The Control Theory of Perpetration in International Criminal Law

Neha Jain
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Abstract

International criminal law lacks a coherent theory of perpetration for international crimes. Courts and commentators oscillate between the doctrines of Joint Criminal Enterprise (JCE) on the one hand and co-perpetration and indirect perpetration on the other, as modes of responsibility. While JCE, which has close analogues in common law modes of responsibility, has been subjected to rigorous scrutiny, co-perpetration and indirect perpetration, which are based on established modes of responsibility in German criminal law and doctrine, have proved more elusive. In this Article, I lay the foundations for an informed discussion on theories of responsibility in international criminal law by familiarizing the audience of international and comparative criminal lawyers with doctrines of perpetration in German criminal law and their adoption by international criminal tribunals. I also take the first steps in this debate by analyzing and ultimately rejecting recent criticisms that have been leveled against the adoption of co-perpetration and indirect perpetration at the international level. While I remain committed to the view that an uncritical and wholesale transfer of these domestic modes of responsibility to the international courts would be deeply problematic, I highlight their importance to the project of building conceptually sound and practically useful doctrines of responsibility for international crimes.

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I. Introduction

Constructing principles for the ascription of criminal responsibility is a task fraught with perils. The question of who can or should be held responsible for what, when, and in what capacity, has occupied many criminal lawyers, who have journeyed far afield into the realms of philosophy, political science, and ethics, to seek solutions to problems that appear only more intractable as one delves deeper into them. Even the ostensibly simple cases provide no easy answers. X who stabs his father must surely be guilty of patricide. What if he did so only to prevent Y from killing both his parents instead? Where does the crux of criminal responsibility pe? Do actions speak the loudest of all, or do our reasons for acting the way we do supersede them? What, moreover, does our concept of responsibility have to say about our relationship to the community in which we live? If A sells a knife to a member of a notorious criminal gang with the awareness that he may use it to stab his next victim, but without in any way intending to support the criminal activity, can he legitimately shelter behind the prescription that no man is his brother’s keeper? How do we distinguish...
between persons who play different roles, ranging from the peripheral to the essential, in the commission of a crime? R, a minor government official, tortures V in order to obtain information, on the direct orders of S, the head of the governmental department, and in accordance with the advice concerning the permissibility of the act of torture prepared by the lawyer Q advising the department. Who should be held responsible and to what extent? Should R bear the primary responsibility as a perpetrator for having physically carried out the act of torture, or is he simply guilty as an aider for having facilitated the act of torture intended and planned by S, the mastermind and true perpetrator? Should Q even fall within the net of criminality, given that he can claim to have simply performed his professional duties?

Challenging as these issues may be in the context of a domestic crime, even more traps await the unsuspecting lawyer once he moves to the arena of international crimes, which are often collective in nature. An international crime such as genocide typically involves widespread participation by a very large number of people dispersed over time and place, playing different roles, and acting on different motivations. The hypothetical figure of the lone génocidaire hardly ever exists in practice: the perpetrator is part of and acts within a social structure that influences his conduct, and he acts with the consciousness that he is part of a common project. To make matters more complicated, international criminal tribunals are rarely concerned with the criminal responsibility of the rank-and-file perpetrator of the crime. They instead focus on persons in positions of authority who are often quite far removed from the actual

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1 For instance, it is estimated that more than a million people participated in some capacity in the Rwandan genocide, which was characterized by broad-based involvement and support. See Alison Des Forges, "Leave None to Tell the Story": Genocide in Rwanda 485, 770 (Human Rights Watch 1999); Philip Gourevitch, We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda 244, 279 (Picador 1998).


3 Mann even classifies perpetrators according to their motives: ideological killers, bigoted killers, fearful killers, careerist killers, materialist killers, disciplined killers, comradely killers, and bureaucratic killers. Mann, Dark Side at 27–29 (cited in note 2).


5 The focus on these categories of persons is a natural (though hardly inevitable) consequence of the jurisdiction of most international tribunals being limited to senior leaders and those deemed "most responsible" for the crimes in question. See, for example, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001), Art 1, amended by NS/RKM/1004/006 (Oct 27, 2004) (limiting the Court's jurisdiction to senior leaders of Democratic Kampuchea and those most responsible for the atrocities committed during the Khmer Rouge); Statute of the
commission of the crime, but whose role in bringing it about is sometimes greater than that of the physical perpetrator.  

       International criminal tribunals and academics have devoted considerable energy to confronting these predicaments: how does one hold an individual responsible as a perpetrator for conduct that is part of a collective criminal project, and further, can he justifiably be labeled as a perpetrator when he personally does not carry out any part of the actus reus of the international crime? The jurisprudence oscillates between the doctrines of Joint Criminal Enterprise (JCE) on the one hand and co-perpetration and indirect perpetration on the other, as modes of attribution of responsibility for international crimes. JCE is largely a common law influenced doctrine, with close analogues in the doctrine of joint enterprise in English law and the Pinkerton conspiracy doctrine in US law. It has been in vogue for much of the existence of the ad hoc criminal tribunals, especially the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Co-perpetration and indirect perpetration are based on established modes of responsibility in German criminal law and are currently the favored doctrines at the International Criminal Court (ICC).

       Whether as a result of its accessibility to common law lawyers, or because of its more established presence in tribunal jurisprudence, almost no aspect of JCE has been left unanalyzed. Co-perpetration and indirect perpetration have

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6 See *The Attorney General of Israel v Eichmann*, 36 ILR 5 ¶ 197 (Dist Ct Jerusalem 1961).
8 See *Pinkerton v United States*, 328 US 640 (1946).
proved more elusive. English-language literature on both doctrines is limited: most commentators on the doctrines, mainly academics trained in the civil law tradition, only provide the gist of the doctrines or allude to specific aspects, without examining the theories and the controversies surrounding them in any detail. The elucidation of the doctrines in the jurisprudence of the tribunals is also quite sparse and based on primarily German or Spanish sources. Not surprisingly, academics without sufficient command of legal literature in these languages have been compelled to understand and critique the doctrines relying on scattered and sometimes opaque references by academics and the ICC. In this Article, I seek to provide an account of the concepts of co-perpetration and indirect perpetration based on the control theory in German criminal law, which opens the possibility for an informed discussion on their promise as modes of responsibility for international crimes in Section II. I also take the first steps in this debate, by subjecting to scrutiny recent criticisms that have been leveled against these concepts in Section III, and suggest ways in which they could illuminate our understanding of perpetration responsibility for international crimes in Section IV.

II. THE CONTROL THEORY IN GERMAN CRIMINAL LAW

A. Forms of Participation in German Criminal Law

The German Criminal Code (StGB) regulates the following categories of participation in a crime:

Section 25: Principals
(1) Any person who commits the offence himself or through another shall be liable as a principal.
(2) If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).

Section 26: Abetting


13 See the analysis in Section III discussing the application of the doctrines at the international criminal tribunals.
Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

Section 27: Aiding

(1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.

(2) The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to section 49 (1).14

Thus, a principal party to the crime commits the offense himself (unmittelbare Täter, or direct perpetrator), or through another person (mittelbare Täter, or indirect perpetrator), or jointly with another principal (Mittäter, or co-perpetrator). In addition, commentators recognize the category of Nebentäterchaft, or independent multiple principals acting alongside each other towards the commission of an offense.15 An accessory either intentionally induces another person to intentionally commit an unlawful act (Anstifter or abettor or instigator) or intentionally renders aid to another in the latter’s intentional commission of an unlawful act (Beihilfe, or aider).16

The StGB is, however, silent on the criterion for demarcation between principals and accessories, and the Federal Court of Justice (Bundesgerichtshof or BGH) and criminal law commentators have propounded numerous theories on the appropriate dividing line. The first category of theories, called the “objective theories,” considers the perpetrator to be the person who realizes the elements of an offense, either in full or in part, himself; all other contributors to the offense are accessories.17 In contrast, the “subjective theories” determine the status of a party to a crime depending on whether he possessed the will of a perpetrator or that of an accessory, and they use different criteria to determine

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15 Johannes Wessels and Werner Beulke, Strafrecht, allgemeiner Teil: Die Straftat und ihr Aufbau (Schwerpunkte) 179, 185 ss (CF Müller Verlag 2008) (German); Michael Bohlander, Principles of German Criminal Law at 153 (Hart 2009).

16 Wessels and Beulke, Schwerpunkte at 179 (cited in note 15); Bohlander, German Criminal Law at 153 (cited in note 15).

The theory most widely endorsed by prominent commentators on German criminal law is the doctrine of “act-domination” or control (Tatherrschaftslehre), which represents a synthesis of the objective and subjective theories. On this account, the decisive criterion for establishing the boundary between principals and accessories is control over the act: the perpetrator dominates or controls the commission of the act, and the accessory participates in its occurrence without domination. To have control over the act means to hold in one’s hands the elements constituting the offense (with the requisite intent). This control can take different forms: direct domination over the act in the case of direct perpetration (Handlungsherrschaft); control over the will of the direct perpetrator or domination arising out of the superior knowledge of the indirect perpetrator in the case of indirect perpetration (Willensherrschaft); or functional domination of the participating joint actor in the case of co-perpetration (funktionale Tatherrschaft). The perpetrator is the person who, as the key figure (Zentralgestalt) in the events, exercises this control through his ability to strategically mastermind the commission of the act (in indirect perpetration) or through his joint hegemony over the act (in co-perpetration). He can thereby execute or obstruct the commission of the offense according to his will. In contrast, the accessory is the marginal figure in the course of events who merely aids or otherwise advances the commission of the criminal act.

The control theory is more multifaceted and more persuasive than the objective and subjective theories, both theoretically as well as pragmatically. It brings together several modes of conduct (act-domination, will domination, and functional domination) under the umbrella term of “control” and thus provides the possibility of a more nuanced concept of perpetration. Unlike the subjective theories, the control theory recognizes that the perpetrator is the subject of the offense, and his conviction is tied to the unlawfulness of the elements of the offense, rather than the blameworthiness of his internal attitude. It also transcends the narrowness of the objective theories in dispensing with the requirement of personal fulfillment of all the elements of the offense and acknowledging that they can be realized with the help of a coerced human instrument or in cooperation with another person.

