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Indirect Perpetration and *Organisationsherrschaft*

An Analysis of Art. 25(3)(a), Third Alternative, ICCSt Taking Into Account the 'German' Differentiated Model and the 'Italian' Unitarian Model of Participation in a Crime

IN *CO-TUTELLE DE THÉSE* WITH THE GEORG AUGUST UNIVERSITY OF GÖTTINGEN

S.S.D. IUS 17

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To my parents

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Table of Contents

PART TWO

THE CONTROL OVER THE ORGANISATION THEORY AND THE *ORGANISATIONSHERRSCHAFTSLEHRE*

List of Abbreviations

ACHR	American Convention on Human Rights
ADPCP	Anuario de derecho penal y ciencias penales
Agg.	Aggiornamento (update)
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Am. U. Int'l L. Rev.	American University International Law Review
Arch. pen.	Archivio penale
Art.	Article
Ass.	Corte d'Assise (Italian Court of Assizes)
Ass. App.	Corte d'Assise d'Appello (Italian Appeal Court of Assizes)
BGH	Bundesgerichtshof (German Federal Court of Justice – Germany)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Official Collection of Decisions of the German Federal Court in Criminal Matters)
Cah. def. soc.	Cahiers de défense sociale
Cass. pen.	Cassazione penale
Cass. pen., Sez.	Cassazione penale (Supreme Court of Cassation), Sezione (Section)
Cass. pen, Sez. un.	Cassazione penale, Sezioni unite (Joint Chambers of the Supreme Court of Cassation)
Chi. J. Int'l L.	Chicago Journal of International Law
CLF	Criminal Law Forum
Colum. L. Rev.	Columbia Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Cost.	Italian Constitution
C.p.	Codice penale (Italian Penal Code)
Crim. L. & Philos.	Criminal Law and Philosophy
Dig. disc. pen.	Digesto delle discipline penalistiche
Dir. pen. proc.	Diritto penale e processo
ECHR	European Convention on Human Rights
EJIL	European Journal of International Law
Enc. dir.	Enciclopedia del diritto

Eur. J. Crime Crim L. & Crim. Just.	European Journal of Crime. Criminal Law and Criminal Justice
Fordham Int'l L.J.	Fordham International Law Journal
Foro it.	Foro italiano
GA	Goltdammer's Archiv für Strafrecht
GDR	German Democratic Republic
G.I.	Giudice Istruttore (Investigating Judge)
GoJIL	Göttingen Journal of International Law
Harv. Int'l L.J.	Harvard International Law Journal
HRLJ	Human Rights Law Journal
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCRPE	Rules of Procedure and Evidence of the International Criminal Court
ICCSt	Statute of the International Criminal Court
ICJSt	Statute of the International Court of Justice
ICLR	International Criminal Law Review
ICTR	International Criminal Tribunal for Rwanda
ICTRSt	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTYSt	Statute of the International Criminal Tribunal for the former Yugoslavia
ILM	International Legal Materials
ILR	International Law Report
IMTCharter	Charter of the International Military Tribunal
Indice pen.	Indice penale
InDret	Revista para el análisis del derecho
JCE	Joint Criminal Enterprise
J. Crim. L. & Criminology	Journal of Criminal Law and Criminology
JICJ	Journal of International Criminal Justice
Jura	Juristische Ausbildung
JR	Juristische Rundschau
JZ	Juristenzeitung
Lav. prep.	Lavori preparatori del codice penale e del codice di procedura penale

Law Quarterly Rev.	Law Quarterly Review
LJIL	Leiden Journal of International Law
Mod. L. Rev.	Modern Law Review
MRCDDH	Memoria, revista sobre cultura, democracia y derechos humanos
NCLR	New Criminal Law Review
NStZ	Neue Zeitschrift für Strafrecht
NYbIL	Netherlands Yearbook of International Law
öStGB	österreichische Strafgesetzbuch (Austrian Criminal Code)
Rass. giust. mil.	Rassegna della giustizia militare
RCDDH	Revista sobre cultura, democracia y derechos humanos
RDPC	Revista de derecho penal y criminología
REJ	Revista de estudios de la justicia
Rev. int. dr. pén.	Revue internationale de droit pénal
Riv. it. dir. pen.	Rivista italiana di diritto penale
Riv. it. dir. proc. pen.	Rivista italiana di diritto e di procedura penale
Riv. pen.	Rivista penale
Riv. st. pol. int.	Rivista di studi politici internazionali
ROPJ	Revista oficial del poder judicial
RP	Revista penal
RPCP	Revista peruana de ciencias penales
StGB	Strafgesetzbuch (German Penal Code)
STL	Special Tribunal for Lebanon
STLSt	Statute of the Special Tribunal for Lebanon
Temp. Int'l & Comp. L.J.	Temple International and Comparative Law Journal
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties
Yale L.J.	Yale Law Journal
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

Abstract

The present study focuses on a peculiar form of criminal responsibility that appeared for the first time in the history of international criminal law in art. 25(3)(a), third alternative, ICCSt: known as indirect perpetration through a responsible person. This form of criminal responsibility unexpectedly became one of the ICC judges' most favoured modes of liability in order to hold individuals in leadership-like positions – such as leaders of sovereign nations, heads of criminal organisations and military chiefs – responsible for the crimes committed by their subordinates.

In order to interpret this mode of liability, the majority of the ICC judges relied on the *Organisationsherrschaftslehre*, a theory elaborated by Claus Roxin in 1963 and further developed in the years following its inception. Nevertheless, in light of a deep analysis of the German theory, it is possible to state that the *control over the organization theory* resulting from its application at the ICC differs significantly from its original version.

The adoption of the theory at the ICC is based on the following premises: (i) the wording of art. 25(3)(a), third alternative, ICCSt; (ii) the implicit recognition of a differentiated model of participation in a crime in art. 25(3) ICCSt; (iii) the acceptance of the control over the act theory as a criterion for distinguishing principals from accessories to a crime; and (iv) the prevailing hierarchical reading of the provision.

Departing from the main (and controversial) premises over which the implementation of the theory at the ICC is based, this study seeks to determine whether it is still necessary, or at least appropriate, to rely on the *control over the organization theory* to interpret and apply art. 25(3)(a), third alternative, ICCSt. Because of this, the comparison with the mechanisms adopted by the Italian unitarian model of participation in a crime to solve scenarios potentially reflected by the *Organisationsherrschaftslehre* plays a relevant role.

The Italian legal system adopted several solutions in order to attribute responsibility to leaders of criminal organisations for the crimes committed by their subordinates in the implementation of the organisational strategy. Such an

approach is used as a source "of ideas and concepts" which may be able to successfully counter the criticism that has been raised against the dominant approach developed at the ICC.

It is reasonable to conclude that, regardless of the model of responsibility adopted by art. 25(3) ICCSt, the interpretation of art. 25(3)(a), third alternative, ICCSt along the lines of the *control over the organization theory* should and must be accepted. Although the theory needs to be further refined and developed, thus far it constitutes not only a "possible" way of interpreting art. 25(3)(a), third alternative, ICCSt, but also the "favourable" way of engaging in such an interpretation. It also serves as the basis for the development of an autonomous international criminal law doctrine on indirect perpetration, which merges the collective nature of international crimes with the individual criminal responsibility of those who are far removed from the scene of the crime for the criminal offences committed through the organisation they control.

Sommario

Questo studio si concentra su una peculiare forma di responsabilità apparsa per la prima volta nella storia del diritto penale internazionale nell'art. 25(3)(a), terza variante, ICCSt: commissione (di un crimine) per mezzo di un soggetto responsabile. Tale forma di responsabilità è inaspettatamente diventata una delle modalità preferite dai giudici dell'ICC nell'attribuzione ai soggetti per lo più in posizione di leadership – presidenti di stati, capi di organizzazioni criminali e vertici militari – della responsabilità dei crimini commessi dai loro subordinati.

Per interpretare tale forma di responsabilità la maggioranza dei giudici dell'ICC ha fatto ricorso all'*Organisationsherrschaftslehre*, elaborata da Claus Roxin nel 1963 e dallo stesso sviluppata negli anni successivi alla sua prima comparizione. Tuttavia, alla luce di un'analisi dettagliata della teoria tedesca, è possibile stabilire che la *control over the organization theory*, risultante dalla sua applicazione all'ICC si discosta notevolmente dalla versione originaria.

L'adozione della teoria all'ICC si fonda sulle seguenti premesse: (i) la formulazione dell'art. 25(3)(a), terza variante, ICCSt; (ii) l'implicito riconoscimento di un modello differenziato nell'art. 25(3) ICCSt; (iii) l'adozione della teoria del controllo del crimine come criterio per distinguere gli autori dai partecipi; e (iv) la prevalente lettura gerarchica della disposizione.

Questo studio ha lo scopo di verificare se, prescindendo dalle maggiori (e controverse) premesse sulle quali si fonda l'applicazione della teoria all'ICC, è ancora necessario, o almeno opportuno, ricorrere alla *control over the organization theory* nell'interpretazione e nell'applicazione dell'art. 25(3)(a), terza variante, ICCSt. Per tali ragioni la comparazione con i meccanismi adottati dal modello unitario italiano per risolvere scenari potenzialmente rientranti nella sfera di applicazione dell'*Organisationsherrschaftslehre* svolge un ruolo rilevante. In Italia, infatti, sono state elaborate diverse soluzioni con lo scopo di attribuire ai capi delle organizzazioni criminali la responsabilità dei crimini commessi dai loro subordinati nel perseguimento degli obiettivi dell'organizzazione. Tale approccio può essere utilizzato come fonte di "idee e concetti" utili a far fronte alle critiche

che sono state sollevate nei confronti dell'orientamento maggioritario che si è sviluppato all'ICC.

In conclusione è possibile ritenere che, a prescindere dal modello di responsabilità adottato dall'art. 25(3) ICCSt, l'interpretazione dell'art. 25(3)(a), terza variante, ICCSt secondo la *control over the organization theory* dovrebbe, e deve, essere accolta. Nonostante tale teoria debba essere ulteriormente perfezionata ed elaborata, ad oggi costituisce non solo un "possibile" modo attraverso cui interpretare l'art. 25(3)(a), terza variante, ICCSt, ma anche il percorso da "preferire". Tale teoria funge inoltre da base per lo sviluppo di una autonoma teoria penale internazionale relativa alla commissione (di un crimine) per mezzo di altri, in grado di riflettere la natura collettiva dei crimini internazionali e, allo stesso tempo, il carattere individuale della responsabilità penale di coloro che si trovano lontani dalla scena del crimine per i crimini commessi attraverso le organizzazioni che controllano.

Zusammenfassung

Die vorliegende Arbeit befasst sich mit einer besonderen Form der strafrechtlichen Täterschaft (*mittelbare Täterschaft mittels eines vollverantwortlichen Vordermanns*), die in der Geschichte des Völkerstrafrechts zum ersten Mal in Art. 25(3)(a), 3. Alt. IStGHS normiert wurde. Sie gilt heutzutage als eine der von IStGH-Richtern bevorzugt angewandten Täterschaftsformen, um Führungspersönlichkeiten – wie z.B. Staats- oder Regierungschefs, Führungspersonen krimineller Organisationen und militärischen Vorgesetzten – für die Verbrechen ihrer Untergebenen verantwortlich zu machen.

Bei der Anwendung einer solchen *mittelbaren Täterschaft* beruft sich die Mehrheit der IStGH-Richter auf die *Organisationsherrschaftslehre*, die Claus Roxin seit 1963 entwickelt hat. Dennoch zeigt eine genaue Analyse der erwähnten Lehre, dass ihre Anwendung durch den IStGH sich von ihrer ursprünglichen Fassung maßgeblich unterscheidet.

Der Annahme der Theorie durch den IStGH liegen folgenden Prämissen zugrunde: (i) der Wortlaut von Art. 25(3)(a), 3. Alt., IStGHS; (ii) die implizite Anerkennung eines Differenzierungsmodells der Beteiligung an einer Straftat in Art. 25 (3) IStGHS; (iii) die Annahme der Lehre der Tatherrschaft als Anhaltspunkt zur Unterscheidung zwischen Tätern und Teilnehmern; und (iv) eine „hierarchische" Auslegung der Vorschrift.

Ausgehend von den wichtigsten (aber strittigen) Prämissen, auf denen die Umsetzung der Theorie im IStGH beruht, soll in dieser Studie untersucht werden, ob es notwendig oder zumindest angemessen ist, sich auf die erwähnte *Organisationsherrschaftslehre* zu stützen, um Art. 25(3)(a), 3. Alt. IStGHS auszulegen und anzuwenden. Aus diesem Grund spielt ein Vergleich mit den Mechanismen des italienischen Einheitsmodells der Beteiligung zur Lösung von etwaigen Problemen der *Organisationsherrschaftslehre* eine relevante Rolle.

Das italienische Rechtssystem hält verschiedene Lösungen bereit, um Führungspersonen krimineller Organisationen verantwortlich zu machen, wegen der Straftaten von Untergebenen, die bei der Umsetzung der Organisationsstrategie begangen werden. Ein solcher Ansatz könnte als Quelle

„von Ideen und Begriffen“ verwendet werden, um den Einwänden gegen den im IStGH entwickelten herrschenden Ansatz erfolgreich entgegenzuwirken.

Vor diesem Hintergrund ist es also angemessen zu folgern, dass eine Auslegung von Art. 25(3)(a), 3. Alt. IStGHS, unabhängig von dem Art. 25(3) IStGHS zugrundeliegenden Beteiligungsmodell, im Sinne der *Organisationsherrschaftstheorie* akzeptiert werden sollte und müsste. Obwohl die Theorie weiter zu verfeinern und zu entwickeln ist, stellt sie nicht nur allein eine „mögliche“ Auslegungsweise von Art. 25(3)(a), 3. Alt. IStGHS dar, sondern auch die „bevorzugte“. Sie dient weiter als Grundlage für die Entwicklung einer autonomen Völkerstrafrechtstheorie der mittelbaren Täterschaft, welche vereint den kollektiven Charakter internationaler Verbrechen mit der individuellen strafrechtlichen Verantwortlichkeit derer, die weit vom Tatort entfernt sind, und die mittels der von ihnen beherrschte Organisation Verbrechen begehen.

Introduction

I. The Problem

Among the various topics in international criminal law that have absorbed the focus and energy of numerous academics and practitioners is that of the attribution of liability and fair labelling of those who, despite their absence from the scene of the crime, plan, mastermind, organise, order or acquiesce to the crime's commission.

In most cases, these individuals – often referred to as "intellectual perpetrators" or "perpetrators behind the desk" – occupy senior leadership positions, such as heads of states or military chiefs, and use other persons to commit the crimes and deal with the dirty work while they remain in the background. However, there may be individuals who indirectly commit the worst atrocities without occupying such a high-level or senior position. One of the most famous examples is the notorious case of *Adolf Eichmann* – the head of the Department IV B4 of the *Reichssicherheitshauptamt* and one of the main organisers of the Holocaust – who enabled the extermination of thousands of Jews without so much as getting a drop of his victims' blood on his hands[1].

The attribution of criminal responsibility for the offences committed on the ground to the men in the backstage is particularly complex in macro-criminal contexts[2].

Contrary to ordinary forms of criminality, which are familiar to national legal systems, international crimes are often systematic and massive in nature, and

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[1] *Attorney-General of the Government of Israel v. Adolf Eichmann*, No. 40/61, Judgment, Jerusalem District Court, 12 December 1961 ('*Eichmann* District Court Judgment'). See also: *Attorney-General of the Government of Israel v. Adolf Eichmann*, No. 336/61, Judgment, Supreme Court, 29 May 1962.

