under duty to do so. However, it is also not completely wrong if it borrows from a domestic legal tradition. Undeniably, international tribunals often inspired and shaped by domestic standards.⁹⁰ However, as Judge Fulford argued,⁹¹ if there is such a need, it should be after a careful assessment of the policy considerations underlying the domestic legal doctrine and its compatibility with the international criminal justice system.

Comparative study is vital for three main reasons.⁹² First, since principles that are developed consistent with the 'general principles of law recognised by civilised nations' have a higher chance to be a genuine source of international law than a principle lend from a single country or few countries, it allows ICL to assess such principle and built its legitimacy on a firm ground. Secondly, exploring diverse legal traditions permits to discover the best solution for the multifaceted factual and legal problems and then eases the difficulties created because of problems of understanding between common and civil lawyers. Lastly, it is justified by Article 21(c) of the ICC Statute that allows the interpretation of the Statute in light of domestic law of states that would normally exercise jurisdiction.

Consequently, to conduct the comparative study, whereas Germany and Ethiopia are chosen from the civil law tradition, United Kingdom and United States are selected from the common law tradition. These countries are chosen based on, besides the attempt to see the view of non-

⁹⁰ Aksenova M (2014) 20.

⁹¹ The *Prosecutor v Thomas Lubanga Dyilo*, ICC (TC) ICC-01/04-01/06-2842, Judgement (14 March 2012) Separate Opinion of Judge Adrian Fulford, 10.

⁹² Cryer in McGoldrick, Rowe & Donnelly (eds) (2004) 262.

member states like Ethiopia, their strong nexus with the birth and development of ICL and their legal tradition's influence on the world's legal system.

3.2.1 Civil Law Legal Tradition

3.2.1.1 Germany

Germany has signed the ICC Statute on 10 December 1998, ratified it on 11 December 2000,⁹³ and enacted the ICC Statute Implementation Act on 1 July 2002. Until this Act entered into force, all criminal matters in Germany were governed by the German Criminal Code. However, the Act does not totally proscribe the application of the Criminal Code.⁹⁴ It allows the application of the Code's general rules such as on the modes of responsibility. Therefore, this discussion on the German legal tradition on the modes of responsibility focuses on the rules that found in their criminal code. The German Criminal Code provides the modes of responsibility from Section 25 to 31. These sections categorise the participant in the commission of a crime in two broad categories: Principal and Accessories.

The German Criminal Code provides three scenarios that perpetrators participate as a principal offender. These are when the person physically commits the offence; via another person; and, jointly with another person.⁹⁵ In the direct perpetrator, the person commits the *actus reus* element of the crime personally with the required *mens rea*.⁹⁶ In the second form, indirect perpetration,⁹⁷

⁹³ American Non-Governmental Organizations Coalition for the International Criminal Court, the ICC > Rome Statute Ratifications, available at <http://www.amicc.org/icc/ratifications> (accessed 13 June 2015).

⁹⁴ The German ICC Statute Implementation Act (2002) Sec. 2.

⁹⁵ German Criminal Code (1998) Sec. 25.

⁹⁶ Hamdorf K 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law' (2007) 5 *JICJ* 228 211.

⁹⁷ For detail analysis, see, Werle & Burghardt 'The German Federal Supreme Court (Bundesgerichtshof, BGH) On Indirect Perpetration: Introductory Note' (2011) 9 *JICJ* 207-226

the person commits the *actus reus* element of the crime via another person.⁹⁸ In this respect, two scenarios can exist.⁹⁹ First, the situation when the person absolutely controls the agent and the latter may be exonerated from criminal responsibility; and secondly, the exceptional situation where the agent is held liable together with the principal despite the principal's domination over the act.¹⁰⁰ Moving to the third form, the commission of the crime is not left to one or some of the participants only but for all;¹⁰¹ i.e., there should be a common plan subscribed by all participants.¹⁰² The common plan does not need an overt discussion between the joint participants and arranged in advance.¹⁰³ Moreover, not all the co-perpetrators are required to be at the scene of the crime.¹⁰⁴

Proceeding to the accessories, they include aiding, and abetting.¹⁰⁵ Generally, the following conditions are necessary for the existence of aiding, and abetting.¹⁰⁶ These are:

I. There must be an intentional assistance or inducement in or to the principal's intentional unlawful act. This means that there is no negligent abetting or assistance¹⁰⁷ and there is no aiding or abetting if the criminal conduct is not the result of the intentional conducts of the principal. Moreover, in the case of abetting, the abettor must be the one who induces the commission of the crime.

⁹⁸ Hamdorf K (2007) 211.

⁹⁹ Jain N (2011) 169.

¹⁰⁰ Bohlander M *Principles of German Criminal Law* (2009) 156-161.

¹⁰¹ Jain N (2011) 165.

¹⁰² Bohlander M (2009) 161.

¹⁰³ Bohlander M (2009) 163-165.

¹⁰⁴ Bohlander M (2009) 163-165.

¹⁰⁵ Looking these modes, it is possible to say that the German model does not completely match with the ICC Statute.

¹⁰⁶ Secs. 26 & 27, German Criminal Code.

¹⁰⁷ Sec. 30, German Criminal Code.

II. While the *actus reus* of the abettor is any act that can cause the principal to take her/his decision to commit a crime, the *actus reus* of the aider could be any kind of act that further the act of the perpetrator(s).

Further, the German Code of Crimes against International Law provides that ‘*Whoever commits an offence pursuant to Sections 8 to 14 in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is also not manifestly unlawful.*’¹⁰⁸

According to this provision, the person who receives an order might not be criminal responsible. Besides the binding nature of the order, the subordinates’ liability is dependent on their knowledge about the illegality of the order and its noticeability. Albeit the subordinates are unwitting about the illegality of the order, they may be criminally responsible if the order’s unlawfulness is easily noticeable. However, inherently the provision does not suggest the situation when the subordinate is more liable than the superior’s liability. Further, the German law recognises some kinds of criminal conspiracy, in cases where two or more persons agree on committing a crime.¹⁰⁹

The German Criminal Code, alike the ICC Statute, distinguishes participants as principal and accessory, and is silent on the means of making distinction. Accordingly, there have been attempts by the German Federal Court of Justice and criminal law commentators to develop various theories. Consequently, the objective theory, the subjective theory, and, the control over the crime theory have been propounded.¹¹⁰ Currently, of these theories, the German legal

¹⁰⁸ Sec. 3, German ICC Statute Implementation Act.

¹⁰⁹ Sec. 30(2) & 31, German Criminal Code.

¹¹⁰ See, Chapter Four: 4.1.2 of this thesis.

tradition has adopted the control over the crime theory (in German “Tatherrschaft”) which was first systematised by Claus Roxin.¹¹¹

Moving to the degree of blameworthiness, akin to some domestic criminal laws like the Swiss Criminal Code,¹¹² the German Criminal Code provides that the aider have a mandatory statutory discount during sentencing.¹¹³ However, similar mandatory mitigation is not available for an abettor.¹¹⁴ This absence of mitigation for the abettor has two immediate suggestions. First, it makes the existence of absolute degree of blameworthiness between principals and secondary participants murky. Because, there is an apparent possibility in which the abettor may receive equal or greater punishment than the principal. The same confusion also exists between aider and abettor. Secondly, it speaks that the mere recognition of a differentiation model of criminal participation does not necessarily imply an immediate implication on degrees of blameworthiness.

Generally, the German legal tradition recognises a differentiation model wherein the control over the crime theory serves as a means to distinguishing the modes of responsibility. However, it is necessary to note that the German law does not recognise an absolute degree of blameworthiness. Further, the law is silent whether there is hierarchical relation or not among the modes of responsibility that are found under the same category; be it as principal (between the three forms) or secondary participants.

¹¹¹ Ohlin J ‘Co-Perpetration German Dogmatik or German Invasion?’ in Stahn C (ed) *The Law and Practice of the International Criminal Court* (2015) 520.

¹¹² Timmermann W (2015) 228.

¹¹³ Sec. 27(2), German Criminal Code.

¹¹⁴ Secs. 25 & 26, German Criminal Code.

3.2.1.2 Ethiopia

Though Ethiopia was an active participant in the establishment of the ICC, finally, along with 20 other countries, it abstained from voting for the adoption of the Statute of the Court. Ethiopia has also, since then not acceded to the ICC Statute, in spite of accepting, in principle, the need for establishing an International Criminal Court.¹¹⁵ Accordingly, in Ethiopia, its domestic criminal law governs every criminal activity.

Ethiopia has a Federal System of Government.¹¹⁶ However, in principle, the power to enact a criminal law is vests in the Federal Government.¹¹⁷ Consequently, the Federal Government has enacted a Criminal Code in 2004.¹¹⁸ This Code provides the modes of responsibility from Articles 32 to 40.¹¹⁹ These provisions crudely classify the participants in criminal conduct into two categories: Principal, and Secondary offenders.

The Ethiopian Criminal Code provides three situations in which a person participates in criminal activity as principal offender. These are: Material Offender; Moral Offender; and, Indirect Offender. The material offender is the person who actually commits the crime either directly or indirectly.¹²⁰ While the direct means is when the person commits the criminal conduct in person with the required *mens rea*, the indirect means refer to the situation in which the perpetrator employs animals or natural forces.¹²¹ Unlike the Ethiopia Criminal Code, the German legal tradition, does not explicitly mention this indirect way of participating as a material offender.

¹¹⁵ See, Tewodros D 'The International Criminal Court: A Brief Survey of Its Statute and Ethiopia's Reservation during Its Adoption' (2009) 3 *Ethiopian Bar Review* 1, 31-70.

¹¹⁶ Constitution of the Federal Democratic Republic of Ethiopia (1995) Arts. 1, 46, & 50(1) (2).