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19 Wessels and Beulke, Schwerpunkte at 181 (cited in note 15); Sieber and Engelhart, MPICC Report at 17 (cited in note 17).
20 Wessels and Beulke, Schwerpunkte at 181 (cited in note 15).
21 Id at 181–82; Sieber and Engelhart, MPICC Report at 17 (cited in note 17).
23 Id.
The control theory was first systematized by Claus Roxin and is now endorsed by the majority of commentators, though in varying forms.\textsuperscript{24} Furthermore, even though the courts continue to adhere to the subjective theory, the current jurisprudence comes quite close to the control doctrine in its use of objective criteria for the identification of the will of the perpetrator.\textsuperscript{25} For instance, in the \textit{Katzenkönigfall} (Cat King Case),\textsuperscript{26} H and P induced R, a psychologically dependent man, into believing that a demon called the Cat King was the supreme power in the universe. H wanted to get rid of N and, together with P, H convinced R that if he did not kill N as a human sacrifice, the Cat King would instead massacre a million people. R was persuaded to act on this belief and stabbed N three times. H, P, and R were all convicted of attempted murder. One of the main questions considered by the court was whether H and P should be held liable as perpetrators or only as accessories to the attempted murder.\textsuperscript{27} The court stated that the issue of whether H and P can be classified as indirect perpetrators will depend on their objective control measured by the criterion of the will of the perpetrator. The indirect perpetrator is the person who induces and manipulates the conduct he intends by deliberately causing a mistake of law, such that the person laboring under the mistake can still be regarded as his (culpable) tool. H and P deluded R and then consciously manipulated him into carrying out the act of murder intended by them. They also determined substantially the mode of its execution—for example, P handed him the murder weapon and instructed him how to use it. R was in a dependent relationship with H and P, which H and P used to control him, and from which R could extricate himself only with great difficulty. Thus, H and P could induce R to commit the crime and could control the act's execution through the strength of their influence and their superior knowledge of the circumstances of the case.

Commentators have employed the control theory to explain all three categories of perpetration—direct, indirect, and co-perpetration. In the remainder of this Section, I will concentrate on its application to the two forms of perpetration most relevant for international crimes: co-perpetration and \textit{Organisationsherrschaft} (control over the act by virtue of a hierarchical organization).

\textsuperscript{24} See, for example, Wessels and Beulke, \textit{Schwerpunkte} at 182–83 (cited in note 15); Sieber and Engelhart, \textit{MPICC Report} at 17 (cited in note 17).
\textsuperscript{27} BGH, 35 BGHSt at 351, 356 (cited in note 26).
B. Co-Perpetration (*Mittäterschaft*)

Co-perpetration is the joint commission of a criminal act\(^{28}\) through a knowing and willing working together of the individual participants.\(^{29}\) It is based on the functional act-domination of each co-perpetrator, which arises from the principle of division of labor and functional role allocation.\(^{30}\) This allocation ensures that the success of the criminal act is possible only through the cooperation of all co-perpetrators, so that the plan succeeds or fails depending on the functional contribution of each co-perpetrator. The act-domination of the co-perpetrator is based on the fact that through his part of the act, he simultaneously controls the total act; his failure to perform his part of the act also results in a failure of the entire plan for all the other participants.\(^{31}\) For instance, two bank robbers A and B rob a bank together where A threatens the employees with a gun while B removes the cash from the tills. Every participant here acts as an equal partner—he participates in a common agreement or plan and joint commission of the criminal act. The act contributions complement each other in such a manner that they collectively make the criminal act a joint venture, and the joint result is fully attributable to each co-worker.\(^{32}\)

There are mainly two requirements for co-perpetration: an objective requirement of collective act execution for the realization of the elements of the offense and a subjective requirement of a common act plan.\(^{33}\)


The co-perpetrators must work together, based on a division of labor, towards the attainment of the result of the elements of the offense. The act contribution of each co-perpetrator must therefore be of sufficient weight and importance such that it grounds the necessary co-domination over the act; this is indeed the primary difference between co-perpetration and aiding, where the contribution of the participant merely amounts to helping the act of another.\(^{34}\) As a general rule, the contribution must consist of an act by the perpetrator, though the jurisprudence of the courts and part of the literature endorses co-
perpetration through omissions.\textsuperscript{35} Thus, if A and B, two prison officers, agree to make the escape of a prisoner possible such that A hands the prisoner the key (act) while B leaves the outer prison gates unlocked in violation of his duty (omission), they will still be co-perpetrators of the offense of facilitating the escape of prisoners (StGB § 120).\textsuperscript{36} If the conditions for co-perpetration are present, the objective act contributions of the participants are mutually attributed as if they had realized all the elements themselves. An attribution is, however, not possible when the elements of the offense have special requirements for the perpetrator such that they call for personal commission by the perpetrator. Also, it is not possible to attribute subjective characteristics such as special intent requirements to another person.\textsuperscript{37}

There is a good deal of controversy over whether this act contribution must be at the stage of execution of the elements of the offense, or whether contributions in the preparation stage may also be sufficient. According to the established jurisprudence of the BGH, even a small amount of cooperation in the preparation stage may lead to liability as a co-perpetrator if it is carried out with the will of a perpetrator\textsuperscript{38} (an idea that reflects the continuing influence of the subjective theory in the BGH's jurisprudence\textsuperscript{39}). This includes acts such as ferrying the perpetrator to the scene of the crime, participating in the planning of a murder, and even giving advice to the co-perpetrator that strengthens his resolve to commit the crime.\textsuperscript{40} Commentators disagree on whether such preparatory acts can ground co-per perpetration. The typical example given is that of a gang leader who conceives of the criminal scheme and decides on its mode of commission, but leaves its execution entirely to the other gang members.\textsuperscript{41} One strand of opinion would reject liability of the gang leader as a co-perpetrator and hold him responsible only as an accessory, unless he took part in some manner in the execution of the crime—for instance, if he remained in contact with the gang through telephone or radio and thus conducted their deployment.\textsuperscript{42} Others contest this characterization on the basis that the gang leader is not participating

\textsuperscript{35} Id at 29.
\textsuperscript{37} Sieber and Engelhart, MPICC Report at 32 (cited in note 17); Wessels and Beulke, \textit{Schwerpunkte} at 188 (cited in note 15).
\textsuperscript{38} Laufhütte, et al, eds, \textit{Leipziger Kommentar} at 1942 (cited in note 17) and cases cited therein.
\textsuperscript{39} See Section II.A, for the discussion of the Cat King Case on the BGH and its adherence to the subjective theory for demarcating parties to a crime.
\textsuperscript{40} Laufhütte, et al, eds, \textit{Leipziger Kommentar} at 1942 (cited in note 17).
\textsuperscript{41} Wessels and Beulke, \textit{Schwerpunkte} at 187 (cited in note 15); Claus Roxin, \textit{Täterschaft und Tatberraschaft} 298–300 (de Gruyter Recht 2006).
\textsuperscript{42} Roxin, \textit{Täterschaft und Tatberraschaft} at 298–300 (cited in note 41).
in the act of another, but rather the result of the act is consequent to a willing, collective participation in a joint act. Also, given the role of the gang leader, it would be inappropriate to consider him an accessory—a marginal figure in the course of events. 43

There is, however, merit in the argument that since perpetration is tied to the realization of the elements of the offense, co-perpetration must consist of joint domination of the implementation of these elements, and thus must exist during the execution stage. A person who merely participates in the preparation stage can certainly influence the course of events but can scarcely be said to control it. If the executor of the plan acts freely and with responsibility, the realization of the plan would always be dependent on the initiative, resolutions, and decisions of the direct executor. 44 Thus, only cooperation in the execution stage would justify responsibility as a co-perpetrator. This execution stage, however, is not limited to the core elements of the offense, but rather encompasses the entire phase between the beginning of the attempt and the formal completion of the act and covers actions that would form an inseparable part of the complex action chain. 45

Another situation which represents an ambiguity in the objective requirements for co-perpetration is the scenario of “successive co-perpetration.” 46 Here the question is whether a contribution subsequent to the commencement of the execution stage can also be punished as co-perpetration, such as when a person joins an action of resistance that has already begun and takes part in further attacks against the enforcement agency. The jurisprudence affirms co-perpetration during the entire execution stage as long as the subsequent participation is based on a mutual understanding and is not unilateral in nature. 47 There is controversy over whether aggravating factors that were already completed before the participation of the subsequently joining co-perpetrator can also be attributed to him. While the courts favor this attribution, the majority of the literature rejects it on the basis that this undermines the functional act-domination at the heart of co-perpetration.48

2. Common act plan.

As functional act-domination based on cooperation in accordance with a division of labor presupposes an overall plan, co-perpetration requires that the

43 Wessels and Beulke, Schwerpunkte at 190 (cited in note 15).
45 Id at 1943–44.
46 Id at 1950.
47 Id.
48 Id.
contributors to the criminal act reach an agreement to commit the act as equal partners.\textsuperscript{49} Mutual consent is essential for the joint realization of the act at the time of, or even before the beginning of, the act. A jointly developed and decided-upon plan is not essential. The acceptance or approval of an already formed plan of another which then forms the basis of the further joint action, is sufficient. This agreement may not take place explicitly; it can also take place by implication. This would exclude situations where a joint accord is missing, such as a coincidental simultaneous exploitation of a situation by persons working side-by-side without a mutual understanding.\textsuperscript{50} Co-perpetration is also possible if the individual participants do not know each other, as long as each person is conscious that there are other participants who are likewise working towards a common goal and that those other participants have the same knowledge.\textsuperscript{51}

From the necessity for a common act plan it follows that the act of one of the contributors that goes beyond the plan, the so-called "excess," cannot be attributed to the others.\textsuperscript{52} This is because the other contributors do not have hegemony over the act or the requisite intention regarding the deviation.\textsuperscript{53} Thus, if several persons plan a robbery and one of them gets carried away and commits a murder during the robbery, he alone will be responsible for the killing.\textsuperscript{54} There are some exceptions to this rule, as it is not necessary that the common plan covers each and every detail of the execution; each perpetrator may be given some leeway to act as the situation demands as long as this helps accomplish the common goal. Therefore, deviations from the common plan that are within the range of the relevant acts with which one must normally reckon do not count as an excess. The main test is the foreseeability of the deviant course of action.\textsuperscript{55} A deviation from the original plan during the joint executing action can also be introduced into the agreement by a mutual understanding, which again negates excess.\textsuperscript{56}


\textsuperscript{53} Sieber and Engelhart, \textit{MPICC Report} at 32 (cited in note 17).

\textsuperscript{54} Reichsgerichts [RG] [Supreme Court] Feb 2, 1911, 44 Entscheidungen des Reichsgerichts in Strafsachen [RGS] 321, 324, BGH NJW 1973 377 (Germany).


\textsuperscript{56} Wessels and Beulke, \textit{Schwerpunkte} at 189 (cited in note 15).
C. Organisationsherrschaft

Section 25 of the StGB states that a person who perpetrates or commits a crime through another is an indirect perpetrator. The word “through” signifies that the indirect perpetrator (Hintermann) controls the direct perpetrator (Frontmann) of the criminal act in such a manner that he uses or manipulates him as a human tool or instrument. Due to this “tool” function, the Frontmann normally possesses some deficit (for instance, he lacks the requisite intent for the offense), which the Hintermann exploits in order to control or dominate him. Thus, while the Frontmann still possesses act hegemony (Handlungsherrschaft), this is overlaid by the Willensherrschaft, or domination over the will, of the Frontmann by the Hintermann. Two main groups of indirect perpetration are recognized. The first is the normal case of indirect perpetration where the hegemony of the Hintermann is based on his dominance over the Frontmann due to some factual or legal grounds. This results in the latter’s exemption from criminal responsibility. The second group is the exception where the Frontmann is held liable alongside the Hintermann despite the latter’s hegemony. The Hintermann is, in this case, the “perpetrator behind the perpetrator.” The most frequently cited cases of establishing control leading to indirect perpetration are coercion; utilization of a mistake on the part of the Frontmann or on the basis of the Hintermann’s superior knowledge; and hegemony through control over an organizational apparatus, or Organisationsherrschaft.