[2] VAN SLIEDREGT E., *The Curious Case*, p. 1174; OHLIN J.D., *Searching for the Hintermann,* pp. 326 ff.; PIVA D., *Responsabilità "individuale"*, pp. 88-89; BORSARI R., *Diritto punitivo*, pp. 441-452. For additional information on the attribution of criminal responsibility in international criminal law: BOCK S., *Zurechnung im Völkerstrafrecht*, pp. 410-427; OSIEL M., *Modes of Participation*, pp. 793-822.

regularly include political connotations. Additionally, due to their collective nature, international crimes are frequently committed by more or less structured organisations or groups[3]. In many cases, state apparatuses themselves are directly involved in their commission[4]. Indeed, these crimes are frequently perpetrated to fulfil a common project[5] and "constitute manifestation of collective criminality"[6]. As such, they involve a large number of persons both in terms of perpetrators and victims. While it is conceivable that international crimes may be committed by individuals acting alone, this possibility is more theoretical than realistic. Furthermore, in such contexts, it is not uncommon that the responsibility of the individuals involved in the commission of international crimes increases proportionately with their distance from the physical commission of the offences[7]. As a consequence, the individual criminal conduct has to be evaluated considering the collective dimension in which it occurs[8].

In academic literature, such a context is named "*Gesamttat*"[9], "*system criminality*"[10], and its strong influence on the individual conduct cannot be underestimated, especially when dealing with theories regarding individual criminal responsibility. This peculiar element represents the greater obstacle to the

[3] KLEFFNER J.K., *The Collective Accountability*, pp. 238-269; FLETCHER G., *The Storrs Lectures*, pp. 1514-1515, pp. 1522-1526; PICOTTI L., *Criminally Protected*, pp. 255-268; ASCENSIO H., *Crime de masse*, p. 119.

[4] AMBOS K., *Treatise, Vol. I,* p. 84. On the relationship between state and individual criminal responsibility: BONAFE' B., *The Relationship*; WENIN R., *La responsabilità individuale,* pp. 149-163.

[5] JAIN N., *Perpetrators and Accessories*, p. 3.

[6] *Prosecutor v. Duško Tadić*, No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 191 ('*Tadić* Appeals Judgment').

[7] WERLE G., JESSBERGER F., *Principles*, pp. 193-194; SERENI A., *Responsabilità personale*, p. 820; SCHROEDER F.C., *Der Täter*, p. 166. In the case law, *inter alia*: *Eichmann* District Court Judgment, p. 237, para. 197; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07-717, Decision on the confirmation of charges, Pre-Trial Chamber I, 30 September 2008, para. 503 ('*Katanga and Ngudjolo* Confirmation of Charges').

[8] ASCENSIO H., *Crime de masse*, p. 136.

[9] AMBOS K., *Treatise, Vol. I*, p. 85.

[10] VAN SLIEDREGT E., *Individual Criminal Responsibility*, pp. 20-22; NOLLKAEMPER A., VAN DER WILT H. (eds.), *System Criminality*.

automatic transposition (at the international level) of the traditional mechanisms of attribution and measures adopted in national legal systems to address ordinary criminality[11].

Different models have been developed by the doctrine in order to take into account peculiar features of international crimes, such as the ones presented by Marxen[12], Vest[13] and Ambos[14]. In particular, the last of the three identifies two models of attribution: on one hand, the "systemic model" favouring the normative attribution irrespective of individual causation; and, on the other hand, the "double imputation model" (collective and individual attribution), which encompasses a first aspect focusing on the collective context, that has to operate in an integrated way with the second aspect, strictly related to the individual attribution[15]. Indeed, despite the macro-dimension of this kind of criminality and the involvement of different organisational settings, the principle of individual criminal responsibility so far remains the cornerstone of international criminal law[16].

Throughout the short history of international criminal law, different concepts and theories have been put forth and developed with the purpose of adequately capturing the responsibility of individuals in the background (or the *Hintermann*, as they are referred to in German doctrine) for offences perpetrated on the battlefield by their subordinates.

Since the creation of the Nuremberg and Tokyo International Military Tribunals (IMT and IMTFE), adequately holding such individuals responsible for the acts of those who physically perpetrate the crime has been a thorny issue and different concepts, commonly accepted by national legal systems, progressively

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[11] AMBOS K., *Treatise, Vol. I*, p. 85; NOLLKAEMPER A., VAN DER WILT H. (eds.), *System Criminality*, p. viii.

[12] MARXEN K., *Beteiligung*, pp. 226-236.

[13] VEST H., *Problems of Participation*, p. 309; VEST H., *Völkerrechtsverbrecher verfolgen*, pp. 393 ff.; VEST H., *Genozid*, pp. 29-30, p. 240, p. 302.

[14] AMBOS K., *Treatise, Vol. I*, p. 86.

[15] *Ibid.*; AMBOS K., *Remarks*, pp. 663-664; AMBOS K., *La parte general*, pp. 163-164.

[16] STEPHENS P.J., *Collective Criminality*, p. 503; MANACORDA S., *Imputazione collettiva*, pp. 111-113.

appeared in the international arena in order to face such a demand[17]. For instance, the notion of *conspiracy*[18], as it exists in common law countries, was introduced in art. 6 IMTCharter. Nevertheless, the notion was strongly criticised, in particular by practitioners and academics from the civil law legal traditions, who considered the concept overly vague and particularly dangerous for the rights of the accused[19]. For this reason, conspiracy gradually disappeared from the Statutes of the international criminal institutions: the *ad hoc* Tribunals – in accordance to the language of the Genocide Convention – maintained only "*conspiracy to commit genocide*" respectively at art. 4(3)(b) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTYSt) and art. 2(3)(b) of the Statute of the International Criminal Tribunal for Rwanda (ICTRSt)[20]. However, in contrast to the limited existence of the notion of conspiracy in the statutes of the *ad hoc* Tribunals, the drafters of the Rome Statute decided to abandon it completely[21].

Likewise, *planning* as a mode of liability was introduced in art. 6 IMTCharter and embodied in art. 7(1) ICTYSt and art. 6(1) ICTRSt, but in the final version of the Rome Statute there are no traces of such a mode of liability, with the exception of the language contained in the definition of the crime of aggression[22].

Other concepts have been subsequently introduced, some of which find their origins in national criminal law legal systems, while others constitute typical creations of international criminal law.

Significant examples of the first group include the "joint criminal enterprise" (JCE) doctrine and the notion of "control over the crime" in the form of the "control over the organisation". The former concept was adopted by the ICTY's Appeals Chamber in the *Tadić* case[23] to interpret the term "*commission*" within

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[17] VAN SLIEDREGT E., *Individual Criminal Responsibility*, pp. 22-37.

[18] For an overview of the concept and its application: OHLIN J.D., *Conspiracy*, pp. 397-401.

[19] FICHTELBERG A., *Conspiracy*, pp. 149-176.

[20] Art. 4(3) ICTYSt and art. 2(3) ICTRSt fully implement art. III Genocide Convention.

[21] For a slighlty different view and on the relation between art. 25(3)(d) ICCSt and conspiracy: OKOTH J., *The Crime of Conspiracy*, pp. 159-162, pp. 177-180.

[22] Art. 8 *bis* ICCSt.

[23] *Tadić* Appeals Judgment, paras. 194 ff. For a general overview on JCE: BOAS G., BISCHOFF J.L., REID N.L., *International Criminal, Vol. I*, pp. 8-141.

the meaning of art. 7 ICTYSt and is mainly based on the English joint enterprise doctrine[24] and the U.S. Pinkerton conspiracy doctrine[25]. The latter concept was used to interpret art. 25(3)(a), third alternative, of the Statute of the International Criminal Court (ICCSt) and finds its origin in the German doctrine of the *Organisationsherrschaft*, mainly based on Claus Roxin's writings[26].

These concepts were merged in different ways to better reflect the characteristics of international crimes and the involvement of a plurality of individuals operating in the background. While the judges of the ICTY chose to apply a mode of liability resulting from the combination of different JCEs (the so-called "parallel JCEs", "interlinked JCEs" or "vertical JCEs")[27], the judges of the ICC opted for combining the notions of co-perpetration and indirect perpetration, resulting in the "indirect co-perpetration"[28]. As mentioned above, in macro-criminal contexts crimes are committed by a single individual only in very exceptional circumstances. This is also true with respect to the leadership level, with the exception, for example, of the crime of aggression (art. 8 *bis* ICCSt).

Within the typical creations of international criminal law we find the superior responsibility. It is referred to in the Statutes of the *ad hoc* Tribunals (art. 7(3)

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[24] On the joint criminal enterprise doctrine in English criminal law: KREBS B., *Joint Criminal Enterprise*, pp. 578-604; HORDER J., *Ashworth's Principles*, pp. 433 ff.

[25] *Pinkerton v. United States*, 328 U.S. 640 (1946); BOGDAN A., *Individual Criminal Responsibility,* pp. 112-115.

[26] ROXIN C., *Straftaten*, pp. 193-207 (in English: ROXIN C., *Crimes as Part*, pp. 193-205, the English version of the article is taken as a reference in the present study); ROXIN C., *Täterschaft*, pp. 242-252 (the first edition dates back to 1963, for a Spanish translation: ROXIN C., *Autoría y dominio*); ROXIN C., *Strafrecht Allgemeiner Teil,* pp. 46-58.

[27] On the inter-linked JCEs concept: GUSTAFSON K., *The Requirement,* pp. 147-158. *Prosecutor v. Radoslav Brđanin*, No. IT-99-36-A, Judgment, Appeals Chamber, 3 April 2007, paras. 410-414; VAN SLIEDREGT E., *Perpetration and Participation*, pp. 505-506; VAN SLIEDREGT E., *Individual Criminal Responsibility*, pp. 158-165.

[28] This concept feebly appeared at the ICTY in the *Stakić* case. It was further developed at the ICC in the *Katanga and Ngudjolo* confirmation of charges decision and in the following jurisprudence. *Prosecutor v. Milomir Stakić*, No. IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, paras. 741-744, 818, 822 ('*Stakić* Trial Judgment'); *Katanga and Ngudjolo* Confirmation of Charges, paras. 491-494.

ICTYSt and art. 6(3) ICTRSt, respectively) and extensively regulated by art. 28 ICCSt, representing the most detailed provision on this peculiar form of liability[29].

In this scenario, the codification of indirect perpetration in art. 25(3)(a), third alternative, ICCSt, constitutes a novelty – above all, because it is the first time that an international instrument refers explicitly to this mode of liability and, secondly, because of its broad formulation. Indeed, art. 25(3)(a), third alternative, ICCSt allows an individual to be held criminally responsible for crimes committed "*through another person, regardless of whether that other person is criminally responsible*". Before its introduction in the Rome Statute, this concept had rarely been addressed in international criminal law, both in the practice of the international criminal Tribunals and in academic literature[30].

The appearance of indirect perpetration in international criminal law marks a turning point. It unexpectedly became one of the preferred modes of liability applied by the ICC to prosecute individuals in leadership-like positions[31]. The key of its success has to be found in its ability – further broadened by its interpretation – to reflect the vertical relationship between the masterminds of the crimes and the direct perpetrators on the ground, and to establish the responsibility of the first for the crimes committed by the latter[32].

In absence of a definition of indirect perpetration in the Rome Statute, the majority of the judges – as set out above – interprets art. 25(3)(a), third alternative, ICCSt along the lines of the *Organisationsherrschaftslehre*.

According to the original version of the theory, under certain circumstances, an individual can be considered responsible (as a principal) for the crimes committed by the members of the organisation he or she controls, despite their full criminal

[29] For an elaboration on superior responsibility, *inter alia*: MELONI C., *Command Responsibility*; MAUGERI A.M., *La responsabilità da comando*.

[30] WERLE G., BURGHARDT B., *Indirect Perpetration*, p. 85; ROXIN C., *Sobre la más reciente*, p. 5.

[31] *Ibid.*; WEIGEND T., *Indirect Perpetration*, p. 540.

[32] KISS A., *Indirect Perpetration*; GRANIK M., *Indirect Perpetration*, pp. 977-992; AMBOS K., *La parte general*, pp. 219-220.

responsibility[33]. The organisation is considered to be a structured and independent identity that operates outside of the legal order and whose physical executors are interchangeable and fungible[34]. In such a mechanism, those who wield authority over the organisation are responsible for the crimes committed by its members because, by having control over the organisation and thus over its members, they dominate the act[35].

Nevertheless, the judges of the ICC did not implement the original version of the *Organisationsherrschaftslehre*. Rather, they applied it in a partially modified manner. It is worth noting that the German theory was adopted at the ICC in the context of the prevailing acceptance of the "control over the crime theory" (originating from the German *Tatherrschaftslehre*[36]) as a criterion to distinguish between principals and accessories to a crime[37]. The adoption of this theory is based on: (i) the hierarchical reading of art. 25(3) ICCSt[38]; (ii) the implicit implementation of a differentiated model of participation in a crime; and (iii) the rejection of the subjective and the objective approaches typically used to distinguish primary and secondary responsibility[39].

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[33] ROXIN C., *Crimes as Part*, pp. 193-205. This concept was further developed by Schroeder in: SCHROEDER F.C., *Der Täter*.

[34] ROXIN C., *Crimes as Part,* pp. 197-202.

[35] AMBOS K., BOCK S., *Germany*, p. 329.

[36] ROXIN C., *Täterschaft*.

[37] OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, pp. 725-726.

[38] An exception is represented by the *Katanga* trial judgment, where the majority of the judges adopted the control over the crime theory in spite of the refusal of a hierarchical reading of the provision: *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 7 March 2014, paras. 1386-1387, 1393-1396 ('*Katanga* Trial Judgment').

[39] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 996-999 ('*Lubanga* Trial Judgment'); *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803tEN, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, paras. 330-341 ('*Lubanga* Confirmation of Charges'); *Katanga and Ngudjolo* Confirmation of Charges, paras. 482-486. In this sense: *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Pre Trial Chamber II, 15 June 2009, paras. 346-348 ('*Bemba* Confirmation of Charges');

According to this approach, principals to a crime are only those individuals who "control" or "dominate" the commission of the crime ("*Tatherrschaft"*), by: (i) physically carrying out the elements of the crime (direct perpetrators); (ii) exercising functional control over the crime (co-perpetrators); or, (iii) controlling the will of the direct perpetrators (indirect perpetrators)[40]. Those who participate in the crime without exercising such control are considered mere accessories[41]. Despite the dominant acceptance of this theory – confirmed also by the Appeals Chamber in the *Lubanga* case[42] – this approach and its premises are far from being settled and have been strongly criticised in case law and in doctrine.

The control over the crime theory in the variant of the control over the organisation was adopted for the first time – although not explicitly – in the decision on the issuance of the warrant of arrest against *Lubanga*[43]. It was further developed by the Pre-Trial Chamber I in the *Katanga and Ngudjolo* confirmation of charges decision, which was the first time the ICC established the doctrine's constitutive elements in a detailed manner[44]. The components of the doctrine have been subsequently elaborated and applied in the Court's case law, in particular in the decision on the issuance of the warrant of arrest against *Al Bashir*[45], in the

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Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, Pre-Trial Chamber I, 16 December 2011, para. 279 ('*Mbarushimana* Confirmation of Charges').

[40] ROXIN C., *Täterschaft*, pp. 107 ss.; WESSELS J., BEULKE W., SATZGER H., *Strafrecht Allgemeiner Teil*, pp. 261-262. For its implementation at the ICC: *Lubanga* Confirmation of Charges, para. 332; *Katanga and Ngudjolo* Confirmation of Charges, para. 488.

[41] *Ibid.*

[42] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", Appeals Chamber, 1 December 2014, paras. 469-473 ('*Lubanga* Appeals Judgment').

[43] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-US-Corr, Decision on the Prosecutor's Application for a arrant of arrest, Article 58, Pre-Trial Chamber I, 10 February 2006, paras. 94-96 ('*Lubanga* Warrant of Arrest Decision').

[44] *Katanga and Ngudjolo* Confirmation of Charges, paras. 495-518.

[45] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, paras. 211-216 ('*Al Bashir* Warrant of Arrest Decision').

confirmation of charges decisions in the *Kenya* cases[46] and, in spite of the defendant's conviction under art. 25(3)(d) ICCSt, in the *Katanga* trial judgment[47].

This form of the control theory is noteworthy because it captures the collective nature of international crimes[48], reflecting the intersection between individual and collective responsibility[49]. It also constitutes a possible alternative to the JCE doctrine, which, despite being the object of strong criticism[50], played a leading role in the attribution of crimes committed in macro-criminal contexts both at the *ad hoc* and mixed Tribunals. In a presumed differentiated model, the control over the organisation theory allows for those who are far removed from the crime scene to be considered as principal offenders. Consequently, the theory also allows for fair labelling of individual liability[51].