¹¹⁷ Art. 55(5), Ethiopian Constitution.

¹¹⁸ Criminal Code of the Federal Democratic Republic of Ethiopia (2004).

¹¹⁹ See, Arts. 42 to 47, Ethiopian Criminal Code.

¹²⁰ Art. 32(1)(a), Ethiopian Criminal Code.

¹²¹ Art. 32(1)(a), Ethiopian Criminal Code.

Moving to the moral offender, it denotes those persons who fully associate themselves with the commission of the crimes and the result intended but without performing the *actus reus* of the crime.¹²² These persons are called ‘working brains’ and are principals and punishable as such, because, they fully associate themselves with the material offender’s criminal act and adopt it as their own offence.¹²³ The moral offender is not entirely about those persons who indirectly control the commission of the crime. It is about all persons who associates themselves in the commission of the criminal conduct and considers it as their activity. Hence, this Ethiopian mode of responsibility is a bit different from the German mode of responsibility called ‘commission through another person’. Lastly, the indirect offender is the person who uses an infant, mentally deficient or a person who is ignorant of the situation as a means or forces others to commit crimes.¹²⁴ This scenario is different from the indirect material offender provided under Article 32(1)(a) by the nature of the instrument or agent used. While the indirect material offender under Article 32 (1)(a) uses means such as animals and non-living things, under Article 32(1)(c) the person uses human beings who are completely irresponsible for reasons including age and mental problem. This mode seems the German ‘commission through another person’. However, the Ethiopian provision is different in the sense that it does not regulate the situation when the person uses an agent who is cognisant of the guilty act and performs the material element.¹²⁵ This follows from the close reading of Article 32(1)(a) & (c). These provisions talks only when the person uses inanimate and animate means but who are criminally irresponsible. Hence, it is one weakness of the Ethiopian criminal law in resolving international crimes. Besides these

¹²² Art. 32(1)(b), Ethiopian Criminal Code.

¹²³ Graven P *An Introduction to Ethiopian Penal Law (Arts. 1- 84 Penal Code)* (1965) 94.

¹²⁴ Art. 32(1)(b), Ethiopian Criminal Code.

¹²⁵ Note: it is different from the moral offender who ‘fully associates’ him/herself with the material offender.

modes, though it is not as express as the German Criminal Code, arguably, it is possible to say that there is a joint perpetration under the Ethiopian Criminal Code.¹²⁶

Moving to the secondary participants, they refer to incitement¹²⁷ and accomplice. Accordingly, any person who ‘*intentionally induces another person whether by persuasion, promises, money, gifts, and threats or otherwise to commit a crime*’¹²⁸ and/or ‘*assists a principal criminal either before or during the carrying out of the criminal design, whether by information, advice, supply of means or material aid or assistance of any kind whatsoever in the commission of a crime*’¹²⁹ is responsible as a secondary participant. Akin to the German Criminal Code and the ICC Statute, under Ethiopian Criminal Code, the responsibility of the secondary participant presupposes the attempt of the criminal conduct by the principal.¹³⁰

The other secondary mode addressed under the Ethiopian Criminal Code is ordering. The only instance that is regulated under the Code is when there is an explicit order from an administrative or military superior who has competence to do so.¹³¹ In this case, criminal liability rests only on the superior if the subordinate did not exceed the order she/he has received.¹³² However, if the subordinate was aware of the illegality of the order, in particular, if she/he knew that the order was given without a lawful authority or has illegal nature, she/he will be responsible.¹³³ Moreover, if the subordinate intentionally exceeded the order, she/he will be alone responsible for the excess.¹³⁴ The construction of ordering under the Ethiopian Criminal Code is similar to

¹²⁶ See, Art. 32(3) & 35, Ethiopian Criminal Code.

¹²⁷ Note there is a nomenclature difference between the Ethiopian, German, and, the Rome Statute.

¹²⁸ Art. 36(1), Ethiopian Criminal Code.

¹²⁹ Art. 37(1), Ethiopian Criminal Code.

¹³⁰ Art. 36(2) & Art 37(3), Ethiopian Criminal Code.

¹³¹ It is narrower than Article 25(3)(b) of the ICC Statute.

¹³² Art. 73, Ethiopian Criminal Code.

¹³³ Art. 74(1), Ethiopian Criminal Code.

¹³⁴ Art. 74(3), Ethiopian Criminal Code.

the German Code of Crimes against International Law. However, since the latter uses a broad phrase ‘*in execution of a military order or of an order comparable in its actual binding effect*’, it is broader than the Ethiopian counterpart. Finally, alike the German legal tradition, the Ethiopian Criminal Code has exceptionally recognised conspiracy as a mode of responsibility.¹³⁵

Under Ethiopian Criminal Code, akin to the German legal tradition and the ICC Statute, there is no provision that indicates how to distinguish the modes of responsibility. Nevertheless, the close assessment of the express principal modes of responsibility designates the recognition of an eclectic of subjective and objective approaches. Since those persons who commit the *actus reus* of the crime is considered as a principal offender, there is an objective approach application. Moreover, regarding those persons who partake in the commission of the crime without committing the *actus reus* of the crime, unlike the German Criminal Code, the Ethiopian Criminal Code adopted a subjective approach. In this case, the question that needs to be answered to determine whether the person is a principal or not is, how much this person associated her/himself in the commission of the crime. If she/he fully associated (mentally) her/himself in the execution of the crime, she/he is a principal. Generally, though there is no an express indication, arguably, the Ethiopian Criminal Code’s approach can be categorise as an eclectic of objective and subjective approaches.

Ensuing to the degrees of blameworthiness, under the Ethiopian Criminal Code, there is no mandatory distinction between the responsibility of the principal and secondary offenders. In principle, the punishment provided to the secondary participants is the same as principals.¹³⁶ However, in the case of secondary participants, the Court is entitled to mitigate the punishment

¹³⁵ Art. 38, Ethiopian Criminal Code.

¹³⁶ Art. 36(3), 37(4) & 32(3), Ethiopian Criminal Code.

within the limits specified by law.¹³⁷ However, unlike the German Criminal Code that provides a mandatory mitigation of punishment for the aider, under the Ethiopian Criminal Code there is no mandatory mitigation of punishment and statutory distinction on the responsibility of the secondary participants. Owing to the permissive nature of the mitigation, it is unfitting to say that there is a scale of degrees of blameworthiness in the Ethiopian legal tradition. Besides, in the case of ordering, unlike the superior, the Criminal Code plainly provided that the subordinate's punishment could be mitigated without restriction.¹³⁸ However, there is still a situation where the subordinate may receive the same punishment as the superior.

Generally, like the German Criminal Code, the Ethiopian Criminal Code adopted a differentiation model but with eclectic means of distinguishing the modes of responsibility. Additionally, alike the German legal tradition, there is no absolute degree of blameworthiness. This strengthens the point that the mere adoption of differentiation model does not mean there is a degree of blameworthiness even among principal and secondary participants. Akin to the German equivalent, the Ethiopian Criminal Code is silent as to whether there is blameworthiness hierarchy among the case of modes of responsibility that found under the same category or not.

¹³⁷ Art. 36(3) & 37(4), Ethiopian Criminal Code.

¹³⁸ Art. 74(2), Ethiopian Criminal Code.

3.2.2 Common Law Legal Tradition

3.2.2.1 United Kingdom

As a common law country, in the UK, there is no comprehensive Criminal Code; instead, it mainly relies on judicial decisions.¹³⁹ However, since the nineteenth century, legislative acts became the primary source of the UK criminal law.¹⁴⁰ Besides this domestic move, the UK has signed the ICC Statute on 30 November 1998. The UK adopted the ICC implementation Act on 11 May 2001 and entered into force on 1 September 2001.¹⁴¹ This Act is applicable in England, Wales, and Northern Ireland but not in Scotland. Though there is no significant difference, there is also a separate Act for Scotland.¹⁴² Concerning the modes of responsibility, besides others, the UK ICC implementation Act made a cross reference to the Accessories and Abettors Act of 1861. The Criminal Law Act of 2007 amended this Act. According to these legal grounds, the UK legal tradition recognised both Principal and Accessorial modes of responsibility.

Under the UK legal tradition, the person who directly executes the *actus reus* of the crime is called a principal in the first degree.¹⁴³ Except its nomenclature, it is similar with the civil law countries', Ethiopia and Germany, direct perpetrator. Moreover, the UK jurisprudence also allows holding of two or more persons as co-perpetrators. Put differently, if each of them fulfils the *actus reus* element of the crime, and if each of them satisfies the necessary *mens rea*, all can

¹³⁹ Terrill R. *World Criminal Justice Systems: A Comparative Survey* 7ed (2009) 56.

¹⁴⁰ Terrill R (2009) 56.

¹⁴¹ IHL National Implementation, International Criminal Court Act 2001, Available at <https://www.icrc.org/applic/ihl/ihl-at.nsf/4fba3fefb860824b41256486004ad097/74f7e6f94e1d370cc1256a860035c309?openDocument> (accessed 20 October 2015).

¹⁴² The International Criminal Court Implementation Act (Scotland) (2001). In this thesis, the author uses the UK Implementation Act only.

¹⁴³ Martin & Storey *Unlocking Criminal Law* 5ed (2015) 113.

be designated as joint offenders.¹⁴⁴ Furthermore, under the UK legal tradition, though an exception, indirect perpetration is the third type of principal mode, which demonstrates itself in the ‘doctrine of an innocent agency’.¹⁴⁵ Here, the perpetrator uses another third person who can be free from criminal responsibility.