Organisationsherrschaft refers to the category of cases where the Hintermann has an organized power apparatus at his disposal through which he can accomplish the offenses at which he aims, without having to leave their realization contingent on an independent decision by the Frontmann. Unlike the other two forms of domination by will, Organisationsherrschaft transfers control over the course of events to the Hintermann despite a fully criminally responsible intermediary. The special position of the Hintermann in these cases results from the specific mode of action within the framework of the organizational apparatus. Such an organization develops a life that is independent of the changing existence of its members and of the decisions of the individual act executors; it functions as if it were automatic. Figuratively speaking, the

57 StGB § 25 (cited in note 14).
58 Sieber and Engelhart, MPICC Report at 19 (cited in note 17); Wessels and Beulke, Schwerpunkte at 190 (cited in note 15).
59 Roxin, Täterschaft und Tatherrschaft at 143 (cited in note 41).
60 Sieber and Engelhart, MPICC Report at 20 (cited in note 17).
61 Roxin, Täterschaft und Tatherrschaft at 242 (cited in note 41).
62 Id at 242-43.
Hintermann sits at the operational center of the organizational structure and, if he presses a button to order a killing, he can expect it to be fulfilled without his even knowing who executes the action.\textsuperscript{63} This expectation of fulfillment does not arise from any deception or duress on the part of the Hintermann. Instead, it is based on the fungibility of the executing organs, such that if one organ refuses to participate, another immediately steps into its place and the execution of the total plan continues unhindered. Each executing organ is therefore an anonymous and arbitrarily exchangeable figure, much like a simple cog in a machine-like organization, which places the Hintermann in the central position of the occurrence and lends him domination over the act.\textsuperscript{64}

It is irrelevant for Organisationsherrschaft whether the Hintermann acts on his own initiative or on the instructions of more highly-placed superiors. All that is required is that he can direct or steer the part of the organization that is subordinate to him, without having to rely on the resolution of his subordinates for the commission of the offense.\textsuperscript{65} An action that does not independently work to steer the organization further would only qualify as accessorial in nature. For instance, A, who simply outlines the plan of destruction without possessing any authority, and B, who stands outside the apparatus as an informer, can only be accessories because they lack steering power. This does not imply that their conduct is less despicable than that of the perpetrator, but it is the element of control, not the degree of culpability, that is decisive for the demarcation of the forms of perpetration.\textsuperscript{66}

1. The BGH’s adoption of Organisationsherrschaft.

The BGH first adopted the doctrine of Organisationsherrschaft in its decision of the German border guards’ case in 1994.\textsuperscript{67} The BGH, however, did not rely solely on Roxin’s version of Organisationsherrschaft in its formulation; it combined it with Schroeder’s criterion of the intermediary’s [absolute] readiness to realize the criminal act. It held that a Hintermann has domination over an act, despite a fully responsible Frontmann, if he uses the basic framework conditions of an organizational structure within which his act contribution gives rise to a regular

\begin{footnotes}
\item[63] Claus Roxin, Straftaten im Rahmen organisatorischer Machtapparate, 110 Goltdammer’s Archiv für Strafrecht 193, 200 (1963); Roxin, Täterschaft und Tatberrschaft at 245 (cited in note 41).

\item[64] Roxin, 110 Goltdammer’s Archiv für Strafrecht at 200–01 (cited in note 63); Roxin, Täterschaft und Tatberrschaft at 245 (cited in note 41). As I shall later examine, the criterion of fungibility has invited much criticism on doctrinal and empirical grounds.

\item[65] Roxin, 110 Goltdammer’s Archiv für Strafrecht at 203 (cited in note 63); Roxin, Täterschaft und Tatberrschaft at 248 (cited in note 41).

\item[66] Roxin, 110 Goltdammer’s Archiv für Strafrecht at 204 (cited in note 63); Roxin, Täterschaft und Tatberrschaft at 249 (cited in note 41).

\item[67] BGHSt 40, 218–40.
\end{footnotes}
operational sequence. Such framework conditions may exist in command hierarchies as well as in state, business, or business-like organizational structures. If the Hintermann acts in the knowledge of these circumstances, in particular if he uses the absolute readiness of the executing organ to fulfill the elements of the offense, and if he wants his action to culminate in the result of the element of the offense, then he will be the indirect perpetrator.  

The BGH, however, went beyond Roxin in introducing the possibility of using Organisationsherrschaft in the case of economic and business-like enterprises. Roxin limits the application of his theory to those organizations that are completely detached from the legal order. As long as the administration and execution organs keep themselves bound in principle to an independent legal order, the instructions to commit criminal acts cannot ground act-dominination. The laws of this order will have a higher ranking vis-à-vis the illegal instructions and will thus exclude the domination by will of the Hintermann. Roxin mainly confined Organisationsherrschaft to two cases: crimes committed by the state authorities and crimes committed by organizations such as underground movements, secret organizations, criminal organizations, and similar unions that function as a "state within the state." In later decisions, the BGH has expanded the range of application of the doctrine even further to include organizations such as hospitals. It also uses different criteria for holding the Hintermann responsible, including his conscious creation and use of the basic framework conditions of the organizational structure in order to implement the elements of the offense. There is no mention of the element of fungibility, which is fundamental to Roxin's explication. To assess the merit of these different approaches, it is important to consider each of the criteria for Organisationsherrschaft that Roxin put forward.

2. Elements of Organisationsherrschaft.

There are three main elements in Roxin's theory of Organisationsherrschaft: (1) the existence of a hierarchical vertically-structured organization (power

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68 Id.

69 On this extension of Organisationsherrschaft, see Sieber and Engelhart, MPICC Report at 23–24 (cited in note 17).

70 Roxin, 110 Goldammer's Archiv für Strafrecht at 204 (cited in note 63); Roxin, Täterschaft und Tatherrschaft at 249 (cited in note 41).

71 Roxin, 110 Goldammer's Archiv für Strafrecht at 205 (cited in note 63); Roxin, Täterschaft und Tatherrschaft at 250 (cited in note 41).

72 Compare BGHSt 48, 77 (90 f) and BGHSt 48, 331 (342) with Bundesgerichtshof [BGH] [Federal Court of Justice] (July 3, 2003) 1 StR C453/02, 30 f (FRG). Sieber and Engelhart, MPICC Report at 25 (cited in note 17).

apparatus), (2) the unlimited exchangeability of the direct actor within the power apparatus (fungibility); and (3) the working of the apparatus outside of the legal order (detachedness from the law).\(^7\)

\(a\) Taut hierarchical organizational structure.

Roxin’s elucidation of Organisationsherrschaft requires an organizational structure which functions such that the instructions of the Hintermann lead to an automatic implementation of the elements of the offense. Roxin also discusses an organization that is independent of its individual members, where the members act as a functional part of a larger machine-like structure; this is the basis on which he excludes a group of asocial persons who unite to commit common criminal offenses and elect one of them as their leader.\(^7\) This concept presupposes a fairly tightly organized hierarchical structure.\(^6\)

Roxin ties this structure to the existence of a large number of fungible act intermediaries. However, it is difficult to reconcile these two elements in practice. The larger the number of act intermediaries, the more difficult it would be to control the system so that the Hintermann’s instructions can be implemented smoothly.\(^7\) This is even more so if these intermediaries are arbitrarily replaceable. One could interpret Roxin as referring to a functionally differentiated and decentralized large enterprise, where the actors often do not know of each other’s exact functions and perform their tasks more or less independently. It is, however, more difficult to ensure a “regular operational sequence” within such a structure,\(^7\) and the ability to replace arbitrarily the intermediaries also becomes far more limited in such circumstances.

\(b\) Fungibility of the act intermediaries.

For Roxin, fungibility of the act intermediaries forms a central part of his theory of Organisationsherrschaft, for it is only due to a large number of replaceable act executors that the refusal of any one of them to commit a criminal act


\(^7\) Roxin, 110 Goldammer’s Archiv für Strafrecht at 206 (cited in note 63); Roxin, *Täterschaft und Tatherrschaft* at 251 (cited in note 41).


\(^7\) Thomas Rotsch, *Tatherrschaft kraft Organisationsherrschaft?*, 112 Zeitschrift für die gesamte Strafrechtswissenschaft 518, 557 (2000) (German).

cannot adversely affect the execution of the criminal plan. This criterion has been heavily disputed by commentators.

One set of arguments focuses on the view of act intermediaries as instrumental cogs in a machine. It asserts that the expectation of automatic implementation of the elements of the offense by these intermediaries contradicts holding them criminally responsible as direct perpetrators. Even in the strictest and most tightly controlled organizational structure, the assumption of soulless humans is also contested, and the fundamental unpredictability of freely acting humans (Organisationsherrschaft assumes this freedom) cannot be eliminated. Organisationsherrschaft presents us with a crooked picture of humans who are merged into an organizational structure and become one with the machine. However, just because some or all of the individuals are replaceable does not make the enterprise any less a union of human beings, nor does it lessen the imponderability of the result that follows from this basis. If the picture of the soulless power apparatus is taken seriously, it is hard to see why this does not at the same time justify relieving the act executors from criminal responsibility.

These internal contradictions of a criminally responsible yet machine-like direct executor can be partially resolved if one distinguishes more clearly between individual unlawfulness and collective unlawfulness (that is, unlawfulness that arises in organizational settings). Unlike the typical case of indirect perpetration where the responsibility of the Hintermann is based on his direct control over the direct perpetrator, in cases of macro-criminality, the Hintermann controls the intermediary only indirectly through the mechanism of the organizational apparatus. The direct perpetrator is, on the one hand, responsible for his own criminal acts; on the other hand, his actions are part of the acts of the organization as a whole. This organizational aspect does not relieve him as an individual for the individual unlawfulness. However, the only person who can be held responsible for this organizational unlawfulness is the person who has control over the organization—the Hintermann.