Furthermore, the *Organisationsherrschaftslehre* has been widely accepted by entities engaged in the prosecution and punishment of grave and large violations of human rights occurring during military dictatorships and armed conflicts[52]. It was applied for the first time in the context of the *Juntas* trial in Argentina and, following it, in several national trials in Germany, Chile, Colombia, Peru and Brasil to hold senior leaders responsible for the crimes committed by members of

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[46] *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, paras. 297, 407-410 ('*Muthaura, Kenyatta and Ali* Confirmation of Charges'); *Prosecutor v. William Samoei Ruto, Henry Kiporono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, para. 292, 313-333 ('*Ruto, Kosgey and Sang* Confirmation of Charges').

[47] *Katanga* Trial Judgment, paras. 1398-1416.

[48] VAN SLIEDREGT E., *Individual Criminal Responsibility*, pp. 87-88; JAIN N., *The Control Theory*, p. 197.

[49] AMBOS K., *Zur „Organisation"*, pp. 846-847 (for a Spanish translation: AMBOS K., *Sobre la "Organización"*, pp. 1-25).

[50] See *inter alia*: CASSESE A., *The Proper Limits*, pp. 109-133.

[51] WEIGEND T., *Indirect Perpetration*, p. 552; WERLE G., BURGHARDT B., *Indirect Perpetration*, p. 88; MANACORDA S., MELONI C., *Indirect Perpetration*, p. 171; AMBOS K., *The Fujimori Judgment*, p. 158.

[52] AMBOS K., *Treatise, Vol. I*, pp. 114-118.

the organisations they controlled[53]. Nevertheless, its adoption at the ICC is controversial and should be further scrutinised. Such scrutiny relates to the implementation of the control over the crime theory as a general matter, while other types of criticism relate to the specific variant of the control over the organisation and its constitutive elements.

One of the strongest critiques relates to the reasons for adopting the control over the organisation approach. More specifically, such concerns the presumed implementation of a differentiated participation model and the hierarchical structure of art. 25(3) ICCSt, according to which the principal modes of liability encompassed in art. 25(3)(a) ICCSt are more blameworthy than the accessory forms of participation listed in art. 25(3)(b)-(d) ICCSt[54]. In most cases the hierarchical reading of art. 25(3) ICCSt is accompanied by the simultaneous adoption of the control theory as a criterion to distinguish between principals and accessories to a crime[55].

The dominant jurisprudence adopts this approach to the provision[56]. However, in the *Katanga* judgment, Trial Chamber II expressed a somewhat peculiar and isolated view on this point. Specifically, the Trial Chamber rejected a hierarchical reading of the article while at the same time adopting the control over the crime theory to differentiate between primary and secondary responsibility, thereby implicitly recognising a derivative nature of the latter[57].

Notwithstanding this particular view, the strongest opposition to the dominant approach used to interpret and apply art. 25(3) ICCSt is found in the dissenting

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[53] MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 113-135.

[54] WERLE G., BURGHARDT B., *Establishing Degrees of Responsibility*, pp. 306-319; WERLE G., JESSBERGER F., *Principles*, pp. 196-197; WERLE G., *Individual Criminal Responsibility*, at p. 957, p. 961; AMBOS K., *Treatise, Vol. I*, pp. 144-147; BURGHARDT B., *Modes of Participation*, pp. 91-94; JESSBERGER F., GENEUSS J., *On the Application*, p. 869.

[55] *Lubanga* Appeals Judgment, para. 462; *Lubanga* Trial Judgment, paras. 996-999; *Katanga and Ngudjolo* Confirmation of Charges; *Mbarushimana* Confirmation of Charges, para. 279.

[56] *Ibid.*

[57] *Katanga* Trial Judgment, paras. 1386-1387, 1393-1396.

opinions of Judge Fulford and Judge Van den Wyngaert, which are based on a plain reading of the provision, as well as in the doctrine (at least in part)[58].

Another strong criticism relates to the theoretical foundations of the control theory in the Rome Statute. Some of those who support the theory have invoked the general principles of law, while others have avoided resorting to art. 21(1)(c) ICCSt and argue that it is implicitly implemented in the Rome Statute[59]. On the contrary, those who criticise the theory's adoption underline that the interpretation of art. 25(3) ICCSt along the lines of the control over the crime theory is neither supported by the Rome Statute, nor by customary law and general principles of law[60]. According to this approach, the majority's view would entail an

[58] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, 14 March 2012, paras. 6-12 ('*Fulford* Separate Opinion'); *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-4, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, paras. 6, 22 ('*Van den Wyngaert* Concurring Opinion'); *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, paras. 279-281 ('*Van den Wyngaert* Minority Opinion'); AKSENOVA M., *The Modes of Liability*, pp. 653-656, pp. 663-644 (the author is against the hierarchical reading of the provision and the control over the crime theory as a criterion to distinguish principals from accessories, however she recognises that the Rome Statute provides a differentiated model of participating in a crime); SADAT L.N., JOLLY J.M., *International Criminal Courts*, pp. 757-758, pp. 774-775, pp. 782-786; OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, pp. 743-746; VAN SLIEDREGT E., *Individual Criminal Responsibility*, pp. 85-88; STEWART J.G., *The End of 'Modes of Liability'*, pp. 205-219; DIARRA F., D'HUART, *Article 25*, p. 811; MILITELLO V., *The Personal Nature*, pp. 948-949; VIVIANI A., *Crimini internazionali,* p. 125.

[59] *Lubanga* Confirmation of Charges, paras. 339-340; *Katanga and Ngudjolo* Confirmation of Charges, para. 500; OLÁSOLO H., *Reflections*, p. 153, footnote n. 32 (according to the author "article 25 (3)(a) RS has embraced the notion of control of the crime"); VAN SLIEDREGT E., *Perpetration and Participation*, p. 507 (according to the author "The control theory can be regarded as subsumed under the text of Article 25(3)(a), which provides for the perpetrator behind the perpetrator, but Roxin's theory should not be embraced in its entirety"); WEIGEND T., *Problems of Attribution*, p. 259 (referring to the "*Täter hinter dem Täter*" the author states that "the drafters of the ICC Statute explicitly wrote this theory into the Statute by treating as a perpetrator under Article 25(3)(a) whoever 'commits such a crime… through another person, regardless of whether that other person is criminally responsible'").

[60] YANEV L., KOOIJMANS T., *Divided Minds*, pp. 797-807, pp. 821-828.

inappropriate extension of the term "*commission*" and more particularly of indirect perpetration, contrasting with the principle of legality[61].

An additional criticism relates to the control over the organisation variant, by focusing on its origin, constitutive elements and limited application in Germany and Latin America. The *Organisationsherrschaftslehre* was developed on the idea that in certain contexts the common concept of crime entails a broader dimension that involves a plurality of individuals – one in which the traditional criteria for attributing responsibility are insufficient for capturing the magnitude of the criminal act. In fact, this variant of the *Tatherrschaft* and its constitutive elements were conceived in particular in order to properly reflect criminal responsibility for offences perpetrated through "organised power structures", which are usually characteristic of bureaucratic dictatorships[62]. The *Eichmann*[63] and *Stashynsky*[64] cases formed the basis of Roxin's analysis [65].

The peculiarity of the contexts considered by the German scholar has led critics to highlight the impossibility of transferring such a theory – which was developed to solve specific problems at the national level – to the proceedings before the ICC[66]. This is particularly evident considering that in most cases the

[61] GIL GIL A., MACULAN E., *Current Trends*, p. 349, p. 356. With particolar reference to indirect co-perpetration: *Van den Wyngaert* Concurring Opinion, para. 20.

[62] ROXIN C., *Crimes as Part*, pp. 197-202.

[63] Further references, documents and the entire transcript of the *Eichmann* trial are available online at: http://www.internationalcrimesdatabase.org/Case/192/Eichmann/ (last accessed on 22 November 2017).

[64] Bogdan Stashynsky was a KGB agent, that was ordered to kill two Ukrainian nationalists (Lev Rebet and Stepan Bandera) in the Federal Republic of Germany. The German Federal Court of Justice ("*Bundesgerichtshof*" – BGH), relying on the subjective approach, punished the defendant as an abettor: BGH, Judgment of 19 October 1962, in *BGHSt*, 18 (1963), pp. 87-96.

[65] ROXIN C., *Crimes as Part*, pp. 197-202.

[66] WEIGEND T., *Indirect Perpetration*, p. 551 (the author establishes that "historically, the introduction of 'control through an organisation' into German legal doctrine can best be understood as a reaction to the phenomenon of 'systematic' crime, which defies the categories of traditional criminal doctrine…[and] make[s] it necessary to devise new modes of criminal responsibility"); WEIGEND T., *Perpetration through an Organization*, p. 107; JAIN N., *The Control Theory*, pp. 193-195; OSIEL M., *Making Sense*, p. 100; MANACORDA S., MELONI C., *Indirect Perpetration*, p. 171.

situations over which the ICC exercises its jurisdiction involve African groups, that often lack structure and are not easily identifiable. It is important to note that in international criminal law, the concept of organisation is controversial also due to the diverse and multiple ways in which organisations can come into being or otherwise manifest themselves. Consequently, the application of some of the doctrine's constitutive elements beyond its original context may be problematic[67]. Although the modified theory has witnessed some implementation at the international level, related concepts such as "control" or "fungibility" are still far from being set. In addition, the identification of these elements in concrete cases is particularly difficult and poses very high burden of proof on the Prosecution[68].

The *Organisationsherrschaftslehre* has been strongly challenged also in Germany and has only been applied in few cases[69]. Furthermore, beyond its country of origin, it has been adopted to solve specific cases only in legal systems that have been strongly influenced by German criminal law and legal theory, such as Argentina, Peru, Colombia and Chile[70]. As a consequence, if experience on the national level is any indication of possible obstacles at the international level, the effectiveness of the doctrine's implementation at the ICC may still be quite far from being guaranteed.

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[67] VAN SLIEDREGT E., *International Criminal Law*, p. 7 (the author refers to the problematic application of the doctrine in the *Katanga and Ngudjolo* case, with particular reference to the African militias and the Nazi bureaucracy).

[68] *Fulford* Separate Opinion, para. 3.

[69] The *Organisationsherrschaftslehre* has been adopted for the first time by the BGH only after about three decades from its appearance in the German doctrine, for ascribing to the civil and military leaders of the German Democratic Republic (GDR) the killings of the GDR citizens trying to cross the border and fleeing to West Germany: BGH, Judgment of 26 July 1994, in *BGHSt,* 40 (1995), pp. 218-240. For an overview: JOECKS W., *StGB § 25 Täterschaft*, pp. 1264-1270.

[70] OHLIN J., *Co-Perpetration*, p. 523; MANACORDA S., MELONI C., *Indirect Perpetration*, p. 170.

The purpose of this work is not to find a way to criminalise conduct that would otherwise not be criminalised[71]. Indeed, before indirect perpetration was included in the Rome Statute as form of responsibility, the most common modes of liability used to prosecute and punish those far removed from the crime scene were ordering, instigation, planning, participation in a JCE, conspiracy and superior responsibility[72].

The objective of the present investigation is therefore to clarify three issues: (i) whether it is appropriate to resort to the control over the organisation to interpret and apply art. 25(3)(a), third alternative, ICCSt; (ii) whether it is preferable to interpret the "independence clause"[73] in a different way; or, (iii) whether, in the extreme case, it is advisable to modify the Rome Statute. This analysis further allows to verify whether the interpretation of indirect perpetration through a responsible person along the lines of the control over the organisation theory still differentiates this mode of liability from others[74], such as ordering under art. 25(3)(b) ICCSt[75] and superior responsibility provided by art. 28 ICCSt[76].

In order to clarify these issues it is fundamental to address and resolve the problems related to the implementation of the doctrine at the ICC. They can be grouped and analysed on various levels, including the theoretical foundations level, the empirical level and the imputation level.

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[71] WERLE G., BURGHARDT, *Indirect Perpetration*, p. 88 (the authors claim that the relevance of the doctrine "does not lie in criminalizing conduct that otherwise would not have yielded criminal responsibility").

[72] WEIGEND T., *Indirect Perpetration*, p. 540; WERLE G., JESSBERGER F., *Principles*, p. 208; WERLE G., *Individual Criminal Responsibility*, p. 964.

[73] This is the term used by Eser to refer to the autonomous nature of the indirect perpetrator's responsibility, as opposed to the responsibility of the tool that he or she uses to carry out the criminal conduct: ESER A., *Individual Criminal Responsibility*, p. 795.

[74] For an overview of the relationship between indirect perpetration and other related concepts: KISS A., *Indirect Perpetration*, pp. 5-7.

[75] VEST H., *Problems of Participation*, pp. 303-304.

[76] On a peculiar interpretation of these concepts: SATŌ H., *International Criminal Responsibility*, pp. 293-300 (according to the author "ordering" is a form of command responsibility *lato sensu* and the control over the organisation has been used by the PTC in the *Katanga and Ngudjolo* to establish "the principal responsibility of superiors for ordering criminal conduct").

The first concerns the doctrine's theoretical foundations in the Rome Statute itself and according to its interpretation. For example, is there a legal basis for the approach chosen by the majority? Can one be sure that the ICC needed to rely on theoretical concepts to fill alleged gaps in the Rome Statute and in order to overcome its ambiguities?

The second relates to the substantive analysis of the doctrine and its empirical application in macro-criminal contexts. Is the *Organisationsherrschaftslehre* a persuasive theory, capable on one hand of capturing the collective nature of international crimes and, on the other, of ascribing the responsibility for the commission of such crimes to the "intellectual perpetrators" or "perpetrators behind the desk"?

Lastly, the third deals with the premises upon which the application of the theory is based and the general structure of art. 25 ICCSt. Is it truly necessary to resort to the control over the organisation theory to attribute the responsibility to the leaders of the organisations for crimes committed by their subordinates? Departing from the controversial premises over which the implementation of the doctrine is based, can we still apply it at the ICC?

II. Methodology

The study adopts an inductive approach. It is for this reason that the interpretation and application of art. 25(3)(a), third alternative, ICCSt are examined immediately after the analysis of its normative evolution. In contrast to what may take place on the domestic level (e.g., in Germany), there is no international criminal law dogmatic that would help guide the ICC judges in their work. The Rome Statute is the result of a pluralistic decision-making process that led to a compromise between different legal cultures. Likewise, many of the ICC's decisions embody and reflect such a varied pluralistic reality. Because of this, it is not unusual for judges to apply national legal theories (either as a whole or in part) – such as the *Organisationsherrschaftslehre* – as tools or "guiding principles" for the purpose of justifying their decisions, rather than using them as instruments to take such decisions.

Consequentially, it appears more appropriate and consonant with the approach adopted by the ICC judges to start the study by analysing the ICC's concrete cases that deal with art. 25(3)(a), third alternative, ICCSt, to delineate the constitutive elements of the 'control over the organisation theory' resulting from the application of the *Organisationsherrschaftslehre* and to provide context regarding the problematic issues that such an approach presents at the international level. A detailed and critical analysis of the case law is not only required in order to define the theory resulting from its application in concrete cases, but also to highlight the problems that its implementation at the ICC presents both on a substantive and foundational level. This is the reason for which the present study examines the dominant approach in great detail and in a way that allows a better understanding of the criticism that has been put forth by the minority.

An in-depth examination of the original version of the *Organisationsherrschaftslehre*, its development and application is worthwhile only once it has been demonstrated that the reliance on the German doctrine is compatible with the system built by the Rome Statute, the applicable law, the techniques of interpretation and the principle of legality.

It is on the basis of the above-mentioned considerations that the *Organisationsherrschaftslehre* and its empirical application are analysed in depth only in the second part of the study.

The analysis of the original version of the *Organisationsherrschaftslehre* is important in order to highlight the main differences between the original version of the doctrine and the version that has resulted from its implementation at the ICC. It is for this reason that the terminology of the German theory may vary.

For example, the terms are used in the following manner:

- "*Organisationsherrschaftslehre*" refers to the original variant of the German theory;
- "*Organisationsherrschaft"* relates to the specific control that the individual in the background exercises over an organisation;
- "*control over the organisation (theory)*" is generally used to designate the theory resulting from the implementation of the "*Organisationsherrschaftslehre*" at the international level.