Moving to accessories, traditionally called second-degree participants, the Accessories and Abettors Act of 1861 mainly govern them. The Act provides that ‘*whoever shall aid, abet, counsel or procure the commission of any indictable offence, whether the same be an offence at common law, or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender.*’¹⁴⁶ In the accessorial modes sense, the words ‘aiding, abetting, counselling, and procuring’ has their ordinary meaning. Moreover, the UK ICC Implementation Act introduced a list of ancillary offences that includes ‘aiding, abetting, counselling, procuring, inciting, attempting or conspiring, and assisting an offender or concealing the commission of an offence.’¹⁴⁷

Under the UK legal tradition, although there is a formal distinction among the principal and accessories, the latter are not by themselves distinct offences.¹⁴⁸ Their responsibility is derivative; i.e., it derives from the responsibility of the principal.¹⁴⁹ Put differently, the accessories are guilty of the crime committed by the principal.

¹⁴⁴ Martin & Storey (2015) 113.

¹⁴⁵ Martin & Storey (2015) 113.

¹⁴⁶ The UK Accessories and Abettors Act (1861) Sec. 8.

¹⁴⁷ See, UK ICC implementation Act (2001) chapter 17, Secs. 55(1)(a)-(d) & 62(a)-(d).

¹⁴⁸ UK: Secondary Liability in the Criminal Law, available at <http://www.mondaq.com/x/136506/Crime/Secondary+Liability+In+The+Criminal+Law> (accessed 16 October 2015).

¹⁴⁹ Jain N *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (2014) 177.

Proceeding to the punishment, under the UK legal tradition, the accessories are liable as if they are a perpetrator of the criminal conduct, and receive the same punishment as the principal.¹⁵⁰ Any distinction between the principal and secondary participant is paltry. There is no mitigation recognised for the accessorial modes of responsibility. Unlike the civil law counterparts, Ethiopian and Germany, the punishment of the principal and accessories is identical. This is, arguably, a typical feature of the unitary model of criminal participation. However, the existence of a formal distinction among the principal and accessories while the latter's liability is contingent on the former's criminal conduct but without punishment difference, falls the UK legal tradition in between of the functional unitary model and differentiation model of criminal participation.

Finally, since there is no degree of blameworthiness among the principals and accessories, for the stronger reason, there will be no hierarchical relationship between those found within the same category.

3.2.2.2 United States of America

Judge Hans-Peter Kaul opines that the US was the one that put the foundation stone for the development of ICL.¹⁵¹ However, irrespective of this contribution at the inception stage, they had refused to ratify the ICC Statute and remain a non-member State with a veto power in the UNSC.

However, the US is a common law country, like the UK, its majority criminal law rules are the result of legislations. Under the US Constitution, unlike the Ethiopian '*grundnorm*', the power to impose criminal responsibility almost exclusively is vests in the states. Today, almost every state

¹⁵⁰ The UK Accessories and Abettors Act (1861) Sec. 8.

¹⁵¹ See, Kaul H 'The International Criminal Court: Current Challenges And Perspectives' 6 *Washington University Global Studies Law Review* (2007) 580-582.

of the US has a Criminal Code.¹⁵² Because of this multiplicity of Criminal Codes, it is difficult to identify a single rule as an American principle of criminal law.¹⁵³ However, as the result of the Model Penal Code of 1962 that influenced the codification process of most states' Criminal Codes,¹⁵⁴ there are some shared similarities.¹⁵⁵ Hence, this Code, more than any other Codes, is the closest instrument to reflect US's Criminal Code principles. Therefore, the author's discussion, apart from other possible necessary legislations and court decisions, is based on it. Accordingly, the US legal tradition recognises two broad modes of responsibility: Perpetrator, and Accomplice.

Akin to other legal traditions, the perpetrators are those who fulfil the criminal act of the offence via their own conduct(s) or through the act of an innocent agent. Accordingly, under the US legal tradition, any person can participate in the commission of a crime as a principal in the following situations: as direct perpetrator who physically engages in the commission of the criminal conduct;¹⁵⁶ and, as indirect perpetrator¹⁵⁷ who uses an unwitting person as a means to commit the crime.

Moving to the Secondary participants, they are referred to as accomplices. An accomplice is any person, who, with the aim of stimulating or expediting the execution of the crime, solicits another person;¹⁵⁸ or aids, agrees or attempts to aid another person in planning or committing the

¹⁵² Cornell University Law School, Legal Information Institute, Criminal Code - By State, available at https://www.law.cornell.edu/wex/table_criminal_code (accessed 27 August 2015).

¹⁵³ Robinson & Dubber 'The American Model Penal Code: A Brief Overview' (2007) *Faculty Scholarship* 131 7-27.

¹⁵⁴ See, Cornell University Law School, Legal Information Institute, Criminal Code - By State, available at https://www.law.cornell.edu/wex/table_criminal_code (accessed 27 August 2015) 5-7.

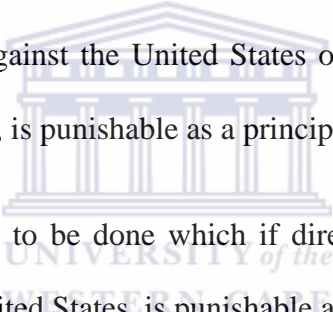
¹⁵⁵ Cornell University Law School, Legal Information Institute, Criminal Code - By State, available at https://www.law.cornell.edu/wex/table_criminal_code (accessed 27 August 2015) 5-7.

¹⁵⁶ The US Model Penal Code (1962) Sec. 2.06(1).

¹⁵⁷ Sec. 2.06(2) (a), US Model Penal Code.

¹⁵⁸ Sec. 2.06(2)(c) & (3)(a)(i), Model Penal Code.

crime.¹⁵⁹ Accomplice also include a person who is under duty to prevent the commission of the crime but fails to make the necessary effort so to do with the aim of promoting or facilitating the commission of it.¹⁶⁰ Albeit the crime is materialised by the principal's conduct, the principal's prosecution or conviction is not a condition precedent to make the accomplice liable.¹⁶¹ While unlike the civil countries and the UK legal tradition the accomplice's liability is independent from the principal; under the US legal tradition, alike the UK legal tradition, there is a formal distinction among the principal and accomplice. Moreover, like the UK legal tradition, the distinction between the principal and accomplice is nominal. There is no distinction in blameworthiness. In this regard, the US Crimes and Criminal Procedure read:¹⁶²

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- a. Whoever commits an offence against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
 - b. Whoever wilfully causes an act to be done which if directly performed by him or another would be an offence against the United States, is punishable as principal.

Therefore, like UK legal tradition, under the US legal tradition the accomplice is subject to the same punishment provided to the principal. This identical punishment for the principals and secondary participants was adopted to rectify the shortcoming of the traditional objective approach of distinguishing the principal and the secondary participant, which is common in the common law countries like the UK and US.¹⁶³ However, it is different from the civil law countries, German and Ethiopian, because, at least in their tradition there is discriminatory and

¹⁵⁹ Sec. 2.06(2)(c) & (3)(axii), Model Penal Code.

¹⁶⁰ Sec. 2.06(2)(c) & (3)(a)(iii), Model Penal Code.

¹⁶¹ Sec. 2.06(7), Model Penal Code.

¹⁶² Crimes and Criminal Procedure (18 US Code) Sec. 2(a).

¹⁶³ Ohlin in Stahn C (ed) (2015) 519.

non-mandatory mitigation, respectively. These all shows the adoption of the unitary model of criminal participation in the US legal tradition though not still pure.¹⁶⁴

3.2.3 Trends in Domestic Legal Systems: In Search of a Common Dimension and Its Applicability to International Criminal Law

Out of 196, there are 123 states parties to the ICC Statute.¹⁶⁵ These states parties are representatives of both common and civil law legal system and the ICL is the result of their compromise. Often, directly or indirectly, the theories adopted at international level are resulted from domestic arena. The rules on modes of responsibility are not different from this.

Both in civil (Ethiopia and Germany) and common (the UK and US) law legal tradition, there is at least a tradition of making a formal distinction of the modes of responsibility as principal and secondary participants. Similarly, save the US legal tradition, the liability of the latter is contingent on the former. Put differently, the principal must at least attempt the criminal conduct. These trends of making at least a formal distinction in common law countries and the actual distinction in the civil law countries and derivative nature of accessories' responsibility indicate the fading of the pure unitary model but a worldwide move towards a differentiation model of criminal participation. However, both legal systems do not provide an explicit means of distinguishing the modes of responsibility. However, while it is possible to argue for an eclectic approach under the Ethiopian Criminal Code, the German Criminal Code upholds the control over the crime theory. The common law countries, on their part, espouse the subjective approach.

¹⁶⁴ Olasolo in Stahn & Sluiter (eds) (2009) 340.

¹⁶⁵ The States Parties to the Rome Statute, available at http://www.icccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed 28 September 2015).

These facts show the absence of unanimously agreed theory on the means of distinguishing the modes of responsibility.

Whatever the means of making distinction may, under both legal systems, there is difference on their stand on degree of blameworthiness. In the civil law countries, albeit not absolute, there is a scale of degrees of blameworthiness between principal and secondary participants wherein the former's responsibility is higher than the latter's. Moreover, there is a murky picture concerning the relation of those modes of responsibility designated as a secondary participant. For example, compared to the principal offenders, under the German legal tradition, while the aider has a mandatory mitigation, there is no similar mitigation for the abettor. Hence, it seems to connote that the abettor is more responsible than the aider. Furthermore, under the Ethiopian legal system, there is only non-mandatory mitigation for secondary participants. Accordingly, under the Ethiopian legal tradition, the issue of blameworthiness is blurry not only among the secondary participants but also between principals and secondary participants. However, there is no similar perplexing situation under the common law legal system. As explained under the UK and US legal systems, there is no degree of blameworthiness whatsoever. Moreover, both in civil law and common law countries, there is no trend of assessing blameworthiness relations among the modes of responsibility that are found under the same category like principal (as direct, co & indirect perpetrators).