This objection is connected to the second set of arguments against fungibility: in the context of the concrete act, there are usually only a limited

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79 Roxin, 110 Goltdammer’s Archiv für Strafrecht at 200 (cited in note 63).
81 Uwe Murmann, Tatherrschaft durch Weisungsmacht, 143 Goltdammer’s Archiv für Strafrecht 269, 273–74 (1996) (German).
82 Ambos, 145 Goltdammer’s Archiv für Strafrecht at 234 (cited in note 76).
83 Id.
84 Rene Bloy, Grenzen der Täterschaft bei fremdbündiger Tatsausführung, 143 Goltdammer’s Archiv für Strafrecht 424, 441 (1996) (German).
number of act intermediaries who can commit it. One cannot therefore refer to
an unlimited number of exchangeable act executors. For instance, in the case of
the guards posted at the border between East and West Germany, in the context
of the temporally and spatially limited concrete act of preventing the escape of
refugees, only a few soldiers were present. At best, the soldiers were not
instantly but only successively replaceable. This would not differ in any material
way from any other form of indirect perpetration or guarantee automatic
implementation of the elements of the offense for the concrete individual
offense.

Roxin seems to distinguish, though, between immediate substitutability in
the context of the concrete act and the abstract substitutability as a whole within
the structure of the power apparatus. He states that in the concrete situation, as
in the Staschinski case, only a few persons need to be involved. This, however,
separates the criterion of fungibility from the concrete act and appears to ground
domination over the concrete act on a different criterion: the conception of the
direct executor that if he were to refuse, another person would perform the
criminal act in his stead, hence leading to his implementing the elements of the
offense. This would, however, make the Hintermann's domination over the act
contingent on his awareness of the belief of the direct executor, which is
suspiciously close to a subjective rather than objective basis for act-domination.
It would also contradict Roxin's own repudiation of the subjective theory.
Even leaving aside this potential inconsistency, the direct executor's mere belief
that he is exchangeable will not necessarily make him perform the criminal act.
Even if he is convinced of the inevitability of the criminal result, he may still be
revolted by the thought of being personally implicated in it and thus refrain from
participation.

Roxin's argument could perhaps still be saved if having domination or
control over the act simply has a different meaning in the context of
Organisationsherrschaft than it does in other cases of indirect perpetration. In the
usual case of indirect perpetration, the "act" (over which the Hintermann must
have control) represents the direct criminal act committed by the Frontmann. In
Organisationsherrschaft, the "act" may be taken to refer to the entire expiration of
events leading to the fulfillment of the result of the elements of the offense. The
Hintermann would thus have the central position if he controls the sequence of

85 Murmann, 143 Goldammer's Archiv für Strafrecht at 273 (cited in note 81).
87 Roxin, 110 Goldammer's Archiv für Strafrecht at 202–03 (cited in note 63); Roxin, Täterschaft und
Tathermchaft at 247–48 (cited in note 41).
88 Rotsch, 112 Zeitschrift für die gesame Strafrechtswissenschaft at 527 (cited in note 77).
events until the implementation of the crime. However, this would result in a decoupling of the domination over the act from the elements of the offense. If Roxin were to accept this solution, it would contradict his stance that the perpetrator must have the key position in the elements of the offense covered by the execution action.

c) Detachedness from the legal order.

Roxin limits the operation of Organisationsherrschaft to organizations that are detached from the legal order, for it is only in these organizations that the administrative and executive organs of the power apparatus are not bound to laws that have a higher ranking. This would normally exclude the automatic implementation of the Hintermann’s illegal instructions. This criterion is challenged primarily by Ambos, who states that while detachedness from the law may exist in these organizations, it is not a necessary condition. In fact, if the organization forms part of the legal order, the Hintermann’s domination over the act is greater. He argues that in the case of non-State power apparatuses that have a symbiotic relationship with the State, such as the Sicilian mafia or Colombian drug cartels, the organization is not detached from the law, but rather operates as a “para State,”—that is, it is integrated into the law in order to achieve a common interest. This does not, however, change anything in the effective domination of the top management of the apparatus over the act and direct executors. Ambos is guilty of eliding the distinction between the “government” and the “State.” While there may indeed be a symbiotic relationship between the former and the organization, one cannot equate this to an integration of the organization within the positive legal order that may still be committed to fighting the criminal acts of the organization.

Ambos is more careful of this distinction when discussing state-organized power apparatuses, where he admits the existence of two parallel legal orders. The first is the “normal” State legal order, which is obligated to fight crime. The second is the “perverted” legal order, based on a secret plan of the government aimed at criminal ends, which forms the basis of the clandestinely operating national power apparatus. However, the situation changes if the legal order forms the basis of state sanctioned crime, where crimes are perpetrated in the

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89 Rotsch, Neues zur Organisationsherrschaft at 15–16 (cited in note 73).
90 Id.
91 Ambos, 145 Goldammer's Archiv für Strafrecht at 243 (cited in note 76).
92 Id at 242.
93 Id at 242–43.
94 Id at 243.
95 Ambos, 145 Goldammer’s Archiv für Strafrecht at 243 (cited in note 76).
name of the law by the authority of the executive and through the instrumentality of the courts.\textsuperscript{96} Here there is no element of detachedness from the law; instead, with the concentration of unlawfulness and the authority of the law in the hands of the same national power apparatus, the automatic implementation of the illegal instruction by the act intermediary is even more assured than in a case of law detachedness.\textsuperscript{97}

Ambos admits that “law” in Roxin’s sense can also refer to natural rather than positive law; the state apparatus that acts in contradiction to \textit{lex naturalis} thus detaches itself from the order of the natural law, even if it is in conformity with the positive law.\textsuperscript{98} However, Ambos rejects this interpretation on the ground that it is too abstract and that such unwritten supra-legal principles do not lend themselves to clear or immediate understanding for the act intermediary.\textsuperscript{99} Thus, they cannot form a normative barrier to the execution of the \textit{Hintermann’s orders}.\textsuperscript{100}

Ambos’s criticism on law detachedness is convincing in the context of a state apparatus if Roxin indeed takes law to mean positive law. However, Roxin intuitively seems to have in mind natural rather than positive law. His references to a “higher ranking” of this law,\textsuperscript{101} and to the rarity of such an organization existing in a constitutionally stable legal order,\textsuperscript{102} point heavily in this direction. As we will discuss later, the criterion of law detachedness may in fact prove to be one of the most salient features of a doctrine of responsibility for international crimes.\textsuperscript{103}

Having considered the main elements of the control theory as applied to the concepts of co-perpetration and \textit{Organisationsherrschaft}, it is now possible to analyze its transposition to the world of international criminal law, particularly the enthusiasm with which it has been taken up by the ICC, and recent criticisms of the theory by international criminal law academics.

\begin{itemize}
  \item \textsuperscript{96} Id at 243–44.
  \item \textsuperscript{97} Id at 244.
  \item \textsuperscript{98} Id at 244–45.
  \item \textsuperscript{99} Ambos, 145 Goltdammer’s Archiv für Strafrecht at 245 (cited in note 76).
  \item \textsuperscript{100} Id at 244–45.
  \item \textsuperscript{101} Roxin, 110 Goltdammer’s Archiv für Strafrecht at 204 (cited in note 63); Roxin, \textit{Tätterschaft und Tatherrschaft} at 249 (cited in note 41).
  \item \textsuperscript{102} Roxin, 110 Goltdammer’s Archiv für Strafrecht at 207 (cited in note 63); Roxin, \textit{Tätterschaft und Tatherrschaft} at 252 (cited in note 41).
  \item \textsuperscript{103} See Section IV.
\end{itemize}
III. CO-PERPETRATION AND INDIRECT PERPETRATION AS MODES OF LIABILITY FOR INTERNATIONAL CRIMES

A. The Control Theory of Perpetration in Tribunal Jurisprudence

While the doctrines of co-perpetration and indirect perpetration have gained renewed prominence due to their adoption by the ICC, they initially invited scrutiny in the aftermath of opinions rendered by judges of the ICTY. The first ICTY judgment to employ the theory of co-perpetration was the Stakic Trial Chamber, which held that before resorting to JCE, it would give preference to “a more direct reference to ‘commission’” such as co-perpetration. The Chamber relied on Roxin to define the key factor as the joint control of the perpetrators over the act such that the perpetrators can realize their plans only insofar as they work together towards its accomplishment, whereas each can individually ruin the plan if he fails to carry out his part. It set out the physical and mental elements of co-perpetration, consisting of (1) an explicit agreement or tacit understanding to reach (2) a common goal through (3) cooperation and (4) joint control over the criminal conduct; (5) the accused’s awareness of the substantial likelihood that crimes would result from cooperation ensuing from the same degree of control over the common acts; and (6) the accused’s awareness that his role is essential for the common goal’s fulfillment.

The Stakic Trial Chamber acknowledged that even though its concept of perpetration overlapped in part with the definition of JCE, the Chamber’s conception was both closer to what most legal systems recognized as “commission” and avoided introducing modes of liability that were not contemplated in the ICTY Statute. This conclusion is far from satisfactory. Not only is it entirely unclear what the Chamber meant by suggesting that co-perpetration is a more ‘direct’ mode of responsibility as compared to JCE, it also fails to clarify the relationship between co-perpetration and JCE. Additionally, the breadth of sources relied on by the Chamber leaves much to be desired. It is thus not altogether surprising that the overly economical elucidation of the doctrine in Stakic then led to the confused indictment in Milutinovic, where the

104 Prosecutor v Stakic, Case No IT-97-24-T, ICTY Trial Chamber Judgment ¶ 438 (July 31, 2003).
105 Id at ¶ 440.
106 Id.
107 Id at ¶ 442.
108 Stakic, Case No IT-97-24-T, Trial Judgment at ¶ 441 & n 950.
109 The Chamber cited Claus Roxin almost exclusively in support of the elements of the doctrine. See Stakic, Case No IT-97-24-T, Trial Judgment at ¶¶ 440-41 n 945-49.
Prosecution argued that under the concept of “indirect co-perpetration” in *Stakic*, an accused will be liable “if he has an agreement with others, plays a key role in the agreement and one or more participants used others to carry out crimes.” The Milutinovic Trial Chamber rejected this mode of responsibility, holding that the source cited by the *Stakic* Trial Chamber (Roxin) did not support its definition of the physical elements and that it could not find any evidence for these elements in customary international law. Furthermore, neither Roxin nor *Stakic* made mention of participants to the agreement using persons outside the agreement to commit the crimes. Given that the prosecution put forward an entirely different form of perpetration responsibility than the one employed in *Stakic*, albeit one that is endorsed by the control theory and by Roxin, the Milutinovic Trial Chamber rightly did not find its claim supportable by *Stakic*. On the same day, the Stakic Appeals Chamber set aside the portions of the *Stakic* Trial Chamber’s decision dealing with co-perpetration on the ground that this mode of liability did not have support either in customary international law or in the settled jurisprudence of the ICTY.

Judge Schomburg sought to remedy some of the problematic aspects of *Stakic* in his separate opinion in the Gacumbitsi Appeals Judgment. Here, he endorsed the core physical elements of co-perpetration as set out in *Stakic*. Judge Schomburg relied not only on Roxin, but also on the penal codes of Colombia, Paraguay, and Finland in support of these elements. He also put forward indirect perpetration, or “perpetration by means,” as a distinct mode of responsibility that was well established in several legal systems around the world. In order to be liable for indirect perpetration, the accused must have used the direct or physical perpetrator of the crime as a mere instrument for the commission of the crime. The attribution of criminal liability was based on the control exercised by the accused over the conduct and the will of the physical perpetrator.