A significant emphasis is placed on the empirical application of the *Organisationsherrschaftslehre* in macro-criminal contexts. In fact, when evaluating the doctrine's success, one's analysis cannot be limited to the constitutive elements identified in literature – it is also equally as important to examine how the doctrine has been practically applied over time. Furthermore, it is important to keep in mind that the doctrine came about in order to solve specific problems presented by the German legal system. For this reason, it is essential not to lose sight of the context that laid the groundwork for the doctrine's inception and subsequent evolution, not only in Germany, but also in other national jurisdictions (such as Argentina, Peru, Colombia and Chile).

The empirical application of the doctrine in different macro-criminal contexts allows one to assess the validity and persuasiveness of the doctrine's transposition at the ICC. Indeed, it is not self evident that the theory – at least in its original version – is appropriate and equally fits all cases dealing with macro-criminality, since it is not uncommon for the context to change notably from one situation to the next.

Therefore, the comparative analysis plays a fundamental role for the entire inquiry. Among the civil law systems, particular attention is given to Germany and Italy. I refer to the first because of the German origin of the *Organisationsherrschaftslehre* and due to the fact that it implements a participation differentiated model, acting as a reference point for the domestic legal systems based on such a model. Furthermore, it is worth noting that the German doctrine, on one hand has always served as a model for many civil law legal systems (in particular Spain, Colombia, Argentina, Japan, etc.); on the other hand, it has also been construed in different ways in order to deal with the problematic attribution of collective and systematic crimes to single individuals, as in the case of the prosecution and punishment of crimes committed by the Nazis and by the East German regime[77].

[77] WEIGEND T., *Problems of Attribution*, p. 255; OHLIN J., *Co-Perpetration*, p. 537 (according to the author "the reason that other nations have modelled their penal codes on the German approach must be because the German Penal Code is either theoretically convincing, pragmatically useful, or both").

I refer to the Italian legal system because, in contrast to the German one, it is based on a unitarian model of participation in a crime. Moreover, the Italian system has been forced to deal extensively with organised crime and the problematic attribution of criminal responsibility to the leaders of criminal organisations, like mafia and subversive associations, whose members have committed offences in furtherance of the organisational strategy. The Italian legal system is not used as a "true source of law", but as a source "of ideas and concepts" that are capable to address the criticism raised against of the dominant approach[78]. This includes considering models other than the alleged differentiated model of attribution of responsibility and resorting to other mechanisms to interpret and apply indirect perpetration under art. 25(3)(a), third alternative, ICCSt. Such an examination is further elaborated by analysing a case, that would be subjected to the ICC's jurisdiction and which has already been decided pursuant to the control over the organisation theory (the *Katanga and Ngudjolo* case), in accordance to Italian criminal law.

This approach appears to be particularly valuable if we consider that the implementation of a participation differentiated model in art. 25(3) ICCSt is still controversial and that the control theory is only one of the possibilities by means it is possible to interpret the provision[79]. Furthermore, this study is based on the presumption that because the formulation of art. 25(3) ICCSt is the result of a compromise between different legal systems its interpretation can vary significantly depending on the experience and legal background of the interpreter[80]. The analysis of the same problem from a different legal perspective – in this case the Italian one – can offer great insight generally and assist in the search of the best mechanism of attribution of criminal responsibility to those who

[78] JAIN N., *Perpetrators and Accessories*, p. 11 (as pointed out by the author "the [national] legal systems serve as sources of ideas and concepts, and not as true sources of law'").

[79] AMBOS K., *The First Judgment*, p. 145. With particular reference to the control over the crime theory in the form of the control over the organisation: *Katanga* Trial Judgment, para. 1406.

[80] SADAT L.N., JOLLY J.M., *International Criminal Courts*, p. 756 (according to the authors "Article 25 is like a legal Rorschach blot, taking on a different meaning depending upon the underlying legal training, tradition, and even policy-orientation of those seeking to interpret it").

are far removed from the crime scene for the offences committed by their subordinates.

PART ONE

TOWARDS THE APPLICATION OF THE CONTROL OVER THE ORGANISATION THEORY AT THE ICC

A. The premises of the *Organisationsherrschaftslehre* implementation at the ICC

I. The codification of indirect perpetration in art. 25(3)(a), third alternative, ICCSt

The current formulation of indirect perpetration is very broad and differs from the one presented by the Preparatory Committee in 1996[81]. The Committee's initial idea was to introduce indirect perpetration as a mode of liability in its traditional form, with the following wording: "*a person shall be deemed a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of law or otherwise acting without mens rea*"[82].

One year later, in February 1997, the Chairman of the Working Group on General Principles of Criminal Law and Penalties proposed a broader concept of commission, which included perpetration by means of a responsible and culpable person[83]. From that moment on, the wider idea of indirect perpetration was

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[81] For the legislative history of art. 25 ICCSt: BASSIOUNI M.C., *The Legislative History*, pp. 191-203; SERENI A., *Individual Criminal Responsibility*, pp. 139-146. See also: SCHABAS W.A., *The International Criminal Court*, pp. 561-562.

[82] Preparatory Committee on the Establishment of an International Criminal Court, Informal Group on General Principles of Criminal Law, Proposal of 26 August 1996 (A/AC.249/CRP.13), https://www.legaltools.org/uploads/tx_ltpdb/doc30911.pdf

[83] Preparatory Committee on the Establishment of an International Criminal Court, Working Group on General Principles of Criminal Law and Penalties, Chairman's Text, 19 February 1997 (A/AC.249/1997/WG.2/CRP.2/Add.2), https://www.legal-tools.org/uploads/tx_ltpdb/doc19258.pdf

maintained and eventually included in the final text of art. 25(3)(a) adopted at the Rome Conference. Consequently, subparagraph (a) – in its present version – clearly reads that a person can commit a crime "*through another person, regardless of whether that other person is criminally responsible*". Surprisingly, during the negotiations, delegates did not pay much attention to the modification of the provision's wording[84]. Nevertheless, the modification would go on to have significant consequences beyond even the delegates' imagination and expectations. In fact, indirect perpetration quickly became one of the ICC judges' favourite modes of liability. They often applied it when faced with the task of deciphering ways to capture the responsibility of those in leadership positions.

The concept of indirect perpetration adopted in art. 25(3)(a), third alternative, ICCSt is quite broad for two reasons. First, it is not limited to the traditional cases in which the person in the background uses an innocent agent to commit the crime – rather, and thanks to the "independence clause", it also allows individuals (in most cases far removed from the crime) to use a fully responsible or culpable intermediary.

Furthermore, the Rome Statute does not specify the modes of "instrumentalization" in the provision. As a result, it seems to "open the door to indirect perpetrationship for any deficiency on the tool's side"[85]. As a result, this category would include, *inter alia*, instances in which the perpetrator, for the commission of the offence, uses: (i) a person under the age of 18 years (art. 26 ICCSt); (ii) a person in state of intoxication or suffering from a mental disease (art. 31(1)(a)-(b) ICCSt); (iii) a person acting in self-defence, under duress (art. 31(1)(c)-(d) ICCSt), or under mistake of fact or law (art. 32 ICCSt); or, (iv) in any other case in which the judges find that there are grounds for excluding the criminal responsibility under art. 31(3) ICCSt[86].

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[84] WEIGEND T., *Indirect Perpetration*, p. 543, footnote n. 34 (the author highlights that "the issue is not [even] mentioned in the brief account on the main debates at the Rome conference by P. Saland"). The German scholar refers to SALAND P., *International Criminal Law Principles*, pp. 198-200.

[85] ESER A., *Individual Criminal Responsibility*, p. 794; MAUGERI A.M., *Autoria, coautoria, autoria mediata*, p. 2515.

[86] ESER A., *Individual Criminal Responsibility*, pp. 794-795; AMATI E., *voce Concorso*, p. 139.

The possibility of committing a crime "*through*" another person is recognised and codified in many civil law legal systems, but in most cases they refer to innocent or non-culpable direct perpetrators[87]. In common law legal systems, judges and practitioners have developed the theory of the "innocent agent" in order to address such situations. Indeed, according to the theory, an individual who uses an innocent agent to commit the crime is punished as if he or she physically committed it and is considered principal to the crime[88]. It is therefore possible to go beyond the limits presented by the derivative conception of complicity[89]. Nevertheless, normally, regardless of the model of responsibility adopted, when such a scenario involves two culpable persons, the direct perpetrator is considered the principal and the man in the background as a secondary party.

The real novelty and most controversial aspect of art. 25(3)(a), third alternative, ICCSt is represented by the "independence clause" through which a culpable individual, under certain conditions (not expressed in the text of the provision), can be considered a tool in the hands of the perpetrator. In such cases, a "parallel responsibility"exists: the responsibility of the indirect perpetrator on one hand and the responsibility of the direct perpetrator on the other[90].

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[87] Despite the different regulation and variable nature, the possibility of being responsible for a crime committed by another person is provided for in several penal codes. For example, arts. 46, 48, 51 (2)(4), 54(3), 86, 111 of the Italian Penal Code provide different situations in which the commission of the crime is determined by duress, mistake caused by deception of another individual, superior orders, incapacity to appreciate the unlawfulness of the conduct provoked by another individual for the purpose to commit the crime, or where an individual determines that a person who is not criminally responsible commit the crime; art. 47(1) of the Dutch Penal Code explicitly refers to the individual who "*causes an innocent agent to commit the offence*"; art. 28 of the Spanish Penal Code introduces the possibility to commit a crime "*por medio de otro del que sirven como instrument*"; art. 25(1) German Penal Code provides the possibility to commit the crime "*durch einen anderen*" without further specifications.

[88] ORMEROD D., LAIRD K., *Smith and Hogan's Criminal Law*, pp. 211-212. On the doctrine of innocent agency, *inter alia*: WILLIAMS G., *Innocent Agency*, pp. 289-298.

[89] MAUGERI A.M., *Autoria, coautoria, autoria mediata*, p. 2516.

[90] VAN SLIEDREGT E., *Individual Criminal Responsibility*, p. 95.

This mode of liability is particularly influential because it captures the dynamics of the crimes under the ICC's jurisdiction, which in most cases involve several criminally responsible individuals acting at different levels within collective entities, such as state apparatuses and criminal groups[91]. The mode of liability further reflects the responsibility of the individuals in high-level positions for the crimes committed on the ground by their subordinates, despite their absence from the scene of the crime[92].

The use of the term "*through*" in the article reveals the specificity of this form of responsibility and, on a *prima facie* level, reflects the main distinction with similar modes of participation in a crime, which implies a sort of unequal and vertical relation between the individuals involved in the commission of the crime, such as ordering, soliciting and inducing (art. 25(3)(b) ICCSt). Perpetration through another person, compared to the modes of liability listed in subparagraph (b), requires more[93]: it implies that the direct agent is a tool or an instrument of the indirect perpetrator. In such cases, the latter acts as the person in the background who uses his or her superiority or dominance over the intermediary in order to commit the crime, without getting blood on his or her hands. This is the reason the crime is also attributed to the individual in the background as if he or she personally committed the offence.

The existence of a "vertical" relationship between direct agents and those in the background is typical of indirect perpetration and further distinguishes it from co-perpetration, which is rooted in a "horizontal" relationship between the perpetrators of the crime, who act side-by-side so to speak, and who play an essential role in the crime[94].

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[91] SCHABAS W.A., *The International Criminal Court*, pp. 561-562; CRYER R., *An Introduction*, p. 367.

[92] KISS A., *Indirect Perpetration*, p. 2.

[93] MAUGERI A.M., *Autoria, coautoria, autoria mediata*, p. 2515. In the case law: *Katanga* Trial Judgment, para. 1396; *Katanga and Ngudjolo* Confirmation of Charges Decision, para. 517.

[94] OHLIN J.D., *Second-Order*, pp. 771-797.

This study will assess whether the introduction of indirect perpetration was indeed necessary in due course[95]. At this stage, it suffices to state that indirect perpetration was expressively codified in the Rome Statute, became one of the favourite modes of liability used to prosecute those in a leadership-like position for the crimes committed by their subordinates and is one of the main objects of the judicial creativity.

It is important to consider that the expansion of the concept of perpetration is common in legal systems where accomplices may only be punished with less severe sentences than principal perpetrators[96]. This is a characteristic of the systems – such as the German one[97] – which are based on a differentiated model pursuant to which to the specific mode of liability applied to the defendant entails a different range of punishment. Nevertheless, art. 77(1) ICCSt provides for a unique range of punishment: imprisonment for an amount of years not exceeding a maximum of 30 years (subparagraph (a)). An exception to this general principle is included in subparagraph (b) of the same provision that allows for the imposition of life imprisonment in extreme and grave cases. Furthermore, on the basis of Rule 145(1)(c) of the Rules of Procedure and Evidence (RPE), "*the degree of participation of the convicted person*" and "*the degree of intent*" are only some of the elements that the judges have to consider in the determination of the sentence according to art. 78 ICCSt[98].

The system built by the Rome Statute endorses a broad concept of perpetration, further expanded – as we will see later on – by judicial interpretation,

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[95] On the doubtful need of indirect perpetration's codification: CRYER R., *An Introduction*, p. 367, in the part he states that "it is questionable whether it was necessary to include this form of liability as a form of commission". See also VOGEL J., *Individuelle Verantwortlichkeit*, p. 427, footnote. 112.

[96] CRYER R., *An Introduction*, p. 367.

[97] However, it has to be noted that, according to § 26 StGB ("*Strafgesetzbuch*", the German Penal Code), the intentionally induction to the intentional commission of a crime has to be punished with the same penalties provided for principals within the meaning of § 25 StGB.

[98] Rule 145 ICCRPE has to be read in conjunction with art. 78(1) ICCSt ('*Determination of the sentence'*). According to art. 78(1) ICCSt "*in determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person*".

notwithstanding the lack of a direct link between modes of liability and applicable penalty, typical of the differentiated models of participation in a crime[99].

II. Does art. 25(3) ICCSt provide for a differentiated model of responsibility?

a) General remarks concerning the normative context of indirect perpetration within the meaning of art. 25(3)(a) ICCSt

In order to better understand the reasons for the implementation of the control over the organisation theory at the ICC, it is important to focus on the normative context of the new mode of liability and on the general structure of art. 25(3) ICCSt[100], found in Part III of the Rome Statute ("*General Principles of Criminal Law*"[101]).

Indirect perpetration is included in art. 25(3)(a) ICCSt, a provision that distinguishes between three different forms of commission: (1) commission "*as an individual*"; (2) joint commission; and, (3) commission "*through another person, regardless of whether that other person is criminally responsible*". Subparagraph (a) is the first of several subparagraphs encompassed in art. 25(3) ICCSt[102]. Subparagraphs (b), (c) and (d) refer to different forms of participation in

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[99] The absence of "correlation between mode of liability and penalty" is highlighted also in the case law: *Katanga* Trial Judgment, para. 1386.

[100] On the general structure of art. 25(3) ICCSt, *inter alia*: AMBOS K., *Internationales Strafrecht*, pp. 170 ff.; AMBOS K., *Article 25*, pp. 987 ff.; COSTI M., *Autoria e forme*, pp. 84 ff.; ARGIRÒ F., *La compartecipazione criminosa*, pp. 399-406.

[101] On Part III of the Rome Statute, *inter alia*: SALAND P., *International Criminal Law Principles*, pp. 189-216; AMBOS K., *General Principles*, pp. 1-32; SCHABAS W., *General Principles*, pp. 400-428.

[102] Art. 25 ICCSt (*"Individual Criminal Responsibility*") states as follows:

"1. The Court shall have jurisdiction over natural persons pursuant to this Statute

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

a crime, namely: (i) ordering, soliciting and inducing (subparagraph (b)); (ii) aiding, abetting and otherwise assisting (subparagraph (c)); and, (iii) contribution to a group crime (subparagraph (d)). Subparagraph (e) deals with incitement to genocide and subparagraph (f) with attempts to commit a crime.

Art. 25 ICCSt is the pillar of the entire system built by the Rome Statute to fight against the impunity of those responsible for genocide, crimes against humanity, war crimes and crimes of aggression. It is the most detailed provision on individual responsibility that has existed in the history of international criminal

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(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

law[103]. In fact, it is not limited to the recognition of the universal acceptance of the principle of individual criminal responsibility in international criminal law (art. 25(2) ICCSt)[104]. In subparagraphs (a)-(d), it further provides a complex and detailed regulation and systematisation of the different modes of commission and participation in a crime.