The stand of the common law legal system on degrees of blameworthiness coupled with its blurry situation under the civil law legal system signify the absence of an absolute degrees of blameworthiness relation in the modes of responsibility at the domestic arena, even among the principals and secondary participants. Besides, the mere acknowledgement of the differentiation

model of criminal participation or making distinction among the modes of responsibility does not assure the existence of degree of blameworthiness.¹⁶⁶

Noticeably, except showing the holistic picture of the issues at the domestic level, the above trends under national level cannot be directly transpose to the international criminal justice system. True, there is no inherently wrong and perfect domestic doctrine. However, the ICL should be vigilant and use a holistic approach when it consults domestic doctrines. The domestic trends, irrespective of to which legal system they belong, must be compatible with the international criminal justice framework.¹⁶⁷



¹⁶⁶ See, Cassese, Gaeta & Baig *et al* (2013) 162.

¹⁶⁷ Cruz P *Comparative Law in a Changing World* 3ed (2007) 25.

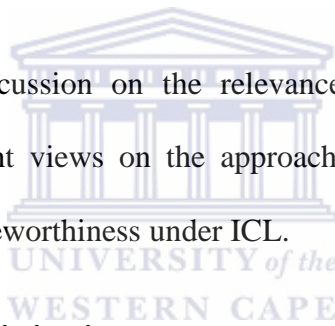
CHAPTER FOUR

4. SCRUTINISING AND SETTLING THE DUST: THE MEANS OF DISTINGUISHING THE MODES OF RESPONSIBILITY AND DEGREE OF BLAMEWORTHINESS IN THE ROME STATUTE

This chapter has two sections. While the first section crystallises the hitherto debates on the modes of responsibility, the second section analyses the specific arguments of the thesis.

4.1 Establishing the Contemporary Outlooks on the Means of Distinguishing the Modes of Responsibility and Degree of Blameworthiness

This section, preceded by a discussion on the relevance of distinguishing the modes of responsibility, provides the current views on the approaches of distinguishing the modes of responsibility and degrees of blameworthiness under ICL.



4.1.1 The Relevance of Making Distinction

As it is shown in the previous chapter, despite some jargon differences and is not as detailed as the ICC Statute is, both the common and civil law countries make a distinction among the modes of responsibility. However, this cannot be enough reason not to probe the relevance of making such distinction. Besides other reasons, the present call for the ‘end of ‘modes of liability’’ by academicians such as Stewart¹⁶⁸ makes the question legitimate. Stewart questions that ‘could it not be possible to put an end to the highly complicated, seriously inefficient and frequently harsh development of modes of liability in international criminal justice by adopting a unitary theory of

¹⁶⁸ Stewart J (2012) 165-219.

participation that collapses all modes of liability into a single standard?'.¹⁶⁹ He advocates a pure unitary model of criminal participation whereby every participant in a crime is considered to be a perpetrator without any further distinction.

The author, for the ensuing illustrative justifications, considers apposite to make distinction among the modes of responsibility:

I. General criminal law principles and transitional justice aspects

Non-transmissibility of criminal responsibility is one among the fundamental principles of criminal law. It requires personal responsibility for one's own guilty act;¹⁷⁰ i.e., all participants should be criminally responsible only for their own personal deeds.¹⁷¹ The other equally important principle is fairness, which demands the right labelling of offenders and punishes them depending on their wrongdoing. To respect these principles, it is necessary to pinpoint the specific contribution and in what capacity the person partook in the execution of the crime. Making a distinction among the modes of responsibility helps to know the specific role of the accused and makes them responsible to that extent.

Besides these criminal law principles, the need to differentiate the modes of responsibility can be justified from a transitional justice perspective. This is manifested in light of the complex nature of international criminal trials.¹⁷² Apart from the involvement of many peoples and the possible insufficiency of evidences, in the case of international crimes, the crime scenes are often spread out in time and space. These problems caused the risk of collective guilt. However, this risk of assigning guilt by association can be abated by making distinction among the modes of

¹⁶⁹ Stewart J (2012) 169.

¹⁷⁰ Militello V (2007) 944.

¹⁷¹ Militello V (2007) 945.

¹⁷² Aksenova M (2014) 121-222.

responsibility. The distinction helps to impose criminal responsibility on those persons who actually committed the crime and avoided victors' justice blame.

II. Human rights aspects

The human rights aspects of distinguishing the modes of responsibility can be seen from two perspectives: from victims and accused aspect.

ICL protects the interest of the international community by rendering a fair justice. The author believes that a meaningful justice cannot be served only by convicting and putting the criminals behind bars. The international community in general, and the specific direct victims in particular, should know how the crime was committed and in what capacity the offender participated in it. This is consonant with the prosecutor and the Court's duty to establish the truth.¹⁷³ The victims should know who did what. Accordingly, differentiating the modes of responsibility is one means to fulfil this interest of the victims.

From the defendant perspective, the issue relates with his/her procedural rights. The accused have the right to be properly informed about the nature of the charges brought against them. Unless the charge sufficiently defines their role in the commission of the crime, it would adversely affect their defence.¹⁷⁴ Consequently, making a distinction among the modes of responsibility has a relevance to the fair trial rights of the accused.

¹⁷³ *The Prosecutor v Germain Katanga*, 01/04-01/07-3363, 'Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons' (27 March 2013) 104.

¹⁷⁴ Aksenova M (2014) 121.

III. 'Expressive Justice' or Moral implications

Albeit arguable, engaging in criminal conduct is a possible indication of moral decay.¹⁷⁵ Nothing than moral deterioration better explains the unspeakable crimes, like what happened in Nazi Germany's concentration and extermination camps. Though the purpose of punishment is not palpable under ICL,¹⁷⁶ rehabilitation can be taken as one of it.¹⁷⁷ To effectively achieve this purpose, it is necessary to know what those persons specifically did and in what capacity they participated in the commission of the criminal conduct.

Moreover, perpetrators of such heinous crimes are a threat to the international community. The more significant role someone plays in such crimes, the more those persons are dangerous and are at least morally responsible for the suffering sustained by the victims. Hence, these persons should be identified and stigmatised and bear the moral blame.¹⁷⁸ Hence, making distinction among participants in the commission of a crime and categorising them as principal and secondary participant can serve this expressive function.¹⁷⁹ It expresses who is dangerous and then at least morally more responsible for the inexpressible misery sustained by the victims.

IV. Legitimacy

Undoubtedly, distinguishing the modes of responsibility increases the transparency, accountability and predictability as well as the credibility of ICL.¹⁸⁰ Moreover, the principle of

¹⁷⁵ Rauch J 'Crime Prevention and Morality the Campaign for Moral Regeneration in South Africa' (2005) *Institute for Security Studies*, 9-11.

¹⁷⁶ D'Ascoli S *Sentencing in International Criminal Law: The Approach of the Two UN Ad Hoc Tribunals and Future Perspectives for the International Criminal Court* (Doctoral dissertation, the European University Institute (2008) 36-42.

¹⁷⁷ D'Ascoli S (2008) 345.

¹⁷⁸ Slidregt in Stahn C (ed) (2015) 511. See also, Drumble M *Atrocity, Punishment and International law* (2007) 174.

¹⁷⁹ Jain N (2014) 7.

¹⁸⁰ Werle & Burghardt in Slidregt & Vasiliev (eds) (2014) 302.

legality requires necessary steps to be taken to guarantee foreseeability of the law.¹⁸¹ If there is distinction, it inhibits the Court and other concerned organs from a mere hunch or an arbitrary application of the modes of responsibility. As Ohlin, Sliedregt, and Weigend argues, a judge, for example, cannot on Monday convict a defendant by 'X' mode of responsibility, and on Tuesday convict another defendant of the same or very similar facts by 'Y' mode of responsibility.¹⁸² This would affect the legitimacy of the Court. The existence or otherwise of transparency, predictability and accountability in the operation of the Court has correlative implications on the legitimacy of the Court. Hence, distinguishing the modes of responsibility is one of the means to build the legitimacy of the ICC. In this regard, to show the danger, the conventional tension between the ICC and Africa can be living evidence. Albeit its genuinity is dubious, African countries accuse the Court as it lacks uniformity and unduly focus on African leaders. Nothing will stop the explosion of the same tension if there is no transparency and predictability on the determination of the participants' modes of responsibility.¹⁸³ Moreover, since under ICL the nexus between the offenders and the crimes are often blurry than the occurrence of the crimes themselves, the need of making and providing clear and distinguishable modes of responsibility is undisputable.¹⁸⁴

Overall, distinguishing the modes of responsibility can be justified by independent factors such as criminal law principles, human rights and transitional justice aspect as well as the purpose of ICL. It should not be seen only from one facet, namely the degree of blameworthiness. Making distinction among the modes of responsibility has a relevance that is far beyond than the controversy on degree of blameworthiness. Degree of blameworthiness is one of the possible

¹⁸¹ Art. 22, the ICC Statute. See also, *Katanga* Judgement (2014) 1388.

¹⁸² Ohlin, Sliedregt & Weigend 'Assessing the Control-Theory' (2013) 26 *LJIL* 3, 729.

¹⁸³ This is apparent when it is seen in light of the argument of degree of blameworthiness.

¹⁸⁴ Wirth S (2012) 979.

justifications but not an immediate outcome of it. This is also reinforced by the comparative study of the previous chapter that illustrated the existence of at least a formal distinction among participants in the commission of a crime but without implication on degree of blameworthiness (in the UK and USA), and an actual distinction, but no absolute degrees of blameworthiness (in Ethiopia and Germany).

4.1.2 Establishing the Current views on Approaches of Distinguishing the Modes of Responsibility

Albeit there is no consensus, there are three main theories of distinguishing the modes of responsibility:¹⁸⁵ subjective, objective, and, control over the crime theory.