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110 *Prosecutor v Milutinovic*, Case No IT-05-87-PT, ICTY Trial Chamber, Decision on Ojdanic’s Motion Challenging Jurisdiction, ¶ 7 (Mar 22, 2006).

111 See also *Gacumbitsi v Prosecutor*, Case No ICTR-2001-64-A, Appeals Chamber Judgment, ¶ 51 (July 7, 2006) (Shahabuddeen, J, separate opinion).

112 See *Milutinovic*, Case No IT-05-87-PT, Decision on Motion at ¶¶ 37, 39, 40–42.


115 See id at ¶ 16 n 29, 17.

116 Id at ¶ 16 n 30, 18–21.

Judge Schomburg concluded with the observation that indirect perpetration was particularly apposite as a theory of international criminal responsibility, as it served to bridge the physical distance between the crime and persons who should be considered the main perpetrators due to their involvement and control over the crimes committed.118 This had also been recognized in Article 25(3)(a) of the Rome Statute establishing the International Criminal Court, which provided for liability through co-perpetration as well as indirect perpetration.119 Judge Schomburg acknowledged that these modes of liability overlapped to a great extent with JCE, the main difference consisting in the key element of attribution; while JCE is based primarily on the common state of mind of the perpetrators (a subjective criterion), co-perpetration and indirect perpetration also depend on whether the perpetrator exercises control over the criminal act (an objective criterion).120 He suggested that these doctrines should be harmonized in the jurisprudence of the ad hoc tribunals to better reflect the notion of “commission” in different national legal systems.121

These attempts to introduce the doctrines of co-perpetration and indirect perpetration into ICTY jurisprudence, however, failed to dethrone JCE as the preferred mode of commission liability at the ad hoc tribunals.122 Part of the reason for this is that, notwithstanding Gacumbitsi, the opinions lack any detailed examination of the elements of these doctrines. While the physical elements that must be present to constitute these modes of liability are relatively precise, the mental elements are quite ambiguous. For instance, the Stakic Trial Chamber’s holding that the accused must be aware of the substantial likelihood that crimes will occur is scarcely sufficient to establish responsibility for specific intent crimes such as genocide. It is also unclear whether all the accused persons charged as co-perpetrators should share the relevant mental state, or whether only a specific accused’s state of mind is in question.123 Moreover, the opinions do not succeed in clarifying the distinct bases of and functions performed by the

118 Gacumbitsi, Case No ICTR-2001-64-A, at ¶ 21 (Schomburg, J, separate opinion).

119 For this, Judge Schomburg also cited the observations of the ICC Pre Trial Chamber I interpreting Article 25(3) in Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 Feb 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Annex I: Decision on the Prosecutor’s Application for a Warrant of Arrest, Art 58, ¶ 96 (Feb 24, 2006).

120 Gacumbitsi v Prosecutor, Case No ICTR-2001-64-A, Appeals Chamber Judgment at ¶ 22 & n 41 (Schomburg, J, separate opinion).

121 Id at ¶ 22, 24.

122 For a detailed discussion of the failed attempts to introduce these modes of liability at the ICTY, see Boas, Bischoff, and Reid, Forms of Responsibility in International Criminal Law at 105–24 (cited in note 9).

123 For a similar point, see Badar, 6 Intl Crim L Rev at 297–98 (cited in note 11).
doctrines of co-perpetration and indirect perpetration. Thus, an international criminal lawyer unacquainted with the doctrines' background in German criminal law and in legal systems influenced by German criminal law would be hard pressed to be able to distinguish between the two.

The Pre-Trial Chamber of the ICC has fared a little better in its explication of these forms of responsibility. In *Lubanga*, the Pre-Trial Chamber noted the different approaches—objective, subjective and “control”—to distinguish between parties to a crime and opined that the doctrine of “control” over the crime was expressly included in the provision of liability for indirect perpetration in Article 25(3)(a) of the Rome Statute. It stated that the notion of “co-perpetration” in the same Article must therefore cohere with this criterion for differentiating between principals and accessories. Thus, only persons who have control over the crime by virtue of the essential tasks assigned to them for the commission of the crime and are aware of having such control can be considered joint or co-perpetrators. Since the notion of “control” is at the heart of the *Lubanga* Chamber’s adoption of co-perpetration, it would have been helpful for the Chamber to have expanded on what exactly control, especially “joint control,” encompasses. One could argue, for instance, that joint control over the act presupposes equal participation or contribution by the co-perpetrators, whereas different kinds or degrees of contributions would lead to distinctions in the categorization of different parties to the crime.

The *Lubanga* Chamber then specified the objective and subjective elements of co-perpetration. The objective elements consist of, first, an agreement or a common plan between two or more persons. This plan can be implicit and should include an element of criminality, even though it need not be directed specifically at the commission of a crime. The second required objective element is coordinated essential contribution by each perpetrator resulting in the realization of the objective elements of the crime. This contribution may be at any stage of the crime.

124 See generally *Lubanga*, Case No ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges (Jan 29, 2007).
125 See id at ¶¶ 331–32, 349–50.
126 Id at ¶¶ 330–32, 341.
128 *Lubanga*, Case No ICC-01/04-01/06, Confirmation of Charges at ¶¶ 343–45. See also *Prosecutor v Katanga and Chui*, Case No ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 522–23 (Sept 30, 2008).
129 *Lubanga*, Case No ICC-01/04-01/06, Confirmation of Charges at ¶¶ 346–48; *Katanga and Chui*, Case No ICC-01/04-01/07, Confirmation of Charges at ¶¶ 524–26 (giving examples of essential contribution as activating mechanisms by leaders that lead to automatic compliance with their
The first subjective element is that the accused must fulfill all subjective elements of the crime with which he is charged, including the specific intent for crimes such as genocide. For most crimes under the jurisdiction of the ICC, this would mean meeting the “intent” and “knowledge” requirements in Article 30(1) of the Rome Statute.130 The second subjective element is that all co-perpetrators must be mutually aware of and accept that the execution of the common plan may result in the realization of the objective elements of the crime. If there is a substantial likelihood that the objective elements of the crime would occur, this mutual acceptance can be inferred from the co-perpetrators’ awareness of this likelihood and their decision to implement the plan despite such awareness. If, on the other hand, the risk is low, the co-perpetrators must have expressly accepted that implementing the plan would result in the realization of the objective elements of the crime.131 The third subjective factor is the accused’s awareness of the factual circumstances enabling him to jointly control the crime—that is, that his role is essential in the implementation of the common plan and that he can frustrate its realization by failing to perform his function.132

The sparseness of the elements outlined by Lubanga makes it difficult to assess how they would be applied to concrete cases before the court. Moreover, some of the interpretations in Lubanga give rise to further concern. For instance, in the absence of any direct evidence that Lubanga was involved in the recruitment of child soldiers, the Trial Chamber based his responsibility for this crime on his “essential role” in the common plan between him and some leaders of the Forces Patriotiques pour la Libération du Congo (FPLC)133 to broaden the base of their army.134 The Chamber held that the implementation of this plan, which targeted young recruits, entailed the objective risk that children under fifteen years of age would be recruited.135 Given Lubanga’s key role in the overall coordination of the FPLC, the Chamber held that he had joint control as a co-

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130 Lubanga, Case No ICC-01/04-01/06, Confirmation of Charges at ¶¶ 349–60; Katanga and Chui, Case No ICC-01/04-01/07, Confirmation of Charges at ¶¶ 527–32.
131 Lubanga, Case No ICC-01/04-01/06, Confirmation of Charges at ¶¶ 361–65; Katanga and Chui, Case No ICC-01/04-01/07, Confirmation of Charges at ¶¶ 533–37.
132 Lubanga, Case No ICC-01/04-01/06, Confirmation of Charges at ¶¶ 366–67; Katanga and Chui, Case No ICC-01/04-01/07, Confirmation of Charges at ¶¶ 538–39.
133 The Forces Patriotiques pour la Libération du Congo was the military wing of a political group in Congo called the Union of Congolese Patriots (UPC), of which Lubanga was the founder and leader. Lubanga, Case No ICC-01/04-01/06, Confirmation of Charges at ¶ 7-8.
134 See Lubanga, Case No ICC-01/04-01/06, Confirmation of Charges at ¶ 377.
135 Id.
perpetrator over the implementation of the plan.136 This part of the decision has been criticized on the basis that Lubanga's key role in the leadership of the FPLC and its activities does not support the inference that his contribution was essential for the specific crime of the recruitment of child soldiers.137 The criticism is certainly valid and stems from the Chamber's failure to clarify what it deems as the object of essential contribution—that is, the specific crime or the common plan.

Another instance of the potential divergence between the outlined element and its application is in inferring mutual acceptance that the execution of the plan may result in the realization of the objective elements of the crime in low-risk cases from the co-perpetrators' express acceptance of this result.138 As an example of this express acceptance, the Chamber points to when "killing is committed with 'manifest indifference to the value of human life;'" on the other hand, intent is absent when the actor perceives a non-substantial risk but believes that his expertise will prevent the realization of the offense.139 However, it is difficult to see how "manifest indifference" in the first case can imply "acceptance" of the victim's death, apart from treating this as an acceptance of the risk of death (which in the Chamber's formulation is not sufficient to prove intent in low-risk cases). In contrast, one could say in the second case that the actor "accepts the risk" and is simply mistaken about his ability to prevent the risk, the level of his expertise, or both.140

In the decision of confirmation of charges in Katanga and Chui, the Pre-Trial Chamber endorsed and expanded upon the notion of control and liability under Article 25(3)(a) developed in Lubanga.141 In Katanga and Chui, however, the Chamber focused on the elements of liability for joint perpetration through another person. The Chamber saw no merit in the defense's argument that the phrase "jointly with another or through another person" can include either "co-perpetration" or "indirect perpetration," but not "indirect co-perpetration."142 It then set out the objective elements for perpetration by means, concentrating on the cases that it considered most relevant to international criminal law—where the perpetrator in the background commits the crime through another, who is

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136 See id at ¶ 383, 398.
137 See Weigend, 6 J Intl Crim Just at 486–87 (cited in note 12).
138 See Lubanga, Case No ICC-01/04-01/06, Confirmation of Charges at ¶ 354 n 436, quoting Stakic, Case No IT-97-24-T, Trial Judgment at ¶ 587.
139 See Lubanga, Case No ICC-01/04-01/06, Confirmation of Charges at ¶ 355 n 437.
140 See Weigend, 6 J Intl Crim Just at 483 (cited in note 12).
141 See Katanga and Chui, Case No ICC-01/04-01/07, Confirmation of Charges at ¶¶ 480–86.
142 Id at ¶¶ 490–93.
also criminally responsible, by means of "control over an organization" (Organisationsherrschaft).\textsuperscript{143}