The provision is the result of long and difficult consultations and reflects the compromise reached by the negotiators coming from different national legal systems and backgrounds[105]. The formulation of art. 25(3) ICCSt reveals its

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[103] The provisions on individual criminal responsibility previously appeared in arts. 6 and 9 IMTCharter, art. 7 ICTYSt and art. 6 ICTRSt are quite rudimentary. Art. 7 ICTYSt ("*Individual Criminal Responsibility*) – reproduced almost identically in art. 6 ICTRSt – states as follows:

"*1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.*

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

[104] The principle of individual criminal responsibility was established for the first time in international law during the trial of the Major War Criminals, in the judgment of 1 October 1946 in *France et al. v. Göring et al*. The Chamber claimed that "Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provision of international law be enforced". This decision can be considered a milestone in the affirmation of the principle in the international arena. The judgment is available in *Am. J. Int. L.,* 41 (1947), pp. 172-333, at p. 221. On the history of the principle of individual criminal responsibility in international criminal law: AMBOS K., *Individual Criminal Responsibility*, pp. 5-31.

[105] SALAND P., *International Criminal Law Principles*, p. 198; VEST H., *Problems of Participation*, p. 300 (the author states that "the provision is the result of a doctrinal compromise

"multi-faceted origins"[106]: it is characterised by the coexistence of concepts developed in national legal traditions as well as in international instruments[107]. For example, the wording of subparagraph (a) may remind one of § 25 StGB (*Strafgesetzbuch* – German Penal Code) [108], while the concepts defined in subparagraphs (b)-(c) follow forms of participation familiar in most national legal systems. With regards to the influence of international instruments, subparagraphs (d) and (e) derive respectively from art. 2(3)(c) of the 1997 International Convention for the Suppression of Terrorist Bombings[109] and art. III (c) of the 1948 Genocide Convention[110].

Despite the compromise reached during the negotiation phase of the Rome Conference, resulting in the final version, the different backgrounds of the commentators continue to play a significant role and consistently manifest themselves through the provision's interpretation by practitioners and scholars alike. For describing this peculiarity, art. 25 ICCSt has been labelled as "a legal Rorschach blot, taking on a different meaning depending upon the underlying

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reached by proponents and experts from different legal systems who based their proposals on their own national laws").

[106] *Van den Wyngaert* Concurring Opinion, para. 13.

[107] VEST H., *Problems of Participation*, p. 300; JAIN N., *Perpetrators and Accessories*, pp. 81-82; VAN SLIEDREGT E., *Individual Criminal Responsibility*, pp. 64-65.

[108] According to § 25 StGB ("*Täterschaft*", "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)*". The English translation is provided by the Federal Ministry of Justice in cooperation with juris GmbH https://www.gesetze-im-internet.de/englisch_stgb/index.html. For an English translation of the StGB see also: BOHLANDER M., *The German Criminal Code*.

[109] According to art. 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings: "*Any person also commits an offence if that person: (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned*".

[110] Art. III (c) of the Genocide Convention states that "*The following acts shall be punishable: (c) Direct and public incitement to commit genocide*."

legal training, tradition, and even policy-orientation of those seeking to interpret it"[111].

When analysing indirect perpetration through a responsible person, and more in general, when dealing with individual criminal responsibility within the meaning and interpretation of the Rome Statute, it is important to also refer to another provision: art. 28 ICCSt[112]. Indeed, as stated in academic literature, "Article 28 complements Article 25(3) in that it extends responsibility to superiors for omission"[113].

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[111] SADAT L.N., JOLLY J.M., *International Criminal Courts*, p. 756.

[112] Art. 28 ICCSt (*"Responsibility of commanders and other superiors*") states as follows:

"*In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:*

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[113] AMBOS K., *Treatise, Vol. I*, p. 206.

Art. 28 ICCSt provides for an additional mode of liability that must be added to the other modes of liability listed in art. 25(3) ICCSt[114]. Therefore, it does not exclude nor substitute the application of art. 25(3) ICCSt, when the elements required by the latter have been met.

Such a provision[115] refers to the responsibility of military, military-like and civilian superiors for the crimes committed by their subordinates[116]. In other words, in order to determine the responsibility of these individuals pursuant to art. 28 ICCSt, the crimes committed by their subordinates must be causally linked to the failure of the superiors to act and thus to comply with their duty[117]. In fact, the superior must take all measures within his or her power in order to prevent or punish the commission of the crimes[118]. As a result, the provision provides for a form of responsibility for omission[119]. It is invoked in order to cover conduct that otherwise would not be punished[120].

According to the most recent case law on the topic, in order to be charged and punished under superior responsibility (and more precisely under art. 28(a) ICCSt), the following elements must be fulfilled: "a. crimes within the jurisdiction of the Court must have been committed by forces; b. the accused must have been either a military commander or a person effectively acting as a military commander; c. the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes; d. the accused either knew or, owing to the circumstances at the time, should have

[114] Regarding the differences between superior responsibility and other modes of liability (in particular, co-perpetration and indirect perpetration) *inter alia*: MAUGERI A.M., *Autoria, coautoria, autoria mediata*, p. 2534 ff.

[115] For an overview on the drafting history of the provision: AMBOS K., *Treatise, Vol. I*, p. 206-207; SALAND P., *International Criminal Law Principles*, pp. 202-204.

[116] TRIFFTERER O., ARNOLD R., *Responsibility of Commanders,* p. 1084.

[117] AMBOS K., *Command Responsibility*, pp. 134-135

[118] *Ibid*.

[119] For a further analysis of the superior responsibility and more in particular of art. 28 ICCSt in academic literature, *inter alia*: TRIFFTERER O., ARNOLD R., *Responsibility of Commanders,* pp. 1056-1106; KISS A., *La responsabilidad penal*, pp. 40-66; AMBOS K., *Treatise, Vol. I*, pp. 206-232; MAUGERI A.M., *La responsabilità da comando*, pp. 163 ff.

[120] WERLE G., JESSBERGER F., *Principles*, p. 222.

known that the forces were committing or about to commit such crimes; e. the accused must have failed to take all necessary and reasonable measures within his power to prevent and repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and f. the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them"[121].

Although thus far there is no case law on art. 28(b) ICCSt[122], to a large extent it appears possible that the same elements mentioned above would also be required when applying the provision related to civilian superiors, with the exception of the mental element. With regard to the mental element, art. 28(b) ICCSt states that the civilian superior must have either known, "*or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes*". The mental element required in the case of civilian superiors is stricter than in the case of military commanders, which necessarily place a more difficult burden of proof on the Prosecutor[123].

Because the present study focuses on indirect perpetration through a responsible person, once the normative context of art. 25(3)(a), third alternative, ICCSt has been established, the following paragraphs will concentrate on the structure of art. 25(3) ICCSt and on the mode of liability under examination.

b) The dominant approach

[121] *Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, Judgment pursuant to art. 74 of the Statute, Trial Chamber III, 21 March 2016, para. 170.

[122] So far, at the ICC, only one individual (*Jean-Pierre Bemba Gombo*) has been convicted pursuant to art. 28 ICCSt (more in particular under art. 28(a) ICCSt). In contrast, it is possible to find extensive case law on superior responsibility at the ICTY.

[123] MELONI C., *Command Responsibility*, p. 186; CRYER R., *Prosecuting the Leaders*, p. 58 (according to the author "This raising of the *mens rea* requirement is unfortunate for cases against high-level government officials, leaving a loophole that they (alongside their usually expensive lawyers) are almost certain to seek to exploit"); MAUGERI A.M., *La responsabilità da comando*, pp. 409 ff.

At the ICC, the dominant idea is that art. 25(3) ICCSt distinguishes between principals (subparagraph (a)) and accessories (subparagraphs (b)-(d)) [124]. According to this reading of the provision, principals to a crime are those who carry out the offence directly, jointly with another person, or through another person (subparagraph (a)). Accessories to a crime are those who participate in the crime by ordering, soliciting, inducing the commission of the crime (subparagraph (b)), aiding, abetting or otherwise assisting in its commission (subparagraph (c)), or in any other way contributing to a group crime (subparagraph (d)). This differentiation is generally associated with the recognition of a hierarchy of blameworthiness between the different modes of liability provided for in the article. In other words, such a structure takes the shape of a pyramid wherein the degree of responsibility becomes progressively lower with respect to subparagraph (a) and where subparagraph (d) constitutes a residual form of accomplice liability[125].

This approach is embraced by the prevailing case law and was confirmed in 2014 by the Appeals Chamber in the *Lubanga* case. In the *Lubanga* judgment, the Chamber ruled that an individual can be held responsible either as a principal for the commission of the crime within the meaning of subparagraph (a), or as an accessory for the contribution to the commission of the offence by one or more persons in one of the modalities expressed in subparagraphs (b)-(d)[126]. In doing so, the judges highlighted that the distinction between principals and accessories is not merely terminological but also "contributes to a proper labelling of the accused person's criminal responsibility"[127]. In the Chamber's view, "a person who commits the crime him- or herself bears more blameworthiness than a person

[124] *Prosecutor v. Jean-Pierre Bemba Gombo et al.,* ICC-01/05-01/13-1989-Red, Judgment pursuant to art. 74 of the Statute, Trial Chamber VII, 19 October 2016, paras. 84 ('*Bemba et al.* Trial Judgment'); *Katanga* Trial Judgment, paras. 1383-1385, 1387-1388; *Lubanga* Trial Judgment, para. 999; *Katanga and Ngudjolo* Confirmation of Charges, para. 471.

[125] *Bemba et al.* Trial Judgment, paras. 84-86; *Lubanga* Trial Judgment, paras. 996-999; *Mbarushimana* Confirmation of Charges, para. 279; *Katanga and Ngudjolo* Confirmation of Charges, para. 499.

[126] *Lubanga* Appeals Judgment, para. 462.

[127] *Ibid*.

who contributes to the crime of another person or persons"[128]. The *Lubanga* Appeals Chamber further recalled the finding of the Trial Chamber majority, affirming that the "notion of principal liability […] requires a greater contribution than accessory liability"[129]. Indeed, the *Lubanga* trial judgment established that principal liability "'objectively' requires a greater contribution than accessory liability*"* and that the first prevails over the second[130]. Consequently, the majority of the trial judges conferred the "capability to express the blameworthiness of those persons who are the most responsible for the most serious crimes of international concerns" to the notion of principal liability under art. 25(3)(a) ICCSt[131].

A peculiar position on this aspect was expressed in the *Katanga* trial judgment. While the trial judges in *Katanga* recognised a clear distinction between principals and accessories is inherent to the Rome Statute, they nonetheless disregarded the position previously expressed on this point by the Pre-Trial Chamber I in the same case[132]. In doing so, the *Katanga* trial judges rejected the hierarchical reading of art. 25 ICCSt, claiming that "a perpetrator of a crime is not always viewed as more reprehensible than an accessory"[133].

This statement is based on the judges' recognition of the lack of rules or articles in the ICC legal tools that would require a specific link between modes of liability and applicable penalty[134]. As a result, it would be within the realm of

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[128] *Ibid.*; *Lubanga* Trial Judgment, para. 996 ("The Majority's view is […] that the contribution of the co-perpetrator who "commits" a crime is necessarily of greater significance than that of an individual who "contributes in any other way to the commission" of a crime").

[129] *Lubanga* Appeals Judgment, para. 467. In the same vein*: Bemba et al.* Trial Judgment, paras. 85-86.

[130] *Lubanga* Trial Judgment, paras. 997-998.

[131] *Ibid*., para. 999.

[132] *Katanga and Ngudjolo* Confirmation of Charges, para. 499. The correlation between principals and those who bear the greatest responsibility is made clear in the Pre-Trial Chamber's words: "assigning the highest degree of responsibility for the commission of the crime – that is considering him as a principal", when referring to indirect perpetrators within the meaning of art. 25(3)(a) ICCSt.

[133] *Katanga* Trial Judgment, paras. 1386-1387.

[134] *Ibid*., para. 1386.

possibility that, under art. 25(3)(b)-(d) ICCSt, an accessory could be punished more severely than a principal under subparagraph (a)[135]. It is on this basis that the Chamber appears to attribute a descriptive character to the list found in art. 25(3) ICCSt[136], along the lines of a functional unitarian model[137].

Before the Chamber's ruling, there was a manifest refusal to interpret the provision in a hierarchical manner – although with slight differences – both in Judge Fulford's separate opinion appended to the *Lubanga* judgment and in Judge Van den Wyngaert's concurring opinion attached to the *Ngudjolo* judgment. The views expressed by the two judges in those opinions constitute the core of the minority approach to art. 25 ICCSt.

Nevertheless, in the approach favoured by the majority, the modes of liability listed in subparagraphs (a)-(d) would not be limited to play a descriptive role. They would express different degrees of criminal responsibility already at the level of the imputation, to be considered later on during the sentencing phase. The

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[135] *Ibid*.

[136] *Ibid*., paras. 1384,1387.

[137] In this vein, and for a general overview: STEWART J.G., *The Strangely Familiar History*, pp. 347-348. Within the monistic models of participation in a crime it is possible to make a distinction between pure unitarian systems and functional unitarian systems. The pure unitarian systems – endorsed for example in art. 110 of the Italian Penal Code and in art. 23 of the Denmark Penal Code – do not contain a differentiation between principals and accessories and the causal contribution to the crime is considered sufficient to be considered perpetrator. The functional unitarian systems formally distinguish – in a functional perspective – between the different forms of participation in the crime on the basis of the different role played by those thaking part to the crime. Nevertheless, they do not embrace the idea of the derivative nature of secondary responsibility and the penalty is not predetermined and related to the different forms of participation. Examples of functional unitarian systems are provided by the Austrian and Polish Penal Codes, respectively in § 12 öStGB ("*österreichische Strafgesetzbuch"* – Austrian Penal Code) and in art. 18 of the Polish Penal Code. AMBOS K., *Ius Puniendi*, p. 68; AMBOS K., *La parte general*, pp. 172-173. For more regarding the Italian model analysed in the third part of this study: GRASSO G., *Art. 110*, pp. 167-168. On the Autrian prominent functional unitarian system: TRIFFTERER O., *Die österreichische Beteiligungslehre*, pp. 33-47; KIENAPFEL D., *Der Einheitstäter im Strafrecht*; KIENAPFEL D., *Erscheinungsformen der Einheitstäterschaft*, pp. 21-58.

approach appears to be based on the implicit recognition in art. 25(3) ICCSt of a differentiated participation model[138].

Scholars coming from national criminal justice systems grounded on a differentiated model of attribution of the responsibility – such as Germany – favour this reading of the provision[139].

In the differentiated systems, it is particularly important to distinguish between principals and accessories because the responsibility of the latter necessarily hinges on and derives from the responsibility of the former[140]. As a consequence, principals to a crime bear the greatest responsibility and are punished more severely[141].

The German Penal Code, for instance, contains a prominent example of such a differentiated model[142]. In particular, § 25 StGB provides for principal modes of liability (direct perpetration, indirect perpetration (paragraph (1)) and co-perpetration (paragraph (2)), while § 26 StGB and § 27 StGB include accessory forms of participation in a crime (respectively instigation and assisting in the commission of the crime)[143].

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[138] MANACORDA S., MELONI C., *Indirect Perpetration*, p. 170.

[139] AMBOS K., *Ius Puniendi*, p. 69; AMBOS K., *Article 25*, pp. 984-985; AMBOS K., *Treatise, Vol. I*, p. 120, pp. 145-147; WERLE G., BURGHARDT B., *Establishing Degrees of Responsibility*, pp. 306-319; WERLE G., JESSBERGER F., *Principles*, pp. 196-197 (according to the authors the attribution of a certain degree of responsibility to the modes of liability provided in art. 25(3) ICCSt would be implicit in the system); WIRTH S., *Co-perpetration*, p. 979; WERLE G., *Individual Criminal Responsibility*, p. 957 (the author focuses on "the linguistic differentiation and the conceptual systematization of the norm"); BURGHARDT B., *Modes of Participation*, pp. 91-94; JESSBERGER F., GENEUSS J., *On the Application*, p. 869. Similarly, see also: JACKSON M., *The Attribution of Responsibility*, pp. 879-895; COSTI M., *Autoria e forme*, p. 84; GIL GIL A., MACULAN E., *Current Trends*, p. 351, p. 362; MAUGERI A.M., *La responsabilità da comando*, pp. 574 ff.