The objective theory looks into the *actus reus* of the crime. According to it, whilst those persons who directly committed the *actus reus* with the required *mens rea* are considered as principal, all other persons are secondary participants.¹⁸⁶ Consequently, those persons who play a pivotal role behind the scene cannot be perpetrators. The subjective approach, adopted by the ICTY via the concept JCE,¹⁸⁷ focuses on the *mens rea*.¹⁸⁸ Therefore, unlike the objective approach, it can encompass those persons who play a significant role without personally committing the *actus reus* as principal, if they make their contribution with the shared intent to commit the offence. The third approach, the control over the crime theory, does not exclusively side with *actus reus* or *mens rea*. It focuses on the control made by the participant in the commission of the crime.¹⁸⁹

¹⁸⁵ *Lubanga* Confirmation of Charges (2007) 328-330. See also, *Lubanga* Judgement (2012) 919-933; *Katanga and Chui* Confirmation of Charges (2008) 480-483; and, *Katanga* Judgement (2014) 1390.

¹⁸⁶ *Lubanga* Confirmation of Charges (2007) 328. See also, *Lubanga* Judgement (2012) 920; *Katanga and Chui* Confirmation of Charges (2008) 482; and, *Katanga* Judgement (2014) 1391.

¹⁸⁷ *Tadic* Appeal Judgement (1999).

¹⁸⁸ *Lubanga* Confirmation of Charges (2007) 329. See also, *Lubanga* Judgement (2012) 921; *Katanga & Chui* Confirmation of Charges (2008) 483; and, *Katanga* Judgement (2014) 1392.

¹⁸⁹ *Lubanga* Confirmation of Charges (2007) 330-331. See also, *Lubanga* Judgement (2012) 922; *Katanga & Chui*

Pursuant to this theory, if they have control over the crime, perpetrators are not only those who physically carry out the *actus reus* of the crime. It also includes those who mastermind its commission behind the scene.¹⁹⁰ Briefly, the control over the crime theory can be taken as a compromise of both objective and subjective theories.

Besides the above three main approaches, it is also necessary to take note of the causal link theory proposed by Judge Fulford¹⁹¹ and the direct contribution approach observed by Judge Wyngaert.¹⁹²

Of the whole theories, albeit unsettled, the ICC embraced the control over the crime theory.¹⁹³ Particularly, in the *Lubanga* case, the Court explicitly stated that neither the objective nor the subjective approaches could be reconciled with Article 25(3)(a) of the ICC Statute.¹⁹⁴ The theory is also taken as consonant with the differentiation model and then has implication on degree of blameworthiness.¹⁹⁵ However, within the Court, judges like Judge Fulford and Judge Wyngaert firmly challenged it. These judges believe that this theory is not supported by the text of the ICC Statute. It obliges the judges to depend on artificial speculations as well as have no status of customary international law or a general principle and hence cannot rank as a source of law

Confirmation of Charges (2008) 484-486; *Katanga* Judgement (2014) 1390; and, *Katanga* Judgement (2014) 1393-1397.

¹⁹⁰ Cassese, Gaeta & Baig *et al* (2013) 176.

¹⁹¹ Judge Fulford's Dissenting Opinion (2012) 15.

¹⁹² *The Prosecutor v Mathieu Ngudjolo Chui*, ICC (TC) 01/04-02/12-4, Judgment (18 December 2012) Concurring Opinion of Judge Christine Van den Wyngaert 44. See also, Ohlin, Sliedregt & Weigend (2013) 728- 730.

¹⁹³ *Lubanga* Confirmation of Charges (2007) 338. See also, *Katanga & Chui* Confirmation of charges (2008) 484-486; *The Situation in Darfur, the Prosecutor's Application for a Warrant of Arrest against Omar Hassen Ahmed Al Bashir*, ICC (PTC) 02/05-01/09 (4 March 2009); *The Prosecutor v Jean Pierre Bemba*, ICC (PTC) 01/05-01/08, Confirmation of Charges (15 June 2009); *Mbarushimana* Confirmation of Charges (2011) 279; *Lubanga* Judgement (2012) 994, 998- 999; *The Prosecutor v Thomas Lubanga Dyilo*, ICC(AC) 01/04-01/06 A 5, Appeal Judgement (1 December 2014) 473; Judge Fulford's Dissenting Opinion (2012) 6-12; Judge Wyngaert's Concurring Opinion (2012) 22-24, 28-30, 67; and, *Katanga* Judgement (2014) 1394.

¹⁹⁴ *Lubanga* Judgement (2012) 333-335.

¹⁹⁵ Werle & Burghardt in Sliedregt & Vasiliev (eds) (2014) 303. See also, Swart B (2009) 87.

under Article 21 of the Statute.¹⁹⁶ These challenges against the theory have also the academics support like Stewart. For him too, the theory is unwarranted by the ICC Statute and is a reflection of an undue domination of the German legal system.¹⁹⁷

To summarise, currently in ICL, the control over the crime theory is merely an endorsed but not a settled approach to distinguishing the modes of responsibility. Moreover, coupled with the differentiation model, it has been serving as a double-edged sword by means of making distinction and indicating the presences of degree of blameworthiness.

4.1.3. Establishing the Contemporary outlooks on Degrees of Blameworthiness

Akin to the above uneasiness on theories of distinguishing the modes of responsibility, there is also incongruity concerning the implication behind the modes of responsibility. Put differently, in ICL, the *raison d'être* behind the listing of Article 25(3) of the ICC Statute is not yet palpable. Hitherto, both in the academia and the Court, there are arguments for and against the degree of blameworthiness.

For proponents, the modes of responsibility that are enumerated in Article 25(3) of the ICC Statute are not mere listings but are an indication of their degrees of blameworthiness.¹⁹⁸ As a result, while the principals received the greatest punishment, the secondary participants are liable for a lesser punishment.¹⁹⁹ This group further argues that such degrees of blameworthiness even

¹⁹⁶ Judge Fulford's Dissenting Opinion (2012) 15. See also, Judge Wyngaert's Concurring Opinion (2012) 44; and, Ohlin in Stahn C (ed) (2015) 527.

¹⁹⁷ Stewart J (2012) 205. See also, Stephens P (2014) 546-547.

¹⁹⁸ *Lubanga Appeals Judgment* (2014) 462. See also, Werle & Jessberger (2014) 192ff; Ohlin, Slidregt & Weigend (2013) 731; Werle G. (2007) 957; and, Werle & Burghardt in Slidregt & Vasiliev (eds), 315.

¹⁹⁹ Herik & Stahn (eds) *The Diversification and Fragmentation of International Criminal Law* (2012) 489-500. See also, Werle & Burghardt in Slidregt & Vasiliev (eds) (2014) 302-303; and, Ohlin J 'The Co-Perpetrator Model of Joint Criminal Enterprise' (2008) *Cornell Law Faculty Publications* 742-743.

apply amid the secondary participants. Besides Olasolo,²⁰⁰ Burghardt²⁰¹ and Ambos,²⁰² this line of argument could rightly be represented by Werle who argues for a ‘value-oriented hierarchy of modes of responsibility’.²⁰³ Emblematically, for them, while the modes of responsibility listed in Article 25(3)(a) are at the pick of the pyramid, those in Article 25(3)(d) are at the bottom. In the middle, from top to down there are those modes which are found in Article 25(3)(b) and Article 25(3)(c) next to Article 25(3)(a) and above Article 25(3)(d), respectively.

However, alike the domestic arena, even by the supporters of degrees of blameworthiness, so far, there is no blameworthiness discussion on the modes of responsibility which are found within the same category/sub-article of the ICC Statute. For example, although in Article 25(3)(a) of the ICC Statute there are alternative principal modes of responsibility, till now, no discussion have been made to check whether there is degree of blameworthiness among each other. The same is also true concerning the secondary modes, which are found within each sub-article of Article 25(3) of the ICC Statute.

Moving to the opponents of degree of blameworthiness, they are mainly those who advocate for pure unitary model of criminal participation. The challenge has started in the Court itself via dissenting and concurring opinions. To them, irrespective of their degree and way of contribution to the commission of the crime, there should be no difference among all participants’ responsibility. They should all be considered as perpetrators. Participating by committing cannot

²⁰⁰ Olasolo H *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (2009) 3-4.

²⁰¹ Werle & Burghardt in Sliedregt & Vasiliev (eds) (2014) 302-303.

²⁰² Ambos K ‘The First Judgment of the International Criminal Court (Prosecutor v. *Lubanga*): A Comprehensive Analysis of the Legal Issues’ (2012) 12 *International Criminal Law Review* 146-147. Ambos has reservation on ‘ordering’.

²⁰³ Werle G (2007) 957.

by and in itself make other modes of responsibility lesser responsible.²⁰⁴ In this sense, almost similar to Sliedregt,²⁰⁵ Judge Fulford,²⁰⁶ and Judge Wyngaert,²⁰⁷ Stephens opines that ‘the self-evident overlap of several parts of Article 25(3) suggests the absence of intention on the part of the drafters to establish such a hierarchy.’²⁰⁸ Moreover, it is important to mention the bold stand held by the ICC Trial Chamber II in the *Germain Katanga* judgement. In this case, unlike the Trial Chamber I’s view on *Thomas Lubanga Dyilo* case,²⁰⁹ opined that Article 25(3) of the ICC Statute does not inhere a ‘hierarchy of blameworthiness’.²¹⁰ Responsibility is contingent on each individual’s personal blameworthiness, but not on his/her formal role.²¹¹

In general, though there is uneasiness, the ICC opted to interpret Article 25(3) of the ICC Statute as if it has a subtle difference in degree of blameworthiness in a descending order from Article 25(3) (a) to (d). Accordingly, while those found in Article 25(3)(a) received the highest punishment; those in Article 25(3)(d) received the lowest punishment. Moreover, the essential contribution requirement in a control over the crime theory is inherently regarded as a sign of the hierarchy among the modes of responsibility.