The first element consists of the perpetrator's control over the organization.\textsuperscript{144} The Chamber opined that since Article 25(3)(a) expressly provided for the commission of a crime through another culpable person, it would also encompass cases involving the principal's control over an organization.\textsuperscript{145} Several national jurisdictions employed this concept to hold leaders of organizations responsible as perpetrators rather than accessories,\textsuperscript{146} on the basis that in some cases of complex crimes, a person's degree of blameworthiness increases in tandem with his rise in the hierarchy within an organizational structure.\textsuperscript{147} The concept had also been recognized in the jurisprudence of international tribunals.\textsuperscript{148}

The second element is the existence of an organized and hierarchical apparatus of power.\textsuperscript{149} The organization must be composed of superiors and a sufficient number of subordinates who are fungible, hence ensuring manifest compliance with orders. The leader must exercise authority through means such as his power to hire, train, discipline, and provide resources to his subordinates. This control should be mobilized to secure compliance with orders that include the commission of crimes within the Court's jurisdiction.\textsuperscript{150}

The third element is execution of the crimes through "automatic" compliance with orders.\textsuperscript{151} The organizational apparatus must be designed such that subordinates are mere cogs in the wheel and are easily replaceable. Thus, any single person's failure to follow orders cannot compromise the plan. In this fashion, the organization develops a life of its own, which enables it to function independently of the identity of any single executor. This automatic compliance,
which is at the heart of the leader’s liability as a principal, may also be achieved through intensive and violent training regimens for subordinates.152

The Chamber went on to hold that a co-perpetrator could be held liable for the crimes committed by the culpable subordinates of his co-perpetrator on the basis of mutual attribution by combining the doctrines of Organisationsherrschaft and co-perpetration.153 It repeated the objective and subjective elements required for co-perpetration in Lubanga and added an additional subjective element in the case of co-perpetration of a crime through another person—the accused’s awareness of the factual circumstances enabling him to exercise control over the crime through another person, that is, the character of the organization, his position of authority within the organization, and factual circumstances enabling automatic compliance with orders.154

The heavy reliance of the Katanga and Chui Pre-Trial Chamber on the theory of Organisationsherrschaft is controversial, given that this theory does not enjoy wide support in domestic legal systems,155 with the exception of Germany and a few Latin American states that are heavily influenced by German legal doctrine. Indeed, the Chamber cites Claus Roxin almost exclusively in its elucidation of the elements of the doctrine.156 Moreover, there is considerable debate even in German academic circles about the viability of the doctrine.157 As noted in Section II, the individual elements of the doctrine of Organisationsherrschaft have been subjected to considerable criticism, and prominent academics in Germany reject the application of the doctrine altogether in favor of co-perpetration and even secondary responsibility for instigation. The elements of Organisationsherrschaft outlined by the Chamber also represent an amalgam of different versions of the doctrine and do not strictly map on to Roxin’s version of it. For instance, there is no mention of the criterion of detachedness from the law, which is central to Roxin’s account of Organisationsherrschaft. The criterion of fungibility also loses much of its bite

152 See id at ¶ 518, citing Roxin, Täterschaft und Tatherrschaft at 245 (cited in note 41); The Juntas Trial, Case No 13/84, Ch 7/6 (Federal Appeals Chamber of Argentina); and German academic commentaries.

153 See Katanga and Chui, Case No ICC-01/04-01/07, Confirmation of Charges at ¶¶ 519–20.

154 Id at ¶¶ 533–37.

155 Compare Jessberger and Geneuss, 6 J Intl Crim Just at 868 (cited in note 10) with Gerhard Werle, Individual Criminal Responsibility in Article 25 ICC Statute, 5 J Intl Crim Just 953, 963–64 (2007) (stating that while perpetration by means is recognized in major legal systems, it had not been regulated by international criminal law instruments or courts prior to the Rome Statute).

156 On Roxin’s version of Organisationsherrschaft, refer to Section II of this Article.

157 See, for example, Herzberg, Mittelbare Täterschaft at 48 (cited in note 78); Rotsch, Neues zur Organisationsherrschaft at 14 (cited in note 73).
because automatic compliance with orders can be secured through violent training methods as well.

These are important formal concerns that the ICC would need to address if it continues to apply the doctrines of co-perpetration and indirect perpetration (or Organisationsherrschaft) to hold individuals responsible as perpetrators for international crimes. None of them, however, touches on the more substantive issue of whether these are theoretically sound modes of liability that the ICC can legitimately adopt for international crimes. We now turn to examine some recent voices of dissent recommending a cautionary approach to adopting co-perpetration and Organisationsherrschaft at the international level and the reasons they put forward for thus arguing.

B. Recent Challenges to the Control Theory of Perpetration

1. Ohlin’s theory of joint intentions.

Perhaps the most detailed criticism to date (in English) of the control theories of co-perpetration and indirect perpetration in international criminal law is Jens David Ohlin’s recent work on joint intentions.\(^{158}\) Ohlin is concerned with developing a theory that adequately explains the imposition of vicarious liability on all participants of a criminal endeavor for the actions of their colleagues, and he puts forward the concept of “joint intentions” as a doctrinally sound and practically useful way of accounting for this.\(^{159}\) He poses his doctrine of joint intentions as a counter to the doctrine of co-perpetration based on the control theory, on the ground that the latter does not pay serious attention to the mental state of the perpetrators.\(^{160}\) Ohlin’s paper is a rich and theoretically complex analysis of the control theory and his suggested alternative, but it falters on at least two counts: (1) his problematization of the control theory of perpetration misunderstands its proper nature, and (2) his own theory of joint intentions actually comes quite close to a true account of the control theory, but is still less sophisticated than the control theory in some respects. I will elaborate on both these arguments in turn.

The first concern with Ohlin’s account of the control theory of perpetration stems from a methodological anxiety. Ohlin outlines the elements of the theory mainly as he understands them to have been set out by the ICC and the ICTY.\(^{161}\) This overwhelming reliance on scant pronouncements by these


\(^{159}\) See id at 693–96.

\(^{160}\) See id at 721.

\(^{161}\) See, for example, id at 721–25.
courts leads to overly broad statements about the doctrine and also confusion about its limits as well as its promise. For instance, one of his criticisms against the use of the concept of “co-perpetration” based on control is that it seems to imply a model of cooperation among a small number of individuals, making it unsuitable for international crimes that are committed by a large number of people. This is, however, precisely the reason why commentators as well as the ICC combine co-perpetration with *Organisationsherrschaft* to address situations of mass criminality. Ohlin acknowledges this only partly when he states that it is not clear whether the drafters of Article 25(3)(a) of the Rome Statute considered this possibility, as the wording is simply “jointly with another.” Since there was little debate on the inclusion of indirect perpetration in Article 25, the *travaux préparatoires* cannot be relied on for guidance. However, the sensible interpretation would be that since the drafters could not have been unaware that international crimes can be committed by a plurality of persons, it would be unwise to have an artificial limit on the number of parties that may be involved in the act of perpetration, and there is certainly nothing in the wording of Article 25(3)(a) that would militate against the participation of a plurality of perpetrators.

Ohlin describes the mens rea requirements for indirect perpetration as a person’s “awareness of his or her control over the crime” and for co-perpetration as a person’s “awareness of their *joint* control over a common plan and awareness of their essential contribution to it;” in addition, “co-perpetrators must also have the intent that the physical perpetrators commit the crime.” Ohlin’s quibble with this mental standard is the interpretation of what it means to “intend” the crime—the ICC considers it fulfilled if the co-perpetrators are aware that the physical perpetrators will commit the offense and either consent or reconcile themselves to it. Ohlin cites two problems with this standard: (1) that this level of intent, known as *dolus eventualis*, is unknown to common law systems and is a lower standard than the Rome Statute’s definition of intent, which requires awareness that a consequence will occur “in the ordinary course of events”; and (2) this lower standard is particularly troubling since the ICC does not interpret it to mean that the plan itself must have a criminal goal, but only that the perpetrator must reconcile himself to the risk that its pursuit will

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163 Id at 725.
164 See Jessberger and Geneuss, 6 J Intl Crim Just at 857 (cited in note 10).
165 Ohlin, 11 Chi J Int l L at 723 (cited in note 158).
166 Id.
entail the perpetration of crimes. Neither objection is especially convincing. P, who is aware of the risk that the acquisition of political control over the territory of a nation (itself not criminal) will result in the commission of crimes—such as unlawful killings, forced labor, and sexual and physical violence—and reconciles himself to that risk, can justifiably be barred from claiming that he did not intend these crimes. Similarly, the fact that a particular level of intent is not a feature of common law systems is not a decisive argument against employing it for international crimes. In the same vein, one could argue that the concept of indirect perpetration despite a criminally responsible intermediary, which the Rome Statute expressly recognizes, is unknown to the common law world. International criminal law is replete with such instances of adaptation from criminal law principles that enjoy far-from-universal application. This standard is also not necessarily lower than what the Rome Statute would require; as Weigend points out, if P knows that there is a substantial risk of bringing about the elements of the offense and nevertheless acts such that the offense occurs, he can legitimately be said to have willed the offense and that this is compatible with his knowledge that the offense would occur in the ordinary course of events.

Ohlin then comes to the heart of his objections against the control theory by revealing its inadequacy in providing a coherent account of a series of hypothetical fact situations. The first is the “Love Parade” scenario where the uncoordinated behavior of several hundred individuals who are caught in a tunnel causes a stampede, resulting in the deaths of several people. Ohlin states that in this case it is difficult to determine whether there was a common plan and whether the contribution of each individual is essential. He alleges that the doctrine resorts to counterfactuals for judging “essentiality,” which produces a paradox—each individual’s role can be considered non-essential, as the stampede would have happened regardless of his individual role, but if one uses this analysis for all the participants, then the stampede would not occur at all. This is not an entirely accurate account of the test of “essentiality.” Weigend, whom Ohlin cites for his test of essentiality, goes on to say that the essentiality of a contribution has to be judged from the viewpoint of the concrete plan; the

167 Id at 723–24 (cited in note 158).
168 This scenario is similar to the scenario considered by the Special Court for Sierra Leone in the case of Prosecutor v Brima, Kamara, and Kanu, Case No SCSL-04-16-T, Appeals Chamber Judgment, ¶¶ 82–84 (Feb 22, 2008).
169 Weigend, 6 J Int'l Crim Just at 482 (cited in note 12).
170 See Ohlin, 11 Chi J Int'l L at 726 (cited in note 158).
171 Id at 732.
mere fact that the crime could have been committed in a different manner than
the one planned does not make the contribution inessential, as long as the
participants worked jointly according to their agreed plan and the contribution
of each was essential to the plan. Thus, in the Love Parade case, the
assessment of essentiality has to be made in the context of the concrete plan, if
one existed, between the participants in the stampede. As Ohlin acknowledges,
this concrete plan was absent, and the uncoordinated behavior of the
participants caused the stampede. However, he seems to suggest that this
causes a problem for the control theory, which does not require a common
criminal plan but only the realization of a substantial risk of criminal
consequences. This is a fairly misleading analysis. There are at least two things
missing in this scenario that would be required by the control theory. First, there
is no common plan that the participants realize will entail criminal consequences.
Second, Ohlin entirely omits any mention of the objective requirement of
working together on the basis of division of labor, which is also missing in the
case of a stampede. The same factors will need to be considered to determine
liability in the second hypothetical derived from the Essen Lynching case, which
would considerably reduce the element of elusiveness that worries Ohlin.