[140] OLÁSOLO H., *Developments,* pp. 339-341.

[141] WERLE G., BURGHARDT B., *Establishing Degrees of Responsibility*, p. 303; MILITELLO V., *The Personal Nature*, p. 948.

[142] HEINRICH B., *Strafrecht Allgemeiner Teil*, pp. 505 ff.; WEIGEND T., *Germany*, pp. 265-267; BOHLANDER M., *Principles*, p. 153.

[143] MURMANN U., *Grundkurs Strafrecht*, pp. 357 ff.; AMBOS K., BOCK S., *Germany*, p. 323.

The peculiarity of this system emerges in § 26 StGB. According to this provision, instigators are punished with the same penalty handed down to the perpetrators themselves, while other participants in the crime receive lesser punishments (i.e., lower sanctions). This is not an isolated case. The Swiss Penal Code[144] and the Spanish Penal Code[145] also operate in a similar manner[146]. However, it has been noted that in substance, it is likely that the instigator will be considered less blameworthy than the perpetrator[147].

In the course of the following paragraphs we will see that – with the exception of the *Katanga* judgment – it is on the basis of this reading of art. 25(3) ICCSt that the majority has adopted a normative approach to liability by implementing the control over the crime theory both as a criterion to distinguish between principals and accessories and as a tool to interpret the various modes of liability set in subparagraph (a).

c) The minority approach

The dominant approach is highly controversial. In case law, it has faced strong criticism, notably in the dissenting opinions of Judge Fulford and Judge Van den Wyngaert. In his separate opinion attached to the *Lubanga* judgment, Judge Fulford did not differentiate between principals and accessories as two categories identifiable respectively in subparagraph (a) and subparagraphs (b)-(d). Rather, in his view, the modes of liability provided in art. 25(3) ICCSt represent "possible

[144] See in particular arts. 25, 48a of the Swiss Penal Code.

[145] According to art. 28(2) of the Spanish Penal Code the instigators and necessary contributors are considered "*autores*" and consequently punished with the same penalty established for the principals. The provision reads that "*También serán considerados autores: a) Los que inducen directamente a otro u otros a ejecutarlo. b) Los que cooperan a su ejecución con un acto sin el cual no se habría efectuado*".

[146] For a general overview: SIEBER U., CORNILS K., *Nationales Strafrecht*, pp. 3-346; PICOTTI L., *L'élargissement des formes*, pp. 368-373.

[147] VEST H., *Problems of Participation*, p. 302. The Swiss scholar, at footnote n. 31, claims that "both German and Swiss courts (at least with regard to concursus delictorum) as well as scholarly writings categorize perpetration as more blameworthy than instigation". See also: DUBBER M.D., HÖRNLE T., *Criminal Law*, p. 323.

modes of crime commission" covering all eventualities[148] and are "not intended to be mutually exclusive", but very much to the contrary, they in fact might overlap[149]. The English Judge went on by strongly opposing the hierarchical reading of the provision, stating that subparagraphs (a)-(d) are not positioned according to a decreasing scale of seriousness, where subparagraph (a) would include the gravest modes of liability and subparagraph (d) the least grave[150]. In support of his findings, Judge Fulford relied on art. 78 ICCSt and Rule 145 RPE, recalling the ICC sentencing system[151]. According to the latter, the penalty is not determined on the basis of the specific mode of liability ascribed to the defendant, but on several factors among which the "*degree of participation*" is only one of many[152].

The approach expressed by Judge Van den Wyngaert in her minority opinion appended to the *Ngudjolo* judgment partially differs from that of Judge Fulford. In fact, the Belgian Judge acknowledged a "conceptual difference" between the responsibility of principals and accessories: the former would be direct and the latter derivative[153]. However, in her opinion, this does not "necessarily translate to a different legal treatment of those who are found guilty under one or the other form"[154].

According to Judge Van den Wyngaert, the Rome Statute does not contain a mode of liability that implies a greater level of responsibility, but different forms of liability that might overlap[155]. As a result, "the blameworthiness of an accused is dependent on the factual circumstances of the case rather than on abstract legal categories"[156]. In her view, in order to adequately capture the responsibility of political and military leaders, it is not necessary to prosecute and punish them as

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[148] *Fulford* Separate Opinion, para. 7.

[149] *Ibid.*

[150] *Ibid.,* para. 8.

[151] *Ibid.,* para. 9.

[152] *Ibid.*

[153] *Van den Wyngaert* Concurring Opinion, para. 22.

[154] *Ibid.*

[155] *Ibid.,* paras. 22-23, 28, 66.

[156] *Ibid.*, para. 24.

principals within the meaning of art. 25(3)(a) ICCSt. Rather, one should rely also on the other modes of liability listed in the provision[157].

If on one hand, the Judge seems to share a general propensity to consider the "masterminds" or "intellectual authors" as the "most blameworthy for large-scale criminality", it is clear that, on the other hand, she does not believe that principal modes of liability contained in art. 25(3)(a) ICCSt necessarily entail the greatest responsibility[158]. On the contrary, Judge Van den Wyngaert is of the idea that forcing a characterisation of a leader's responsibility by relying at any cost on the principal modes of liability would in fact be problematic[159]. It is for these reasons that she believes that the solution should consist in the abandonment of a rigid division between subparagraph (a) and subparagraphs (b)-(d)[160].

In the minority opinion attached to the *Katanga* judgment the Belgian Judge further reiterated her reasoning in point of responsibility and confirmed the rejection of the hierarchical reading of the provision[161].

The abovementioned minority opinions are based on a plain reading of the provision according to art. 31(1) of the Vienna Convention on the Law of Treaties (VCLT)[162] and as a result, serve to underline the importance of such an approach[163].

The judges highlighted that the Rome Statute and the *travaux préparatoires* do not provide a legal basis for deciding in favour of a hierarchical reading of the provision[164]. Judge Van den Wyngaert further recalled the *ad hoc* Tribunals' practice of imposing lighter sentences on aiders and abettors. Nevertheless, in doing so, she also noted that the mental element required by aiding and abetting

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[157] *Ibid.*, para. 70.

[158] *Ibid.*, para. 29

[159] *Ibid.*

[160] *Ibid.*

[161] *Van den Wyngaert* Minority Opinion, para. 279.

[162] The Vienna Convention on the Law of Treaties was signed on 23 May 1969 and entered into force on 27 January 1980.

[163] *Fulford* Separate Opinion, paras. 7, 13; *Van den Wyngaert* Concurring Opinion, paras. 69-70; *Van den Wyngaert* Minority Opinion, para. 280.

[164] *Fulford* Separate Opinion, paras. 8-9; *Van den Wyngaert* Concurring Opinion, paras. 23-24.

under art. 25(3)(c) is "*purpose*", which is a higher standard than "*knowledge*" found in the ICTY's jurisprudence for interpreting aiding and abetting under art. 7(1) ICTYSt[165]. The Judge evoked the severe sentence (50 years' imprisonment) imposed upon former Liberian President, *Charles Taylor*, for aiding and abetting, among the elements that contrast with a hierarchical reading of the provision, further noting that "mandatory reductions for aiding and abetting and other forms of accessorial responsibility is not something that is familiar to a majority of legal systems" [166]. As a consequence, in the Judge's view, the mandatory sentence reduction depending on the mode of liability cannot be regarded as a general principle of law under art. 21(1)(c) ICCSt[167].

As will be seen below, the view adopted by the minority expresses the central reasoning for the rejection of the control over the crime theory.

d) Concluding observations

Whether art. 25(3) ICCSt provides for a differentiated model of responsibility so far remains an open question. It is questionable whether the differentiation encompassed in the provision's wording plays a mere descriptive role – where appropriate in accordance to the principle of legality[168] – or whether it in fact leads to further consequences.

What is certain is that the provision distinguishes – at least terminologically – between the modes of liability listed in subparagraphs (a)-(d). However, at the same time, the ICC legal tools provide for a unique range of punishment with the exception of life imprisonment available in extreme cases[169]. As a result, it is not possible to automatically conclude that the different modes of liability are

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[165] *Van den Wyngaert* Concurring Opinion, para. 25.

[166] *Ibid.*, para. 27.

[167] *Ibid*.

[168] MILITELLO V., *The Personal Nature*, p. 949.

[169] VEST H., *Problems of Participation*, pp. 300-301 (the author states that "the *mode of sentencing* chosen by the Statute could be descibed as a *unitary approach* because there exists only one range of punishment with a special clause for extreme cases"). For an overiew on the sentecing system adopted by the ICC, *inter alia*: AMBOS K., *Treatise, Vol. II*, pp. 279 ff.

specifically positioned to reflect a decreasing order of blameworthiness[170]. This must be true also if one considers that nothing in the preparatory works shows such an intent on the part of the drafters in this regard[171].

The majority approach developed in the relevant case law – and lastly confirmed by the Appeals Chamber in the *Lubanga* judgment[172] – appears to acknowledge a differentiated model of responsibility in art. 25(3) ICCSt, which, in addition to making a clear distinction between principals and accessories, also establishes certain corresponding degrees of blameworthiness.

The predominance of the hierarchical reading of the provision can be recognised also in the ICC's practice. In fact, the most common modes of liability used to prosecute and punish the crimes under the jurisdiction of the Court are those listed in art. 25(3)(a) ICCSt (in particular, co-perpetration, indirect perpetration and indirect co-perpetration resulting from their combination). In contrast, the forms of participation specified in subparagraphs (b)-(d) so far play a minor role and in most cases are utilised only at a later stage of the proceeding, following the re-characterisation of one of the principal modes of liability applied in the first instance. A clear example of this would be the *Katanga* case, where indirect co-perpetration was initially used to characterise the defendant's conduct (charged jointly with *Ngudjolo*), but which was subsequently overturned in favour of contribution to a collective crime under art. 25(3)(d) ICCSt. It is worth noting that in this case subparagraph (d) played a rather important role as fall-back provision.

The majority's need to fairly label[173] the criminal responsibility of the accused relates to the ascription of a higher degree of blameworthiness and a stigmatising character to the status of principal offender, in accordance with the symbolic and educational function of ICC decisions[174]. This is among the reasons why, from

[170] AKSENOVA M., *The Modes of Liability*, pp. 653-656, pp. 663-644.

[171] SALAND P., *International Criminal Law Principles*, pp. 198-200.

[172] *Lubanga* Appeals Judgment, paras. 462, 467.

[173] On the principle of fair labelling: ASHWORTH A., HORDER J., *Principles of Criminal Law*, pp. 77-79. See also: CHALMERS J., LEVERICK F., *Fair Labelling*, pp. 217-246.

[174] KISS A., *Indirect Perpetration*, pp. 15-16 (the author emphasises the importance to make the distinction already at the level of the attribution of responsibility and not only at the sentencing

this perspective, it is particularly important to distinguish between principals and accessories, in spite of the lack of a correspondent differentiation of punishment in the Rome Statute penalties system. Academic literature has claimed that the modes of liability provided in art. 25(b)-(d) ICCSt do not adequately capture a leader's criminal responsibility[175]. Consequently, as will be seen throughout the course of this study, the concept of principal liability has expanded in several ways.

Nevertheless, the approach adopted by the majority might be problematic, especially when analysed in the light of the gravity threshold endorsed in art. 17(1)(d) ICCSt. Indeed, the hierarchical reading of the provision, where accepted and considered as the most appropriate, could lead to a paradoxical consequence: only those who are allegedly liable under the categories of responsibility listed in subparagraph (a) could justify action by the Court. As a result, so far it seems difficult to unconditionally accept this approach to art. 25(3) ICCSt.

In contrast, the minority approach represented by the dissenting opinions and – limited to this point – by the *Katanga* trial judgment, attribute a more descriptive role to the different modes of liability[176]. The rejection of the hierarchical reading of the provision adopted by the minority is mainly based in the pragmatic and systematic reading of arts. 25, 77-78 ICCSt and Rule 145(1)(c) RPE. This approach appears to be rooted in the implicit recognition of a unitarian approach,

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stage); STEER C., *Translating Guilt*, pp. 35 ff.; GIL GIL A., MACULAN E., *Current Trends*, p. 363; VAN SLIEDREGT E., *The Curious Case*, pp. 1184-1185.

[175] MANACORDA S., MELONI C., *Indirect Perpetration*, pp. 161-162; OLÁSOLO H., *The Criminal Responsibility*, p. 3.

[176] In this vein seems to be also Judge Tarfusser: *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3363, Judge Tarfusser *dissenting opinion* to the *Judgment on the appeal of Mr. Germain Katanga against the decision of the Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons"*, 27 March 2013, para. 10 ("Sub-paragraphs (a) to (d) of article 25 (3) of the Statute describe different expressions of the broad idea of (commission by) participation in the execution of a crime; in any and all of the scenarios contemplated by the provision the accused has taken part in the commission of a given crime and the difference among the different sub-paragraphs is one of degree rather than of nature").

not only with respect to sentencing, but also with regard to the individual participation in the crime[177].

Furthermore, it is worth noting that in the confirmation of charges decisions issued in 2014, the ICC Pre-Trial Chambers often relied on the multiple charging of different modes of liability[178]. Multiple charging allows for various forms of responsibility to be attributed by the Pre-Trial Chambers with regard to the conduct of the accused, so long as such charging is supported by evidence[179]. It is therefore up to the ICC Trial Chambers to determine the appropriate form of responsibility in the light of the evidence produced during the trial[180].

This practice avoids Regulation 55's[181] use and abuse[182], and limits the delay of time at the trial phase. As far as the present analysis is concerned, such a

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[177] In favour of the reading of art. 25 ICCSt along the lines of a unitarian model: SADAT L.N., JOLLY J.M., *International Criminal Courts*, p. 758; MILITELLO V., *The Personal Nature*, pp. 948-949; STEWART J.G., *The End of 'Modes of Liability'*, pp. 205-219; VIVIANI A., *Crimini internazionali*, p. 125.

[178] This practice was adopted for the first time by the Pre-Trial Chamber II in the *Ntaganda*'s confirmation of charges: *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, para. 100 ('*Ntaganda* Confirmation of Charges'). It was followed also in: *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, para. 227 ('*Gbagbo* Confirmation of Charges'); *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-186, Decision on the confirmation of charges against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, para. 133 ('*Blé Goudé* Confirmation of Charges'); *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-422-Red, Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, 23 March 2016, para. 35 ('*Ongwen* Confirmation of Charges'); *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-84-Red, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, Pre-Trial Chamber I, 24 March 2016, para. 22 ('*Al Mahdi* Confirmation of Charges').

[179] On the comulative/alternative charging and recharacterisation of facts and forms of participation (Regluation 55): AMBOS K., *Treatise, Vol. III,* pp. 420 ff.

[180] LANZA G., *Qualche breve considerazione*, pp. 1-10.

[181] Regulation 55 ("*Authority of the Chamber to modify the legal characteristion of facts*") states as follows:

"1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the

practice appears to contrast with a reading of the provision along the lines of a differentiated model of responsibility. In fact, in these models (such as the German one) the individual is charged with a specific form of responsibility from the initial phases of the criminal proceedings.

The acceptance or refusal of the hierarchical reading of art. 25 ICCSt along the lines of a participation differentiated model is strictly related to the adoption or rejection of the control over the crime theory, with the only exception being the *Katanga* judgment, which, despite rejecting a hierarchical reading of the provision, adopted such a theory to distinguish between principals and accessories.

III. The adoption of the control over the crime theory as a criterion to distinguish principals from accessories to a crime

a) A peculiar demand of the differentiated models of responsibility

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accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e)".

[182] Upon a different point of view, for a comparison between the reasons that justified the turning of the Austrian model from differentiated into unitarian and the problematics presented by the implementation of Regulation 55 at the ICC: STEWART J.G., *The Strangely Familiar*, pp. 347-349.