²⁰⁴ Sliedregt in Stahn C (ed) (2015) 512 & 515. See also, Sliedregt E (2012) 85.

²⁰⁵ Sliedregt E (2012) 85. See also, Sliedregt in Stahn C (ed) (2015) 513 & 515.

²⁰⁶ Judge Fulford’s Dissenting Opinion (2012) 8.

²⁰⁷ Judge Wyngaert’s Concurring Opinion (2012) 28-30.

²⁰⁸ Stephens P (2014) 545.

²⁰⁹ *Lubanga* Appeal Judgment (2014) 462.

²¹⁰ *Katanga* Judgment (2014) 1386.

²¹¹ *Katanga* Judgment (2014) 1386.

4.2 Settling the Dust: The Means of Distinguishing the Modes of Responsibility and Degrees of Blameworthiness

The above section has crystallised the on-going debates on modes of responsibility in light of the approaches of making distinction among the modes of responsibility and question of degrees of blameworthiness. In this section, a specific discussion is made as to which theory is an apt theory to distinguishing the modes of responsibility, and ascertaining the query of degrees of blameworthiness.

4.2.1 Discerning the Modes of Responsibility: Unearthing the Apt Theory

The theory that could be endorsed as a solution for the on-going debate on the means of distinguishing the modes of responsibility cannot be chosen arbitrarily. Instead, to absolve it from potential criticisms, objective criteria in view of which the evaluation is made should be determined. Consequently, the author has identified some criteria. However, first, it is apposite to reiterate the ICC's approach on model of criminal participation.

As discoursed before, unlike the pure unitary model, making distinction among the modes of responsibility and the existence of contingent liability are the main features of the differentiation model. Consonant with these touchstones of the model, the ICC Statute unequivocally provides the modes of responsibility in a systematic and organised manner. Moreover, the responsibility of the secondary participants is derived from the principals' criminal conduct.²¹² This undoubtedly, unlike the military trials, signifies the adoption of a differentiation model. Albeit there is still a call for the adoption of a unitary model,²¹³ owing to the particular importance that

²¹² Art. 25(b)(c)(d), the ICC Statute.

²¹³ Stewart J (2012).

distinguishing the modes of responsibility has, as discussed under the previous section, the author supports and urges this stand of the ICC Statute.

Receding to the means of differentiation, for deciding the apt theory, the following illustrative criteria are considered pertinent by the author.

First, the theory must be consonant with the purpose of ICL. It must be a theory, which goes hand in hand with the purpose why the Court is established: ending impunity and strengthening accountability for mass atrocities.²¹⁴ If there is a need to borrow from a domestic arena, the transplantation must consider this objective of the Court. Because of the slight difference of the objective of the domestic criminal law and ICL, direct adoption of the domestic theory may not be appropriate. For instance, the Ethiopian Criminal Code has the objective of ‘ensuring order, peace, and the security of the State, its People, and inhabitants for the public good’.²¹⁵ Accordingly, unlike ICL that focuses on heinous crimes and offenders who bear the greatest responsibility and applied complementary to national jurisdiction²¹⁶ to end impunity, it has no such specific focus. Moreover, at their inception, neither the common law nor the civil law legal traditions were envisioned to deal with the crimes that fall under the jurisdiction of the ICC.²¹⁷ Therefore, the selection from a domestic legal system should be made in conformity with this difference of the objective of the domestic criminal law and ICL. This being said, the theory shall not be arbitrarily selected from a single jurisdiction. As explained before, an undue dominance of a single country’s theory is one among the criticisms invoked against the adoption of the control over the crime theory. Whereas it is not a flaw to borrow from a single country by

²¹⁴ Preamble 5, the ICC Statute.

²¹⁵ Art.1 Ethiopian Criminal Code.

²¹⁶ Preamble (paragraph 10), Art. 1 & 17, the ICC Statute.

²¹⁷ *Lubanga* Judgement, 976.

and in itself, and international law usually starts from domestic jurisdictions, it is preferable if the borrowing from a domestic legal system backed up by sufficient doctrinal development. This would place the theory firmly in the ICL paradigm and have an easy legitimacy.

Compared to the objective and subjective approaches, according to the comparative study of this thesis, there is question with regard to the broad base of the control over the crime theory at the domestic level. Nonetheless, for the author, the dominance is not as claimed by its opponents like Stephens. Stephens says the control over the crime theory is ‘not only limited to one such national legal system [Germany], but in a form almost wholly dependent on one scholar’s [Roxin] view as well as controversial within that one legal system.’²¹⁸ Put differently, concerning countries outside Germany that apply this theory such as Spanish speaking countries, since they were assisted by German Scholars in their criminal law reform,²¹⁹ it is possible still to say there is a dominance of one legal system.²²⁰ However, it is submitted that since the control over the crime theory is an eclectic of the subjective and objective approaches’²²¹ attacking it as an undue dominance of a single legal system is unconvincing. Its nature by and in itself inherently enables it to present wherever the subjective and objective theories have application. Indeed, it has also the effect of limiting the ambit of principals only to those who have made the ‘essential contribution’.²²² Furthermore, having a broad base at a domestic arena is an additional advantage, not an absolute criterion to choose a theory. Whatever the domestic base may be, the control over the crime theory has a comparative advantage over the objective and subjective

²¹⁸ Stephens P (2014) 546-547.

²¹⁹ Sliedregt in Stahn C (ed) (2015) 507.

²²⁰ Manacorda & Meloni ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’ (2011) 9 *JICJ* 159 170. See also, Weigend T (2011) 105.

²²¹ Ohlin, Sliedregt & Weigend (2013) 728.

²²² Ohlin, Sliedregt & Weigend (2013) 728.

approaches in capturing as comprehensively as possible those who may bear greatest responsibility and contribute to the realisation of the purpose of the ICL.

Secondly, compatible with the first criterion, the theory must be consonant with the nature of the commission of core crimes. The typical nature of international crimes is based on its collective nature. Besides the dirty hand of oligarchical governments, they have the involvement of plurality of persons in different capacities and techniques. Thus, the theory must be able to address these intricate natures of the commission on crimes under international law. As much as possible, it shall be comprehensive enough to embrace those persons who played a significant role in the commission of the crimes and bear the greatest responsibility. Truly, comprehensiveness shall also be consonant with the fundamental principles of criminal law.

On this point, in comparison with the objective and subjective theories, the control over the crime theory has a particular importance. The objective approach is inept to regulate those persons who have made a significant contribution but without committing the *actus reus*. The subjective approach on its part, apart from being unduly broad,²²³ is highly dependent on the *mens rea* of the defendant and even creates a chance for her/him to determine the mode of responsibility she/he would be charged with. In this regards, Ohlin firmly questions ‘Why give the actor the power to frame the contours of his own criminality?’²²⁴ Moreover, as argued in the *Lubanga* and in the *Katanga* cases, since the *mens rea* requirement enshrined in Article 30 of the Statute is applicable to all modes indiscriminately, the subjective theory cannot be reconciled with the ICC Statute.²²⁵ However, the control over the crime theory is relatively free from these

²²³ Sliedregt in Stahn C (ed) (2015) 499.

²²⁴ Ohlin J (2008) 744.

²²⁵ *Lubanga* Confirmation of Charges (2007) 329. See also, *Lubanga* Judgement (2012) 921; *Katanga & Chui* Confirmation of Charges (2008) 483; and, *Katanga* Judgement (2014) 1392.

setbacks. It can regulate all those who make an essential contribution in the commission of the crime and designate them as a principal.

As the history of international criminal justice has proven, the most dangerous criminals of all times do not directly participate in the commission of the crime. As Werle rightly mentions, those who are in distance from the scene of the crime are the most dangerous ones.²²⁶ The most serious delinquents like Hitler, Eichmann, and Pinochet did not directly take a single life while they are responsible for enormity of international crimes. They were behind the curtain far from the scene of the crime. Interestingly, the control over the crime theory covers such offenders and fits with the nature of the core crimes as well as plays an important role in narrowing the door of impunity than other theories. Further, it is argued that the inclusion of ‘commission through another person’ under Article 25(3)(a) of the ICC Statute is a heavy pointer towards the control over the crime theory under the ICC jurisprudence.

Finally, the theory to be adopted should not be contrary to the due process and other substantive rights’ of the accused. It shall respect the substantive rights of the accused. It should, however, be clear that modes of responsibility are not element of the crime but means how offenders commit such crimes. Moreover, since clarity and consistency are fundamental to build legitimacy, the theory must also play its part in ensuring certainty and predictability in the operation of the Court.

To conclude, while searching a theory that can solve the means of distinguishing the modes of responsibility, the question should not be from which legal system in general and from which country in particular the theory shall be taken. The question should be on the capability of that

²²⁶ Werle G (2007) 954.

theory in circumventing; at least relatively compared to other available theories, the confusion and play a role in achieving the purpose of ICL. Moreover, undoubtedly adopting a theory which has unanimous or majority's support would have a positive impact on the legitimacy of the theory and thereby the Court. As a second option, since there is no unanimity, it is also preferable to adopt a theory that embraces the main features of the world legal system's theories.

Compared to other theories, the control over the crime theory is a commendable approach to the ICC jurisprudence. It has the elements of the objective and subjective theories', relatively is more consonant with the purpose of ICL and nature of core crimes commission as well as compatible with the procedural and substantive rights' of the accused. Consequently, the Court is right when it adopts the control over the crime theory as an approach to discern the modes of responsibility as principal and secondary participant. However, as rightly argued in *Germain Katanga's* judgement,²²⁷ the mere acknowledgment of the control over the crime theory must not in and by itself be taken as a warranty for the existence of degrees of blameworthiness among the modes of responsibility.