Ohlin has different concerns in his concentration camp scenario. There he
questions whether the camp guards in charge of the inmates can be considered
jointly in control of the crimes in the camp, considering that they are in the
middle of the organizational hierarchy and the commandant of the camp
exercises ultimate control over them. Ohlin mistakenly uses co-perpetration
analysis for this scenario, which would be more ideally dealt with under the

172 Weigend, 6 J Intl Crim Just at 480 (cited in note 12).
174 See id at 733.
175 Ohlin’s Essen Lynching example is drawn from an actual case. Trial of Erich Heyer and Six Others (“The Essen Lynching Case”), British Military Court for the Trial of War Criminals, Essen, 18th–19th and 21st–22d Dec, 1945, 1 Law Reports of Trials of War Criminals 88 (UNWCC 1947). In this scenario, British POWs are marched into Essen, beaten by crowds, and thrown over a bridge. They die from the fall and from shots fired by the crowd. While the crowd’s conduct is spontaneous, it is preceded by an openly delivered order from the German officer in charge of the POWs to his subordinates commanding non-interference in the event of an attack on the POWs by civilians. Ohlin suggests that the issue of control in such spontaneous crowd behaviour proves elusive. See Ohlin, 11 Chi Intl L at 726, 733.
176 See id.
177 See id at 727, 733.
178 Id at 733.
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... doctrine of Organisationsherrschaft. The latter considers it irrelevant whether the indirect perpetrator acts on his personal initiative or on the instructions of more highly placed superiors. All that is required is that the indirect perpetrator can direct or steer the part of the organization that is subordinate to him, without having to rely on the resolution of his subordinates for the commission of the offense. Of course, this only applies if the other conditions for Organisationsherrschaft liability, outlined earlier, are present.

The thrust of Ohlin’s critique is that the control theory severely understates the importance of the culpable mental state of the participants of collective crimes in favor of the objective element. This criticism is a recurrent theme throughout his analysis of the control doctrine. He also states that “intentionality—rather than control—must be the center of any doctrine of group criminality” and that the ICC’s approach towards the control theory results in such a low threshold of intentionality that the control requirement appears to do all the “heavy lifting” in the doctrine. This account is slightly mystifying. It gives the impression that the control doctrine is entirely devoid of any subjective requirements. As discussed in Section II, intentionality is as much a part of the control doctrine as are the objective elements of working jointly on the basis of functional role allocation and division of labor. The true subject of Ohlin’s disagreement with the control theory is not “intentionality versus control,” but rather the level of intent he considers appropriate for attribution of criminal liability.

This mischaracterization of the elements of co-perpetration and indirect perpetration leads Ohlin into his account of what he considers central for the ascription of liability—the distinctive mental state of the participants in a collective endeavor. Ohlin states that “[d]efendants should only be held liable for each other’s actions when each has the intention that they commit the crime together.” I agree, and so does the control theory, but the theory has a different vision perhaps of what constitutes intent and also goes further than Ohlin in requiring certain kinds of physical conduct.

179 Roxin, 110 Goldammer’s Archiv für Strafrecht at 203 (cited in note 63); Roxin, Täterschaft und Tatherrschaft at 248 (cited in note 41).
180 See Ohlin, 11 Chi J Intl L at 734 (cited in note 158).
181 Id at 721.
182 Id at 724.
183 See id at 721.
184 See Ohlin, 11 Chi J Intl L at 696 (cited in note 158).
Ohlin relies on Michael Bratman’s influential “Shared Intentions” thesis to develop his account of joint intentions: X and Y both have individual reciprocal intentions that they engage in an activity together; each individual desires that the group commit the action with the knowledge that the other individual desires the same; and each has an expectation that their activities will be coordinated to achieve this desire. As Ohlin notes, this account is highly individualistic. It relies on the intentions of each individual person, and the “collective element,” insofar as it exists, is supplied by the concept of planning, which yields a “shared intention.” Ohlin develops his own variation on Bratman’s account by taking this element of planning to involve the process of pooling information by the participants and collective decision-making, so as to achieve the desired collective aim. He then uses this analysis to assess whether the theory of joint intentions yields a better account of the behavior and responsibility of the participants than the control theory. For instance, in the Love Parade example, he applies joint intentions to conclude that since the participants did not act in cooperation and did not make decisions in light of the actions of the other participants in the tunnel, there would be no question of vicarious liability. Similarly, in the “Attack Against Civilians” scenario, where a group of soldiers is directed to seize a town and decides to kill any civilians it encounters in order to achieve this aim, Ohlin refers to the shared commitment to the goal and the coordination, along with meshing of plans to achieve the goal, which all together justify vicarious responsibility. The basis for responsibility is that by intending for the group to commit the offense and also intending to contribute to the collective plan, each soldier “makes the action his own.” This, however, is at least part of the inquiry that the control theory of co-perpetration would also require.

As noted earlier, co-perpetration signifies the joint commission of a criminal act by individuals knowingly and willingly working together towards its accomplishment. It is based on the joint control of each individual stemming from the division of labor and functional role allocation, which ensures that the crime can be committed only through the cooperation of each co-perpetrator. The two elements of the control theory of co-perpetration mirror the analysis

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185 Id at 735–36.
186 See id at 737.
187 See id at 739–40.
188 See Ohlin, 11 Chi J Intl L at 742 (cited in note 158).
189 See id at 742–43.
190 Id at 743–44.
Ohlin wants to undertake: (1) the co-perpetrators must work together jointly, based on a division of labor towards the attainment of the result of the elements of the offense; and (2) the co-perpetrators must reach a common agreement or plan denoting mutual consent over the joint realization of the act, where each individual acts in the awareness that there are other participants who are likewise working towards a common plan. This agreement would exclude situations such as a coincidental, simultaneous exploitation of a situation by persons working side-by-side but in the absence of a joint accord.

Ohlin would indeed be introducing a novel element into the current literature on responsibility for collective endeavors were he to put forward a reasoned basis for the proposition that his theory of joint intentions suggests, but does not conclusively establish. This proposition is that each participant must have the direct intent to commit the crime and that mere dolus eventualis would not suffice. However, none of Ohlin's hypotheticals provide conclusive support for such a proposition. He also takes pains to emphasize that he is not sure what the theory of co-perpetration as control adds to his account of joint intentions, or how it improves upon his account in any manner. The answer actually lies in something Ohlin himself acknowledges: "joint intentions" is a necessary, but not sufficient, account of perpetration liability for collective crimes. Unlike the control theory of co-perpetration, it has nothing to say, or at least Ohlin does not articulate any statement, on the objective or actus reus elements required for criminal liability.

2. Osiel's critique of Organisationsherrschaft.

While Ohlin claims to offer an alternative to the "control theory of perpetration," as the above analysis explained, most of his comments pertain to "co-perpetration" and do not affect significantly the doctrine of indirect perpetration and its variant Organisationsherrschaft. This latter doctrine is the focus of the discussion in Mark Osiel's writings that are concerned as much with the law of superior responsibility as with the JCE doctrine. Osiel is on balance positive about the promise of Organisationsherrschaft as a mode of perpetration responsibility, and his writing does not completely reject its application to international crimes. As he notes, one of the major insights of the doctrine of Organisationsherrschaft lies in its simultaneous recognition of how individuals who are in control of organizational resources can harness these to perpetrate mass crimes.

191 See id at 745.

192 Ohlin, 11 Chi J Intl L at 735 (cited in note 158).

atrocity through willing and culpable subordinates, while avoiding liability for mere organizational membership. Osíel's concern stems instead from individual elements of Organisationsherrschaft and how well they are able to reflect the reality of mass atrocity.

Osíel is skeptical about Roxin's adherence to a tightly structured and hierarchical organizational apparatus that is harnessed by the military or civilian superior to commit the crimes he intends. As Osíel demonstrates, such an organizational form rarely constitutes the medium through which mass atrocity is planned, incited, and perpetrated. Informal networks of power are often a more potent force of killings and destruction than hierarchical organizations. Not only can the de facto exercise of power deviate from its de jure conferment, but no individual or even set of individuals completely exercises authority over the conduct of individuals at the lower levels of the hierarchy, who often enjoy considerable latitude and discretion in the exercise of their functions. This individual initiative may indeed deliberately be encouraged by superiors or may even be wrested reluctantly from them. Osíel also challenges the contingency of the superior's control on the subordinate's fungibility. He correctly points out that, especially in small organizations, members are not so readily replaceable, and that even if they are, a superior may yet expect his instructions to be followed for entirely different reasons, such as indifference on the part of the subordinates. It is for this reason that Katanga specifically recognizes other forms of exercising control, such as "intensive, strict, and violent training regimes," that enable automatic compliance with orders.

These are strong objections that deserve serious consideration. Roxin's organizational structure, though conceded by him to be an "ideal type," does not reflect the reality of the majority of situations of mass conflict. Crimes committed by the direct perpetrators in these situations are often spontaneous crimes, crimes of opportunity, or individual responses to a climate of permissibility. The direct executor can hardly be said to be part of any power

194 See Osíel, Making Sense of Mass Atrocity at 95 (cited in note 2).
195 See id at 99–102.
196 See id at 99–100; Mark Osíel, Constructing Subversion in Argentina's Dirty War, 75 Representations 119, 141 (2001).
199 See Katanga and Chui, Case No ICC-01/04-01/07, Confirmation of Charges at ¶ 518.
200 Roxin, 110 Goldammer's Archiv für Strafrecht at 207 (cited in note 63); Roxin, Täterschaft und Tatberrfahrt at 252 (cited in note 41).
structure, and even less a tightly organized and controlled one, especially given that the crimes are spatially and temporally widespread and can encompass entire geographical regions. Perhaps Roxin would circumvent this objection by limiting the requirement of a taut hierarchical structure with regular operational sequences to the leadership level of the organization. Thus, top and maybe even mid-level officials must be part of this vertical hierarchical structure that unleashes the chain of events leading to the commission of mass crimes. However, this would be contrary to his criterion of the fungible direct executor as part of the organizational chain structure.

Similarly, the criterion of fungibility is also not convincing, especially in the context of mass atrocity. As discussed in Section II on German criminal law, this element is widely criticized in German criminal law literature on the ground that perfect substitutability of the subordinate is not likely in the context of the concrete offense. Even if we take the criterion to imply the subordinate’s belief in his fungibility, rather than actual substitutability, this will not necessarily result in his willingness to perform the criminal act.