As mentioned above with regard to legal systems based on a differentiated approach, it is essential to distinguish between principals and accessories to a crime in light of the fact that the responsibility of the latter derives (at least with regard to intentional criminal offences[183]) from the responsibility of the former[184]. It is due to this reality that different degrees of blameworthiness (and naturally, different levels of punishment) are associated with the two categories[185]. This makes it quite the task for practitioners and scholars seeking to identify the most appropriate criterion for the purpose of distinguishing principals perpetrators from secondary participants.

In Germany, for example, several theories have been developed in order to differentiate between the two categories[186]. To a large extent, the theories can be divided into three main groups: (1) the subjective theories; (2) the objective theories; and (3) the control theory[187].

Relevant jurisprudence has relied for a long time on a subjective approach based on the state of mind of the individual and the subjective attitude to the

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[183] For instance, German criminal law does not recognise secondary participation in negligent criminal offences and in administrative offences.

[184] AMBOS K., *Ius Puniendi*, p. 68.

[185] SEMINARA S., *Tecniche normative*, pp. 182-184.

[186] MURMANN U., *Grundkurs Strafrecht*, pp. 330 ff.; HEINRICH B., *Strafrecht Allgemeiner Teil*, pp. 513-518; DUBBER M.D., HÖRNLE T., *Criminal Law*, pp. 324 ff.; SCHÜNEMANN B., *StGB § 25 Täterschaft*, pp. 1846-1853; FORNASARI G., *I principi*, pp. 423-426; SAMMARCO G., *Il concetto di autore*, p.1009 ff.

[187] Part of the doctrine considers the Roxin's control over the crime theory a "variant of the 'objectivist' theory" (WEIGEND T., *Perpetration through an Organization*, p. 95); another part of the doctrine believes it is a good compromise between the objective and subjective theories (DUBBER M.D., *Criminalizing Complicity*, pp. 982-983) or a "synthesis of the objective and subjective theories" (JAIN N., *Perpetrators and Accessories*, p. 119, in the same vein also AMBOS K., *Ius Puniendi*, pp. 69-70). At the international level, it is interesting to note that the Appeals Chamber in the *Lubanga* case only recently referred to the control theory as an "objective criterion to distinguish commission liability from accessorial liability" (*Lubanga* Appeals Judgment, para. 468). In prior case law, the control theory was considered as an approach that incorporated "both subjective and objective components" (*Katanga and Ngudjolo* Confirmation of Charges, para. 484).

offence[188]. According to this approach, the *animus* of the agent is the main element used to establish whether, in committing the crime, the individual played the role of a perpetrator (*animus auctoris*) or the role of a participant (*animus socii*). The analysis focuses mainly on subjective criteria – no decisive importance is attributed to the factual (i.e. objective) contribution of the agent[189]. In other words, a perpetrator can be considered the individual "who wishes to commit the crime himself" and a participant is an individual "who wishes only to assist" in the commission of the crime as an aider or abettor[190].

This approach was favoured in the prosecution and punishment of crimes committed by members of the Nazi regime. In such cases, the approach allowed prosecutors to downgrade direct perpetrators' degree of responsibility (i.e., low or middle ranking individuals) and in some cases even exoneration, in order to focus on the leaders[191].

This approach has nonetheless been strongly criticised for being arbitrary and providing judges with excessive discretionary powers[192]. Furthermore, the reform of 1975 amended § 25 StGB and explicitly permitted for principals to be considered as "*any person who commits the offence himself or through another*". In the aftermath of the amendment – which was notably influenced by Roxin's theory[193] – the Courts abandoned the "extreme subjectivism" approach in favour of an analysis rooted in both subjective and objective elements ("evaluative overall consideration" or "*wertende Gesamtbetrachtung*")[194]. Indeed, under this

[188] WEIGEND T., *Problems of Attribution*, p. 257; WERLE G., BURGHARDT B., *Claus Roxin*, pp. 191-192.

[189] AMBOS K., BOCK S., *Germany*, p. 324; WEIGEND T., *Perpetration through an Organization*, p. 95.

[190] WEIGEND T., *Problems of Attribution*, p. 257.

[191] WERLE G., BURGHARDT B., *Claus Roxin*, pp. 191-192.

[192] WEIGEND T., *Perpetration through an Organization*, p. 95.

[193] The terminology adopted by the amended provision recalls the wording used and developed by the German scholar in his theory.

[194] WEIGEND T., *Problems of Attribution*, p. 258; BOHLANDER M., *Principles*, p. 163; FLETCHER G., *New Court,* p. 190.

new formulation, it was no longer possible to consider as a mere participant someone whose criminal conduct met all the elements of the crime.

In contrast, an individual's factual contribution is at the centre of the objective approach, which provides that principal perpetrators of a crime are only those individuals who directly carry out in full or in part (with other perpetrators) the elements of the crime, while the other individuals are considered mere accessories depending on the type of assistance they provide[195].

An additional approach developed through Claus Roxin's *Tatherrrschaftslehre* (which is part of his larger main work "*Täterschaft und Tatherrschaft*")[196] has also significantly influenced the thought of German courts. The *Tatherrrschaftslehre* distinguishes between principals and accessories by focusing on the notion of "control over" or "domination over" the act ("*Tatherrschaft"*), which is a somewhat open concept that serves "more [as] a guiding principle than a fixed rule with precise inferences"[197]. Accordingly, to a large extent, principals to a crime are only those who control the action by directly carrying out in full or in part the elements of the criminal offence (direct perpetrators and co-perpetrators), or by controlling the will of the direct perpetrators they use as an instrument for the commission of the crime (indirect perpetrators)[198]. The individuals who take part in the crime without exerting such control are considered simply accessories.

Surprisingly, this doctrine has had immense influential impact on the ICC's first cases and initial jurisprudence. In fact, the control over the crime theory was taken directly from Roxin's theory. Scholars have often referred to the strong influence of the German dogmatic at the international level. For example, Weigend entitled his reflections on the presence of the

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[195] JAIN N., *Perpetrators and Accessories*, pp. 117-118; SCHÜNEMANN B., *StGB § 25 Täterschaft*, pp. 1847-1848.

[196] For a deep analysis of the origins of the theory: ROXIN C., *Täterschaft*, pp. 60-67. The first to use the term "*Tatherrschaft*" was Hegler in his monography on "*Die Markmale der Verbrechens*" of 1915. However, a first version of the control over the act theory was presented for the first time by Welzel: WELZEL H., *Studien zum System*, pp. 491-566.

[197] AMBOS K., *Ius Puniendi*, p. 71; ROXIN C., *Täterschaft*, p. 122.

[198] ROXIN C., *Strafrecht Allgemeiner Teil*, pp. 19-105.

Organisationsherrschaftslehre at the ICC as "the unexpected career of a German legal concept"[199]. Another renowned scholar in the area of international criminal law, Ohlin, pondered whether the interpretation of co-perpetration within the meaning of art. 25(3)(a), second alternative, ICCSt could be considered the expression of the "German *Dogmatik* or [of a] German invasion"[200].

Regardless of the worthwhile nature and importance of better understanding the implementation of the German theory at the ICC – which will be examined in the course of this study – what is unquestionable is that the majority of ICC judges have relied heavily on German criminal law and have given the control theory a leading role in the Court's case law[201]. So far, it is the favoured criterion used to achieve two objectives that are crucial to the Court's purpose: (i) distinguish principals and accessories to a crime; (ii) define the constituent elements of the modes of liability listed in art. 25(3)(a) ICCSt.

With exception of the *Katanga* trial judgment, the adoption of the control theory is based on the assumption that art. 25(3) ICCSt provides for a differentiated and hierarchically structured model of attribution of liability and on the need to establish a workable criterion for distinguishing between principals and accessories[202].

The "control theory" appeared for the very first time in the *Lubanga* confirmation of charges decision, where ICC judges applied it in order to distinguish between the modes of liability provided by subparagraph (a) and subparagraphs (b)-(d) of art. 25(3) ICCSt[203], and to interpret co-perpetration within the meaning of subparagraph (a), second alternative[204]. This first approach

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[199] WEIGEND T., *Perpetration through an Organization*, pp. 91-111.

[200] This is the title used by Ohlin for his analysis on co-perpetration: OHLIN J., *Co-Perpetration*, pp. 517-537.

[201] VAN SLIEDREGT E., *Perpetration and Participation*, p. 499.

[202] OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, pp. 725-726; AMBOS K., *Ius Puniendi*, pp. 69-70.

[203] *Lubanga* Confirmation of Charges, paras. 330-332, 338. An implicit reference to the control theory was already made in *Lubanga* Warrant of Arrest Decision, paras. 94-96.

[204] *Ibid*., paras. 340-367.

was later confirmed by both the *Lubanga* Trial and Appeals Chambers, as well as in other cases before the Court[205].

Two ICC decisions – the confirmation of charges decisions in *Lubanga* and in *Katanga and Ngudjolo* – stand out among the rest because they provide detailed insight and analysis regarding the reasons for the adoption of the control theory as a criterion to distinguish principals from accessories. For a long time, the two confirmation of charges decisions served as the benchmark for ICC case law that followed. Oftentimes, the latter simply repeated the language contained in the first two decisions, taking for granted both the provision's structural interpretation and the reliance on the theory in the differentiation between principals and accessories, preferring to focus on the constituent elements of the modes of liability endorsed in subparagraph (a) according to the theory adopted. Nevertheless, the Pre-Trial Chamber's reasoning was further elaborated during the trial phase and affirmed at the appeals level in the *Lubanga* case.

The *Lubanga*, *Katanga* and *Ngudjolo* cases offer the most important and relevant decisions on both the implementation and refusal to implement the control over the crime theory at the ICC. Indeed, the minority approach has been represented in Judge Fulford's separate opinion attached to the *Lubanga* judgment, Judge Van den Wyngaert's minority opinion appended to the *Ngudjolo* judgment

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[205] *Lubanga* Trial Judgment, para. 994; *Lubanga* Appeals Judgment, paras. 469-473; *Katanga* Trial Judgment, paras. 1394-1396; *Katanga and Ngudjolo* Confirmation of Charges, paras. 480-486; *Blé Goudé* Confirmation of Charges, para. 135; *Bemba* Confirmation of Charges, paras. 347-349; *Muthaura, Kenyatta and Ali* Confirmation of Charges, para. 296; *Ruto, Kosgey and Sang* Confirmation of Charges, paras. 291-292; *Mbarushimana* Confirmation of Charges, para. 279; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, paras. 152-153 ('*Abu Garda* Confirmation of Charges'); *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* ICC-02/05-03/09-121-Corr-Red, Corrigendum on the "Decision on the Confirmation of Charges", Pre-Trial Chamber I, 7 March 2011, paras. 126-127 ('*Banda and Jerbo* Confirmation of Charges'); *Situation in the Libyan Arab Jamahiriya*, ICC-01/11-01/11-1, Decision on the "Prosecutor's Application pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI", Pre-Trial Chamber I, 27 June 2011, para. 68 ('*Gaddafi et al.* Warrant of Arrest Decision'); *Al Bashir* Warrant of Arrest Decision, para. 210.

and Judge van den Wyngaert's concurring opinion attached to the *Katanga* judgment. Judge Fulford's opinions have demonstrated a more radical approach against the control theory.

In order to adequately analyse the two approaches, this study will focus on each relevant decision separately.

b) The dominant approach

i) The *Lubanga* case

In the confirmation of charges decision against *Lubanga*, the pre-trial judges relied on co-perpetration to establish the defendant's criminal responsibility with respect to the war crimes of conscripting and enlisting children under the age of 15 years (art. 8(2)(e)(vii) ICCSt).

The acceptance of the German theory is based on the presumption that the provision distinguishes between primary and secondary forms of liability. It is on this premise that even before implementing the control theory, the judges of the ICC Pre-Trial Chamber analysed some of the traditional criteria used to distinguish perpetrators from participants, assessing the consistency of said criteria with art. 25 ICCSt.

With regard to the objective approach – the first to be examined – the judges determined that it would be incompatible with the wording of the provision (particularly the part in which it allows for a crime to be committed through another person – subparagraph (a), third alternative)[206]. In fact, because perpetrators are, under this approach, only "those who physically carry out one or more of the objective elements of the offence"[207], it would not be possible to consider principals to a crime, individuals who, despite their absence from the scene of the crime, organise and orchestrate the worst atrocities (i.e., indirect perpetrators)[208].

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[206] *Lubanga* Confirmation of Charges, para. 333.

[207] *Ibid.,* para. 328.

[208] *Ibid.,* para. 333.

The pre-trial judges further argued that applying the subjective approach – based on the individual's state of mind[209] – would render art. 25(3)(d) ICCSt superflous[210]. Specifically, the Chamber highlighted that "had the drafters of the Statute opted for a subjective approach for distinguishing principal and accessories", the idea expressed in subparagraph (d), which is similar to JCE or common purpose adopted by the ICTY, "would have been the basis of the concept of co-perpetration within the meaning of article 25(3)(a)"[211]. Nevertheless, this was not the case because in the judges' view, subparagraph (d) endorses a residual form of responsibility and as such must be kept separated[212]. Therefore, this approach was rejected on the basis of a combined reading of subparagraphs (a) and (d)[213].

The Chamber went on to examine the control over the crime approach. The judges believed that this approach, which contains an objective and a subjective element[214], would allow them to resolve the problems presented by the two approaches previously examined.

To justify its adoption of the control theory, the Chamber pointed to the theory's implementation in several legal systems and highlighted its endorsement in the Rome Statute, in particular in subparagraph (a), third alternative[215]. In the judges' view, the latter constitutes "the most typical manifestation of the concept of control over the crime"[216]. In other words, applying such a theory would enable to consider as principals to a crime those who, despite their absence from the

[209] *Ibid.,* para. 329.

[210] *Ibid*., paras. 334-337. The judges associated the JCE with the subjective approach.

[211] *Ibid.*, para. 335.

[212] *Ibid.*, paras. 336-337.

[213] *Ibid.*, para. 338.

[214] *Ibid.*, para. 331. According to the Chamber "this approach involves an objective element, consisting of the appropriate factual circumstances for exercising control over the crime, and a subjective element, consisting of the awareness of such circumstances".

[215] *Ibid.,* paras. 330, 338.

[216] *Ibid.*, para. 339.

scene of the crime, "control or mastermind its commission because they decide whether and how the offence will be committed"[217].

The judges further stated that, on the basis of this criterion, principals are "only those who have control over the commission of the offence – and are aware of having such a control" because: "i. they physically carry out the objective elements of the offence (commission of the crime in person, or direct perpetration); ii. they control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration); or iii. they have along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration)"[218].

After the Pre-Trial Chamber described the theory implemented as a criterion to distinguish principals from accessories, it focused on the analysis of co-perpetration and its constitutive elements[219].

The *Lubanga* Trial Chamber followed the path drawn by the Pre-Trial Chamber and took for granted its reading of art. 25(3) ICCSt. On the methodological level, the judges reaffirmed the importance of resorting to art. 31(1) VCLT to interpret the provision[220]. However, in lieu of engaging in a structural analysis of the article, the judges – with the exception of Judge Fulford– focused on the specific elements required to establish co-perpetration according to the doctrine adopted[221].

The *Lubanga* Appeals Chamber judgment is important for several reasons. At the outset, the Appeals Chamber recalled and confirmed the reasoning of the Pre-Trial and Trial Chambers, acknowledging that the control over the crime is a "convincing and adequate approach" for distinguishing principal and accessorial liability[222] and is capable of reflecting the peculiar structure of art. 25(3) ICCSt (thereby better suiting the provision)[223].

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[217] *Ibid.,* para. 330.

[218] *Ibid.,* paras. 331-332.

[219] *Ibid.,* paras. 342-367.

[220] *Lubanga* Judgment, para. 979.

[221] *Ibid.*, paras. 976-1018.

[222] *Lubanga* Appeals, paras. 469, 472-473.

Arguing from a methodological point of view, the Appeals Chamber expressed that it was "not proposing to apply a particular legal doctrine or theory as a source of law", but that it considered the German approach to be a source of inspiration in the interpretation of the provision[224]. According to the Chamber, it is *"*appropriate to seek guidance from approaches developed in other jurisdictions in order to reach a coherent and persuasive interpretation of the legal texts"[225]. Moreover, in the judges' view, the reliance on the normative approach does not violate the principle of legality under art. 22 ICCSt[226]. The Chamber further emphasised the importance of this approach for the purpose of distinguishing between principals and accessories, and stressed that the JCE doctrine also reflects the normative approach[227]. However, the primary difference between the control over the crime approach and the JCE doctrine is that the former relies on an objective element and the latter is rooted in a subjective component[228].