4.2.2 Degrees of Blameworthiness: The Conundrum of *Raison D'etre*

The ambivalence towards degrees of blameworthiness is the result of an absence of a clear rule in Article 25 of the ICC Statute. Despite bestowing systematic and organised modes of responsibility, the Statute says nothing concerning the implication behind the listed modes of responsibility. This silence, as shown in the previous section of this chapter, caused two lines of arguments. Of these, albeit still contested, the ICC has opted to endorse the existence of degree of blameworthiness in a descending order. Accordingly, whilst the greatest responsibility

²²⁷ *Katanga* Judgement (2014)1395-1396.

assumed by those modes that are enshrined under Article 25(3)(a), the lowest responsibility is imposed on those which are designated as ‘residual’ and found under Article 25(3)(d) of the Court’s Statute. As it is explained below, the author approaches the hierarchy issue from three categories:

4.2.2.1 Degree of Blameworthiness: Principals versus Secondary Participants

Although there is no clear indication as to the degree of blameworthiness, Article 25(3) of the ICC Statute can be read as it creates two main categories of modes of responsibility: those who ‘commit’ the criminal conduct;²²⁸ and, those who participate in the criminal activity of another person.²²⁹ While those who commit the criminal conduct termed principals, those who participate in another person’s (principal’s) criminal conduct are secondary participants. This classification was also supported by the drafting history of the Statute. From the author’s point of view, this categorisation of the modes of responsibility shows the implicit hierarchical relation between these groups. This is revealed via the dependence of the secondary participant’s liability on the principals’ conduct. Moreover, consonant with this, as pinpointed under the previous section of this chapter, distinguishing the modes of responsibility has an ‘expressive justice’ function. In the ‘expressive justice’ function context, the distinction of the modes of responsibility as principal and secondary and locating the particular role of the participants in the commission of the crime has an inherent nature of earmarking blameworthiness. Accordingly, it can be argued that it is morally and logically persuasive to make the one who can independently be answerable for the criminal conduct more responsible than those who participate in his/her criminal activity in different capacity. Put differently, since the denunciatory and educational function of

²²⁸ Art. 25(3)(a), the ICC Statute.

²²⁹ Arts. 25(3)(b)(c)(d), the ICC Statute.

designating the offender, as a principal,²³⁰ should also be backed up by a commensurate penalty, the principals should be more responsible than the secondary participants.

The sentencing provisions of the ICC Statute and the Rules of Procedure and Evidence of the Court can support the above reading, which is based on the classification and nature of the modes of responsibility. The Statute in its sentencing provision requires the judges consider all relevant factors including the severity of the crime and the individual circumstances of the convicted person.²³¹ The Rules of Procedure and Evidence, on its part explicitly require emphasis to be given to the culpability of the convicted person and the degree of participation.²³² Hence, the modes of responsibility are one of the aspects that the judge is required to consider in determining the punishment of a convicted person. Moreover, the documents containing the charges are required to include the legal characterisation of the facts to accord the precise mode of responsibility under Article 25 and 28 of the Statute.²³³ This requirement to show the precise mode of responsibility is an indication that they are among the things that need to be considered in determining the punishment. Moreover, putting the principal at the apex of the hierarchy does not open a door for those persons who may bear greatest responsibility. Therefore, *Ceteris paribus* all the other conditions, the principals are more dangerous and then blameworthy than the secondary participants.

To sum up, based on the cumulative reading of the above legal provisions and classification as well as the nature of principal modes of responsibility, there should be degrees of blameworthiness among principal and secondary participants. Those who participate via the

²³⁰ Slidregt in Stahn C (ed) 2015) 511 .

²³¹ Art. 78(1), the ICC Statute.

²³² The RPE (2002) Rule 145.

²³³ Regulations of the ICC (2004) Regulation 52(c).

modes provided under Article 25(3)(a) of the ICC Statute should be more blameworthy than those who participate by Article 25(3)(b)(c)(d) capacity. However, this construal of Article 25(3) of the Statute should not be too stringent and should guarantee an absolute lower punishment for the secondary participants. As Ohlin argues, it should not be a mask to guard the secondary participants from receiving the most serious punishments²³⁴ like life imprisonment.²³⁵ This understanding should be eschewed and the so severe situations where the secondary participants may deserve a serious punishment even compared to the principal should be foreseen exceptionally. This can be achieved by approaching the degree of blameworthiness interpretation between the principal and the secondary participants in a qualified approach, i.e. the hierarchy should be a matter of principle.

Accordingly, the existing proponents of degrees of blameworthiness among the principal and secondary participants are right while they argue in support of the existence of hierarchy among the principals (Article 25(3)(a)) and the secondary participants (Article 25(3)(b)(c)(d)). However, their argument should have considered exceptional circumstances where the secondary participants could possibly be so dangerous.

4.2.2.2 Degrees of Blameworthiness: Between Secondary Participants

Secondary modes refer to the modes of responsibility that are stipulated under Articles 25(3)(b)(c)(d) of the ICC Statute. Akin to the principal and secondary modes relation, the ICC Statute is silent on the secondary participants' degrees of blameworthiness. As explained under the previous section of this chapter, albeit there is no agreement, the ICC considers as they are listed in descending hierarchical order next to the principals enumerated under Article 25(3)(a)

²³⁴ Ohlin in Stahn C (ed) (2015) 531.

²³⁵ Rule 145(3), RPE.

of the Statute. However, owing to the subsequent rationales, the author argues that there is no such degree of blameworthiness among secondary modes of responsibility.

First, the existing argument in favour of degrees of blameworthiness among the secondary participants is not supported by the world legal system. As the comparative study conducted in this thesis showed, there is no such strict blameworthiness hierarchy, both in civil and common law countries. For instance, under the Ethiopian Criminal Code, there is no distinction among the secondary participants responsibility.²³⁶ However, compared to the principal criminal, albeit it is not mandatory, there is mitigation of punishment.²³⁷ Although it is not as apparent as the Ethiopian Criminal Code, the examination of the German legal tradition, from which the control over the crime theory has been adopted, also indicates the absence of such stringent degree of blameworthiness. Precisely, the German Criminal Code does not show a clear hierarchy among the secondary participants. For the author, as explained under the comparative chapter of this thesis, the silence concerning the abettor cannot necessarily warrant the existence of hierarchy between the abettor and the aider. Likewise, under the common law countries, there is no issue of degrees of blameworthiness from the outset. All the participants are subjected to the same punishment. Moreover, as explained under chapter two of this thesis, the trend during the *ad hoc* tribunals was not consistent. All of these facts signify the absence of practice that ensures an absolute hierarchy among secondary modes. True, since practices can also be developed at the international level, the absence of such practice alone cannot lead to a conclusion. Nevertheless, in conformity with the subsequent rationales, it can be taken as one main ground.

²³⁶ Arts. 36(3) & 37(4), Ethiopian Criminal Code.

²³⁷ Arts. 36(3) & 37(4), Ethiopian Criminal Code.

Secondly, the existence of an entire degree of blameworthiness argument including the secondary participants presumes only a single circumstance. Comparing to each other, the participants in a crime could be less, equal, or more dangerous to each other. The seriousness and significance of the secondary participants' contribution to the criminal conduct of the principals differs depending on the prevailing situation in which the contribution is made. Claiming the aider is always less significant and dangerous than the instigator does not at all accord with the dynamic and intricate natures of the commission of international crimes. There could be a situation when the aider is more dangerous than the instigator. The existence of strict degrees of blameworthiness interpretation cannot address such possible scenarios. Flexibility, i.e. a case-by-case determination of responsibility, within the secondary participants will help to address unpredictable situations in the commission of the crimes

Thirdly, the existence of a maximum punishment provision in the Statute²³⁸ can also be taken as an indication for the need of a certain level of discretion on the part of the Court in determining punishment. It is submitted, if there had been strict degree of blameworthiness mind, the Statute's engineers would have provided specific punishments in connection with the respective modes of responsibility than simply putting the maximum punishment. Though the absence of such detailed punishment by and in itself does not warrant absence of blameworthiness, it can equally show that the degree of blameworthiness argument on the modes of responsibility is an afterthought of the academia and the judges of the Court. Though afterthoughts in criminal law could often possibly be contrary to some principles of the law; like principle of legality,²³⁹ since modes of responsibility are not inherently about defining crimes, afterthought on such area

²³⁸ Art. 77(1), the ICC Statute. See also, Rule 145(3), RPE.

²³⁹ Given the fact that criminal law has a dire consequence on the fundamental rights of the accused, the defendant should be free from being liable for the afterthought interpretation of the law or crime by argument. See, Cassese, Gaeta & Baig *et al* (2013) 22-36; and, Art. 22, the ICC Statute.

should not be totally rejected. Nevertheless, it should be applied narrowly in a way that is consonant with the purpose intended to be achieved by ICL. To this end, the best interpretation would be conferring the greatest responsibility to those who commit the criminal conduct (principals) and determine the liability of those who participate in the principal's conduct by a case by case approach. Besides the above grounds, the drafting history of the Statute barely supports the existence of degree of blameworthiness throughout Article 25(3) of the ICC Statute. There is nothing in the ICC Statute or *travaux préparatoire* that suggests that the modes of responsibility are arranged in a particular order that denote hierarchy.²⁴⁰ The intention of the drafters was to provide a range of modalities from which judges and other concerned organs can choose.²⁴¹ Accordingly, while those who commit the criminal conduct are assigned in one group, others who participate in the commission or attempt of the first groups' criminal conduct constitute the second group. The second groups are modes of responsibility that are relatively, at least by being a means to participate in other's criminal activity, have a common denominator. Hence, the listing in the case of secondary participants in Article 25(3)(b)(c)(d) should not be construed as hierarchy but mere enumeration based on their level of closeness and easiness of understanding.