Neither objection is, however, fatal to the attractiveness of the basic concept of Organisationsherrschaft. The doctrine has withstood the rejection of the element of fungibility by domestic courts\(^{201}\) as well as the ICC,\(^{202}\) since control leading to an expectation of compliance with instructions can be achieved through other mechanisms. Similarly, as Osiel notes, Roxin’s image of a machine-like apparatus with a potentially infinite number of drones at its disposal is simply a metaphor.\(^{203}\) The power of the metaphor must not, however, succeed in distracting from the message it seeks to convey—that “control” may be established by an indirect perpetrator through his ability to manipulate or utilize an operational framework or apparatus that involves scores of culpable individuals, whom he may indirectly harness to achieve the ends he desires. This apparatus need not, however, be vertically structured or rigidly hierarchical; informal networks of power with weak links may well prove more efficient for the commission of international crimes.\(^{204}\) The indirect perpetrator’s control over the apparatus may be established through different mechanisms. Quite often, it will be based on occupying a position of authority that enables him to

\(^{201}\) As Rotsch discusses, the BGH has omitted any reference to the criterion of fungibility in several instances. Rotsch, Neues zur Organisationsherrschaft at 17 (cited in note 73).

\(^{202}\) As is clear in the discussion in Katanga and Chui, the ICC does not appear to consider fungibility as a necessary condition. Katanga and Chui, Case No ICC-01/04-01/07, Confirmation of Charges at ¶ 518.

\(^{203}\) Osiel, Making Sense of Mass Atrocity at 103 (cited in note 2).

\(^{204}\) See id at 115.
order his subordinates to commit the crimes he intends and to supply them with the resources to do so.\(^\text{205}\) He may use this position to perform activities ranging from formulating a criminal plan, deciding on the mode of its execution, setting up a framework to achieve the intended outcome, and ordering subordinates to ensure its implementation.

IV. THE PROMISE OF THE CONTROL THEORY

The previous discussion should make amply evident that my account of the control theory of perpetration is far from evangelical; despite, or perhaps because of, its recent championing by the international criminal law community, I share the worry that an uncritical adoption of the control theory by international criminal law would be a disastrous course of action to pursue. Nevertheless, I hold that it is equally unhelpful to throw the baby out with the bathwater; the control theory in its different variants can provide a promising template around which one can construct a theory of perpetration for international crimes. Emphasis on the concept of “control” and the perpetrator as the central figure in the course of events constituting an offense \((\text{Zentralgestalt})\), based either on his functional control over the act (co-perpetration) or his control over the will of the direct perpetrator (indirect perpetration), opens up the possibility of holding several people simultaneously responsible as principals. Differentiating between the principal and the accessory based on the weight and quality of the party’s contribution to the act is also an appealing starting point for the construction of a concept of perpetration for international crimes. If someone is a marginal figure in the occurrence of the criminal act and his contribution to it is secondary in nature, such that he would be considered as contributing to the act of another, he should be classified as an accessory rather than a principal. This is certainly a more accurate characterization of the role of an immediate physical perpetrator of a murder that is part of a genocidal policy of which he is ignorant.

The individual forms of perpetration based on the control theory also provide a useful starting point for thinking more clearly about a theory of perpetration that corresponds to the reality of mass atrocity. This is particularly true of the concept of indirect perpetration, which addresses several of our intuitions about mass atrocity and which can be modified and developed into a coherent account of principal responsibility. For instance, Schroeder premises the indirect perpetrator’s \((\text{Hintermann’s})\) responsibility on the fact that he deliberately inflames the dormant passions of the intermediary so as to use him

\(^{205}\) This is similar to the criterion used by the ICC Pre-Trial Chamber in \textit{Katanga and Chui}, Case No ICC-01/04-01/07, Confirmation of Charges at \(\S\) 511–14.
as a tool to achieve the criminal result he desires. This is certainly one part of the reality of how high-level perpetrators can harness ordinary people to physically commit the crimes that they have planned and set in motion. The same emphasis on the carefully planned actions of the Hintermann that enable him to manipulate circumstances such that he can ensure the fulfillment of the elements of the offense he intends is apparent in the BGH’s version of Organisationsherrschaft. The Hintermann’s liability hinges on his conscious creation and utilization of the basic framework conditions of an organizational structure that result in the realization of an offense. In both cases, the focus is, as Roxin states (though not quite for the same argument), on the Hintermann’s ability to unleash destruction on a scale that simply cannot be equated with an ordinary instigator. Though the language of the law can scarcely accommodate an element as vague as “destructive potential” in its lexicon, it is an important insight to keep in mind while constructing a theory of perpetration.

The other important contribution of Organisationsherrschaft to a theory of attribution of criminal responsibility lies in its differentiation of individual unlawfulness from collective unlawfulness. Organisationsherrschaft provides a foundation for a claim that principles of criminal responsibility and attribution may differ for cases of individual and collective criminality. The Hintermann’s criminal responsibility in the latter case is derived from organizational (collective) unlawfulness rather than the act of any single individual perpetrator. This obviates the problem of having to trace the chain of causation from each physical perpetrator’s individual act of murder or rape to the overall genocidal enterprise in which the Hintermann occupies a leadership position. It also circumvents the contradiction in holding the Hintermann liable despite a criminally responsible intermediary. It offers the closest analogue in domestic criminal law theories on perpetration to the uniquely collective dimension of the elements of an international crime.

Perhaps even more significant than these elements is Roxin’s criterion of detachedness from the law, which has been curiously ignored in most of the discussion on Organisationsherrschaft. This criterion is to my mind one of the major strengths of Roxin’s theory when applied to international crimes,

206 See F.C. Schroeder, Der Täter hinter dem Täter: Ein Beitrag zur Lehre von der mittelbaren Täterschaft § 158 (Duncker & Humblot 1965) (German).
207 See Rotsch, Neues zur Organisationsherrschaft at 17 (cited in note 73).
208 Claus Roxin, Anmerkungen zum Vortrag von Prof. Dr. Herzberg, in Knut Amelung, ed, Individuelle Verantwortung und Beteiligungsverhältnisse bei Straftaten in bürokratischen Organisationen des Staates, der Wirtschaft und der Gesellschaft 55, 56 (Pro Universitats Verlag 2000) (German).
209 See Ambos, 145 Goldammer’s Archiv für Strafrecht at 234 (cited in note 76).
210 See id; Bloy, 143 Goldammer’s Archiv für Strafrecht at 441 (cited in note 84).
especially if one takes "law" here to mean some form of "natural law" rather than the positive legal order. It is exactly because such unwritten higher laws cannot be immediately comprehended by the act intermediary that they do not present a barrier to him for executing the contravening illegal instruction of the Hintermann. This lack of comprehension would result from the intermediary's unawareness of the material unlawfulness of the instructions due to the ideological glare that surrounds situations of mass atrocity; the direct executor of the international crime often acts in a social climate of moral permissiveness for the criminal act. Roxin's criterion of law detachedness would then perform two very important functions in clarifying the basis for international criminal responsibility. It would capture the social context in which mass crimes are committed and the "banality of evil" documented by historians and sociologists in these situations; at the same time, it would provide a moral compass for the behavior expected of the act intermediary when surrounded by a climate that sanctions horrific acts of brutality and would constitute a normative justification for his criminal responsibility. This element admittedly goes beyond a simple assessment of the responsibility of the individual defendant before the court and involves the court in ascertaining the veracity of complicated historical, social, and political facts. However, it is this element that makes international crimes distinct from their domestic counterparts. Moreover, it is this perversion of norms that lends the high-level perpetrator his destructive potential. It makes the commission of the individual crimes by ordinary people far more likely than in a situation where these acts are condemned by the moral and social climate and the individual must overcome his scruples in acting against them.

V. CONCLUSION

At first glance, it seems scarcely possible that the entire edifice of international criminal law could have been constructed in the absence of a philosophical foundation for what it means to be responsible as a principal party to an international crime. The crisis witnessed today, with competing conceptions of perpetration responsibility that are borrowed from domestic legal systems, but without serious thought to their application to crimes that are distinct from the garden variety wrongs that a large proportion of domestic criminal law encounters, is a natural consequence of this lack of doctrinal sophistication. In some ways, this is a pervasive feature of international criminal law, and the conceptual confusion surrounding modes of responsibility is reflective of deeper issues, methodological as well as doctrinal, that international

211 See, for example, Osiel, Mass Atrocity, Ordinary Evil, and Hannah Arendt in Argentina's Dirty War at 25–31 (cited in note 197).
criminal lawyers have been remiss in addressing. Two such issues feature most prominently in developing a viable theory of perpetration for international crimes: (1) an inadequate assessment and comparison of domestic criminal law principles, and (2) the lack of attention accorded to isolating features of international crimes that would necessitate a reconceptualization of domestic principles of criminal responsibility.

The first failing invites a little more sympathy. International and comparative criminal law are fairly new areas of research. Unlike traditional fields of public international law on the one hand, and pure domestic criminal law on the other, international criminal law practitioners and academics are rarely trained in the methods and doctrines of international criminal law as "career" academics or practitioners. It is perhaps not so surprising then that they transpose their own training and experience in domestic criminal law systems or in pure public international law doctrine to issues they confront in international criminal law. This problem is only compounded by the fact that even someone who sincerely wants to understand and analyze the different theories, debates, and controversies in diverse domestic criminal law systems will not find this an easy challenge to undertake. The primary problem is one of language and translation. For instance, it is difficult to find a single textbook that explains the main principles of German criminal law in detail in English.\(^{212}\) The second omission is a little more surprising, given that the entire discipline of international criminal law at least prima facie assumes that there is something different about certain crimes that are labeled "international," which justifies taking them out of the purview of the exclusive jurisdiction of national courts and legitimizes their investigation and prosecution by the international community.

In this Article, I have made a modest attempt to address the first lacuna by clarifying the bases for the ascription of criminal responsibility in a highly theorized and influential system of criminal law: the German legal system. Given the rather precipitate ascendance of modes of responsibility derived from the German system in the international criminal law circles, it is vital that scholars and practitioners are able to engage in an informed debate on their utility for international crimes. I also identify features of these doctrines that are not readily reconcilable with the reality of mass atrocity, while simultaneously signaling the potential for their adaptation to the unique features of international crimes. These are only the tentative first steps in the ambitious task of

\(^{212}\) Bohlander's work, Bohlander, *German Criminal Law* (cited in note 15), is an excellent introduction to the basic principles of German criminal law in English, but is unfortunately not particularly helpful if one wants to understand in depth and critique these principles. Admittedly, this is also not the purpose of his project, which only purports to give an overview of the law and theory.
fashioning forms of principal responsibility for international crimes that are conceptually sound and practically useful. This is the task that must engage the attention of the international criminal lawyer—not in isolation, but in conversation with other disciplines that seek to understand the processes that lead to mass atrocity.