To conclude, the existing proponents of degree of blameworthiness, both in and outside the Court, are not convincing when they argue for degrees of blameworthiness even among the secondary participants. The responsibility of the secondary participants should be determined on a case-by-case basis. This flexibility concerning secondary modes lends a space for the possible

²⁴⁰ Aksenova M (2014) 117.

²⁴¹ Sliedregt in Stahn C (ed) (2015) 512. See also, Saland P 'International Criminal Law Principles' in Lee R (ed) *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results* (1999) 198.

offenders who may bear the greatest responsibility while they are under the category of secondary participant and is consonant with the purpose of ICL.

4.2.2.3 Degree of Blameworthiness: Within the Same Sub-articles

Although the issue of modes of responsibility is the most discussed area in ICL, this discussion neglects the issue of degree of blameworthiness among the modes of responsibility, which are found within the same sub-article. Concisely, while under the principal's provision²⁴² there are direct perpetrator; co-perpetrator; indirect perpetrator and indirect co-perpetrator, order; solicits and induces are provided in Article 25(3)(b) of the ICC Statute. There are also other categories of participation under Article 25(3)(c) of the Statute. Hence what is missed from being discussed is, for example, the degree of blameworthiness relationship between principals like among the direct perpetrator, co-perpetrator, and commission through another person. The same question is also true for the other sub-article of the Statute in particular, Article 25(3)(b) which contains those who order; solicits and induces another person, and Article 25(3)(c) that includes aiding and abetting.

On this point, the author argues for a plain reading of the provisions and determines responsibility on a case-by-case approach. This point can be inferred, besides the above justifications accorded for the secondary modes relation in general, from the general structure of Article 25(3) of the Statute and the practice of the Court.

The structure of Article 25(3) of the ICC Statute does not accord an exhaustive list of all modes of responsibility. For example, Article 25(3)(c) of the Statute provides that as far as it is with the purpose of facilitating the commission of a criminal conduct by the principal, besides aiding and

²⁴² Art. 25(3)(a), the ICC Statute.

abetting, it includes all other assistances. This provision is an open-ended provision that can include future ways of participating in the commission of a crime via a generic term of assistance. In the same vein, Article 25(3)(d) of the Statute adopted the same open and broad approach. Even in the other provisions, as the practice of the Court showed, there is still a probability to come up with additional modes of responsibility, which is not explicitly provided by the Statute. Albeit it is still arguable mode, this practice was manifested upon the development of the indirect co-perpetration as a principal mode of responsibility. In the presence of this illustrative nature of the modes of responsibility that are found in the same sub-article of Article 25(3) of the Statute, it is not plausible to adopt a degree of blameworthiness. Instead, it should be evaluated based on a case-by-case approach.



CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATION

5.1 Conclusion

The typical nature of crimes under international law is the involvement of many persons in different capacities. This ‘multi-person criminality’ nature coupled with the very nature of the core crimes makes the establishment of individual criminal responsibility very difficult. In principle, individual criminal responsibility has been recognised since the Nuremburg trials. However, compared to the military trials and *ad hoc* tribunals, the most detailed provision on modes of responsibility is accorded by the ICC Statute, in particular Article 25. Article 25(3) of the Statute lists the modes of responsibility under four sub-articles. While Article 25(3)(a) provides the principal modes of responsibility, Articles 25(3)(b)(c)(d) enshrines the secondary participants. The provision is silent concerning the implication behind the listing of the modes, and how to distinguishing them among each other. Owing to this silence, the modes of responsibility, specifically, the theories of making distinction, and the existence or otherwise of degrees of blameworthiness have been disputatious areas both in the ICC and in academia. Hence, these two issues are the main concern of this thesis.

The tensions on the above issues of modes of responsibility can generally be categorised into two groups. The first group is those who support the control over the crime theory as a means to make a distinction and argue for the existence of a degree of blameworthiness in a descending order among the modes of responsibility. The second group is those who reject both the theory and the existence of degree of blameworthiness, and argue mainly for the plain reading of the

Statute's provision. In both groups, the relation of the modes of responsibility, which are found in the same group (sub-article), has never been an issue.

This thesis is conducted with the aim of ameliorating this tension. Besides a comparative study, a detail discussion is made on the issues with a specific emphasis on the ICC legal framework and the academia's debate. Consequently, besides the incidental issues, the author comes up with the following points as a conclusion.

Albeit there is a contrary argument for a pure unitary model of criminal participation, distinguishing the modes of responsibility can be justified in light of, *inter alia*, Criminal law principles, human rights aspect, transitional justice aspect, and the purpose of ICL. This is consonant with both the civil law (Ethiopia and Germany) and common law (the UK and USA) legal systems that the author examined. While in the common law countries there is a formal distinction among the principal and secondary participants, under the civil law countries there is an actual distinction wherein the liability of the secondary participants is contingent on the principal. However, in both legal systems (in view of the above selected countries), there is no express and unanimously agreed theory of making distinction among the modes of responsibility. However, an eclectic of objective and subjective approaches, and the control over the crime theory are the foremost approaches under the civil law countries Ethiopia and Germany, respectively. The common law countries, on their part, tend to focus on the subjective approach. Besides at least the formal distinction of the principal and the secondary participants, the dependence of the secondary participants' responsibility on the principal signposts the worldwide move to a differentiation model and the fading of the unitary model of criminal participation. However, the mere move and recognition of the differentiation model of criminal participation does/should not guarantee the existence of degree of blameworthiness. Degree of

blameworthiness, as explained above, could only be one among the possible justifications for making distinction but narrowly. To put it in the context of the comparative study, while there is no degree of blameworthiness relation whatsoever in the case of common law countries (the UK and USA), there is no absolute degree of blameworthiness in civil law countries: Ethiopia and Germany. Put differently, while in Germany there is no mitigation of punishment provided for the abettor, in Ethiopia, the mitigation provided for the secondary participants is not mandatory. Hence, though there is a differentiation model, the abettor in Germany and the secondary participants in Ethiopia could receive the same punishment as the principal.

On the model of criminal participation, the ICC Statute is self-telling. It does recognise a differentiation model of criminal participation. However, akin to the above domestic jurisdictions, it is silent on how to differentiate the modes of responsibility. Hence, there is a need to opt the apt theory. The author believes, for any theory to be opted as a best approach for distinguishing the modes of responsibility under the ICC jurisprudence, it should be consonant with the purpose of ICL, the nature of core crimes, the text of the Statute, and the substantive and procedural rights of the parties to the proceeding. Moreover, it should be a theory that can play its part in boosting the Court's legitimacy.

The author, in this thesis, has concluded that compared to the available theories; the control over the crime theory is the apt theory. Besides being consonant with the above criteria, it is a better approach to strike the balance as it has the nature of both the objective and subjective approaches. In addition, the country where it is taken shall not be an Achilles heel for its endorsement under the ICC jurisprudence.

Moving to the degree of blameworthiness question, the author does not fully endorse the arguments made by both the proponents and opponents. For him, it is unconvincing to say that Article 25(3) of the ICC Statute recognised a descending order of degree of blameworthiness from Article 25(3)(a) to 25(3)(d) wherein those who are found under Article 25(3)(a) receive the highest penalty whilst those who fall under Article 25(3)(d) receive the lowest punishment. Similarly, he does not concur a plain reading of the entire Article 25(3) of the Statute. Article 25(3) of the ICC Statute does not warrant an absolute degree of blameworthiness as the current proponents argue, and does not totally give a deaf ear as the opponents argue. A ‘One-size-fits-all’ construal of Article 25(3) of the Statute is unpersuasive and does not comport with the reality on the ground.

To the author’s mind, the provision’s construal should be seen, *inter alia*, in view of the very purpose of ICL; drafting history and structure of Article 25(3) of the Statute; the nature of the core crimes; and, the dynamic nature of the commission of international crimes. Evaluating the issue in light of these illustrative standards will help to ameliorate the existing tension. Accordingly, the author has made his conclusion from three perspectives. These are:

- a. As a matter of principle, *ceteris paribus*, there should be degree of blameworthiness only among principals and secondary participants; i.e., among those provided in Article 25(3)(a) on the one hand and Article 25(3)(b)(c)(d) on the other hand.
- b. There is no degree of blameworthiness among the secondary participants, which are provided in Article 25(3)(b)(c)(d) of the Statute. Their responsibility should be determined on a case-by-case approach.

c. There is no degree of blameworthiness among the modes of responsibility that are provided under the same sub article; i.e., either as a principal²⁴³ or secondary participant.²⁴⁴ Their responsibility should be determined on a case-by-case approach.



²⁴³ Art. 25(3)(a), the ICC Statute.

²⁴⁴ Art. 25(3)(b),(c) & (d), the ICC Statute.

5.2 Recommendation

The ICC is not an infant anymore. It has been functioning for more than ten years. However, the controversial issues on some of its very pivotal provisions like the modes of responsibility are not perfect. It is evident from the practices of the Court and writings of the academia that the tension on the above issues is not yet settled. The author duly believes in the need of making further study; but it should be to narrowing the existing gap. This paper is conducted with the aim of playing this role, specifically, on the means of distinguishing the modes of responsibility and the question of degree of blameworthiness. Therefore, based on the above conclusion, the author recommends the following points:

I. With regards to approaches of making distinction

- The control over the crime theory shall be continued as an official approach of making distinction among the principal and secondary modes of responsibility.

II. With regards to degrees of blameworthiness

- Degree of blameworthiness among the modes of responsibility shall be construed narrowly and shall be limited only between principals and the secondary participants' relation.
- There should be no degree of blameworthiness both among the secondary participants and the modes of responsibility that are found in the same sub-article either as principal or secondary participants. Responsibility in both cases must be determined on a case-by-case approach.

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