The aforementioned observations highlight, on one hand, the Appeals Chamber's willingness to address the theory's critics[229] and, on the other, a failure of the Chamber to provide in-depth analysis of the provision or discuss the theoretical foundations of the doctrine's implementation.

ii) The *Katanga* and *Ngudjolo* cases

In the *Katanga and Ngudjolo* confirmation of charges decision, Pre-Trial Chamber I[230] recalled the reasoning that, in the *Lubanga* case, led it to consider

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[223] *Ibid.,* para. 472-473.

[224] *Ibid*., para. 470.

[225] *Ibid*.

[226] *Ibid*. para. 471.

[227] *Ibid*.

[228] *Ibid*.

[229] *Ibid*., footnote n. 876.

[230] The judges composing the panel of Pre-Trial Chamber I are the same in both *Lubanga* and *Katanga and Ngudjolo* cases with the only exception of Judge Jorda. In the second case he was substituted by Judge Ušacka. Judge Kuenyehia and Judge Steiner instead were unvaried. Consequently, in the *Lubanga* case Pre-Trial Chamber I was composed by judges Jorda,

the control over the crime theory as the guiding approach to distinguish between principal and accessories to a crime, which is consequently adopted[231].

The Chamber confirmed that the control over the crime approach "synthesises both objective and subjective components"[232] and further underlined that both the subjective and objective approaches have been rejected by the modern legal doctrine[233]. In support of its views, the Chamber quoted only German scholars, and in particular Roxin's writings[234]. In cementing its adoption of the doctrine, the Chamber – as done in the *Lubanga* confirmation of charges decision[235] – claimed its incorporation in the Rome Statute framework[236], invoked its wide recognition in the legal doctrine and its application in a "number of legal systems"[237]. While this section of the decision appears to be mere repetition[238] of the *Lubanga* confirmation of charges decision (albeit with an increased amount of references), it contains a particularly innovative approach to art. 25(3)(a) ICCSt.

First, the decision transformed the concept of ontrol over the crime into a unique form of control over the organisation, based on the second variant of the Roxin theory (*Organisationsherrschaftslehre*)[239]. Second, the judges applied subparagraph (a) second and third alternatives in a joint manner, introducing "indirect co-perpetration" as a unique and separate title of liability[240]. These aspects will be analysed in further detail in the following paragraphs. In this section, I analyse the implementation and the use of the control over the crime as a criterion to distinguish between principal and accessories at the ICC.

Kuenyehia and Stainer, while in the *Katanga and Ngudjolo* case by judges Kuenyehia, Ušacka and Stainer.

[231] *Katanga and Ngudjolo* Confirmation of Charges, paras. 480-486.

[232] *Ibid.*, para. 484. See also *Lubanga* Confirmation of Charges, paras. 331-332.

[233] *Katanga and Ngudjolo* Confirmation of Charges, paras. 482-483.

[234] *Ibid.,* paras. 482-483; footnotes n. 642, 645-646 (besides C. Roxin, the judges referred to W. Joecks, K. Miebach, G. Stratenwerth, L. Kuhlen, and K. Kühl).

[235] *Lubanga* Confirmation of Charges, para. 330.

[236] *Katanga and Ngudjolo* Confirmation of Charges, paras. 500-501.

[237] *Ibid.*, para. 485.

[238] *Ibid.,* paras. 485; footnote n. 647.

[239] *Ibid.,* paras. 496-518.

[240] *Ibid.,* paras. 492-494.

During the trial phase of *Katanga and Ngudjolo* case, the proceedings were separated: *Ngudjolo* was acquitted[241] and *Katanga* was convicted for war crimes and crimes against humanity under art. 25(3)(d) ICCSt[242]. In the judgment on *Ngudjolo*'s acquittal, Trial Chamber II did not pay much attention to the interpretation of art. 25 ICCSt or to indirect co-perpetration. On the contrary, Judge Christine Van den Wyngaert took the opportunity to give her view on both aspects. Her concurring opinion will be examined in the next section.

During the trial phase of the *Katanga* proceeding, the Trial Chamber II majority highlighted the need to find a "guiding principle" to distinguish principals and accessories to a crime (despite its refusal to interpret art. 25(3) ICCSt in a hierarchical manner)[243]. It so decided because it believed that such a differentiation "inheres in the Statute", but that the provision is silent on the criterion to adopt[244]. The judges further established that principal liability is autonomous, while accessorial liability hinges on the latter and as a result is derivative in nature[245].

Before confirming the adoption of the criterion based on the control theory to differentiate the two categories, the majority rejected both the objective and the subjective approaches. In rejecting the objective approach, the majority – as already done in the previous case law – relied on its inconsistency with the wording of art. 25(3)(a), third alternative, ICCSt. Regarding the subjective approach, the majority found it to be incompatible with art. 30 ICCSt[246]. It claimed that because art. 30 ICCSt applies to both principals and accessories, it would be impossible to resort to the subjective element in order to distinguish

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[241] *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-3-tENG, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 18 December 2012, para. 197 ('*Ngudjolo* Trial Judgment').

[242] *Katanga* Trial Judgment, paras. 658-659.

[243] *Katanga* Trial Judgment, paras. 1386-1387. The judges are of the view that because there are no rules or articles requiring a link between the mode of liability and the penalty handed down, an accessory within the meaning of art. 25(3)(b)-(d) could potentially be punished more severely than a principal under art. 25(3)(a) ICCSt.

[244] *Ibid.,* paras. 1384, 1387-1388.

[245] *Ibid.,* paras. 1384-1385.

[246] *Ibid.,* paras. 1391-1392.

them[247]. It was the first time that the mental element provision was invoked for the purpose of rejecting the subjective approach.

Consequently the majority stated that "the "control over the crime" criterion appears the most consonant with article 25 of the Statute, taken as a whole, and best takes its surroundings context into account, in due consideration of the terms of article 30"[248]. According to this approach, principals to a crime are only the individuals who wield control over the commission of the crime and are "aware of the factual circumstances allowing them to exert such control". All others are mere accessories[249]. With particular regard to indirect perpetrators, the Chamber, recalling the Pre-Trial Chamber's confirmation of charges decision, stated that such actors determine the execution of the crime by having "the power to decide whether and how the crime will be committed"[250].

As will be seen during the course of the following analysis[251], the methodology used by the judges for the purpose of supporting the implementation of the theory under examination is quite innovative.

c) The minority approach

i) The *Lubanga* case

In his dissenting opinion attached to the *Lubanga* judgment, Judge Fulford paid particular attention to the Pre-Trial Chamber's approach to the provision.

In his opinion, he strongly objected to the Pre-Trial Chamber's reliance on the control over the crime theory as a criterion to differentiate between principals and accessories by highlighting the lack of support for the theory in the Rome Statute. He also criticised the theory because it would impose an unjustified and avoidable burden of proof on the Prosecution[252]. More specifically, as mentioned above, the

[247] *Ibid*., para. 1392.

[248] *Ibid.,* para. 1394.

[249] *Ibid.,* para. 1396.

[250] *Ibid.*, paras. 1396, 1405.

[251] See infra Section C., I.

[252] *Fulford* Separate Opinion, paras. 3, 6.

Judge rejected the Pre-Trial Chamber's reading of art. 25(3) ICCSt and the resulting need to rely on a criterion to distinguish between primary and secondary forms of liability. He further criticised the methodology used by his colleagues to apply – although not in its entirety[253] – the German theory. In doing so, he pointed out that the Pre-Trial Chamber relied on the minority views expressed in *Stakić* and *Gacumbitsi* cases before the ICTY, without seeking to establish whether the German theory could be considered a general principle of law according to art. 21(1)(c) ICCSt[254].

While Judge Fulford appears to have implicitly recognised the similarity between the wording of art. 25 ICCSt and § 25 StGB, he also underlined the need to scrutinise the compatibility of the national doctrine with the Rome Statute framework before its implementation[255]. In his view, the specific reasons justifying the control over the crime at the national level were non-existent at the ICC[256]. The legal theory was developed in a system – in this case, the German one – where the type of criminal punishment hinges on the mode of liability applied, thereby making it absolutely necessary to distinguish between perpetrators and participants[257].

With regard to the Pre-Trial Chamber's adoption of the control over the crime theory as a criterion to attribute principal responsibility to those who are far removed from the scene of the crime, Judge Fulford opined that the individuals indirectly involved in a crime can be prosecuted as co-perpetrators without necessarily relying on the German theory[258]. The entire reasoning of the English Judge is based on the plain reading of the provision that, in his view, is supported by art. 31(1) VCLT[259].

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[253] *Ibid.*, para. 10, footnote n. 20.

[254] *Ibid.*, para. 10.

[255] *Ibid*.

[256] *Ibid.,* para. 11.

[257] *Ibid*.

[258] *Ibid.,* para. 12.

[259] *Ibid.,* para. 13.

ii) The *Katanga* and *Ngudjolo* cases

In the judgment on *Ngudjolo*'s acquittal, Judge Van den Wyngaert took the opportunity to offer her view on several aspects: (i) the interpretation of art. 25 ICCSt and its structure; (ii) the concepts of "common plan" and "essential contribution" required by joint perpetration; (iii) the notion of commission through another person and *Organisationsherrschaft*; and, (iv) last but not least, indirect co-perpetration. Nevertheless, in the present study, I only cover the first, third and fourth aspects.

Judge Van den Wyngaert's concurring opinion – together with Judge Fulford's separate opinion attached to the *Lubanga* judgment – contains some of the most critical views regarding the dominant approach relating responsibility. The Belgian Judge highlighted that the direct importation of a specific national legal doctrine (as is the case of the control over the crime theory) can be problematic and may contrast with the "universalist mission" of the ICC[260]. In her view, the control over the crime theory is not "consistent with Article 22(2) ICCSt and the ordinary meaning of the Article 25(3)(a)"[261]. Furthermore, as mentioned previously, she denied the alleged hierarchical reading of art. 25(3)(a)-(d) ICCSt: premise of the control over the crime's adoption[262]. She recalled that the latter was adopted "ostensibly to provide a criterion to make a normative distinction between principals under Article 25(3)(a) and accessories under Article 25(3)(b)-(d) of the Statute"[263].

In her minority opinion, appended to the *Katanga* judgment, Judge Van den Wyngaert further affirmed the reasoning previously developed in the *Ngudjolo* case and rejected both the hierarchical reading of art. 25(3) ICCSt and the control theory[264]. The Judge emphasised the inconsistency of the new approach adopted by the majority due to the fact that the approach implements the control theory as

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[260] *Van den Wyngaert* Concurring Opinion, para. 5.

[261] *Ibid.,* para. 6.

[262] *Ibid.,* paras. 6, 66, 70.

[263] *Ibid.,* para. 22.

[264] *Van den Wyngaert* Minority Opinion, paras. 279-281.

a criterion to distinguish between principals and accessories, despite rejecting the provision's hierarchy[265]. Indeed, in her view "the notion of hierarchy is […] inherent in the control over the crime"[266]. According to the Judge, no reasons exist – and the majority does not highlight the advantages – to adopt such a complex theory for the purposes of making a distinction between principals and accessories when it would be preferable to rely on the "ordinary meaning of the language of article 25(3) of the Statute"[267].

d) The dominant approach v. the minority approach – contrasting approaches

On the basis of the case law analysed, it is possible to distinguish between two different attitudes to art. 25(3) ICCSt. The first is favorable to the control theory implementation and is followed by the majority; the second strongly contrasts the German model and is predicated by the minority.

The dominant approach is manifest in the *Lubanga* and *Katanga and Ngudjolo* confirmation of charges decisions, in the *Lubanga* and *Katanga* trial judgments, and finally in the *Lubanga* appeals judgment. In all of these decisions, the adoption of the control theory is grounded on the presumption that art. 25(3) ICCSt distinguishes between principals under subparagraph (a) and accessories under subparagraphs (b)-(d), as well as on the need to establish a criterion that allows judges to differentiate between these two categories. In fact, the judges adopted the German theory after rejecting – although on the basis of slightly different reasons – both the objective and subjective approaches. This theory progressively became the leading model in the interpretation of art. 25 ICCSt and the favoured criterion for distinguishing principal from accessories[268]. Furthermore, its implementation is based on a hierarchical reading of the provision, with the only exception being the *Katanga* judgment, where the

[265] *Ibid*., para. 281.

[266] *Ibid*.

[267] *Ibid*.

[268] See supra footnote n. 205.

majority adopted the control theory despite rejecting a hierarchical interpretation of the provision.

In contrast, the minority opinion[269] strongly rejected the control theory. The judges' rejection of the German theory is based on an overall denial of the premises on which the theory is based, included the hierarchical reading of art. 25(3) ICCSt. The dissenting judges further highlighted the theory's inconsistency with the Rome Statute and the ordinary meaning of the provision, criticising the approach used by their colleagues to legitimise its adoption[270].

As the control theory heavily relies on German literature and in particular on Roxin's writings, one of the crucial issues the judges have had to face since it was first introduced at the Court concerns its theoretical foundations. Nevertheless, this aspect will be examined later in this analysis[271].

e) The normative approach v. the naturalistic approach

In academic literature it has been stated that the perspective adopted by the majority is a reflection of the "normative approach" to liability, while the minority's view is the expression of a "naturalistic or empirical approach"[272]. Before engaging in an in-depth analysis of the two models developed through case law, it is important to decipher what is meant by the normative and naturalistic (or empirical) approaches[273].

According to the normative approach, the responsibility of the individuals involved in the commission of the crime is measured on the basis of "norms or

[269] This opinion is manifest in Judge Fulford's separate opinion attached to the *Lubanga* judgment and Judge Van den Wyngaert's two opinions – her minority opinion appended to the *Ngudjolo* judgment and her concurring opinion attached to the *Katanga* trial judgment.

[270] Fulford Separate Opinion, para. 3; Van den Wyngaert Concurring Opinion, para. 6.

[271] See infra Section C.

[272] OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, pp. 740-743; AMBOS K., *The First Judgment*, pp. 142-147.

[273] ARGIRO' F., *Le fattispecie tipiche*, pp. 203-209; VOGEL J., *How to Determine*, pp. 154-157; AMBOS K., *La parte general*, pp. 143 ff.

standards or principles which can serve as guidelines"[274]. As a result, an individual's degree of responsibility is not necessarily related to the direct and physical commission of the objective elements of the offence. Therefore, principals to a crime can also be those individuals who are far removed from the scene of the crime, such as the leaders of organisations or the heads of state, or, in other words, the so called "intellectual perpetrators" or "perpetrators behind the desk". This entails an expansion of the concept of perpetration[275]. Furthermore, from a normative perspective, principals to a crime are more blameworthy than accessories and, as a result, are punished more severely than the latter[276]. The normative approach is also referred to as a "top-down system"[277]. In order to assess individual responsibility in collective and systematic contexts, one must depart from those primarily responsible at the top level and gradually go down in the chain until one arrives to the "small fish"[278].

In contrast, the naturalistic model "takes as a starting point the natural world and the reality of cause and effect"[279]. The causal contribution to the crime plays a fundamental role in this model[280]. As a consequence, an individual can be principal to a crime only if he or she is physically present at the scene of the crime and carries out the objective elements of the offence. If not, he or she is simply an accessory or accomplice. Under this system, an indirect perpetrator – except in exceptional cases[281] – cannot be principal to a crime. The differentiation between principals and accessories is therefore based on an empirical analysis, which is why this approach can also be termed "naturalistic". Furthermore, in such a

[274] VOGEL J., *How to Determine*, p. 156.

[275] VAN SLIEDREGT E., *Individual Criminal Responsibility*, p. 73.

[276] *Ibid.*, p. 72 (the author states that "the 'mitigation principle' inheres to this approach").

[277] VOGEL J., *How to Determine*, p. 156.

[278] *Ibid.*, p. 155. OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, p. 741.

[279] OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, p. 740.

[280] VOGEL J., *How to Determine*, p. 154.

[281] The reference is to the doctrine of the 'innocent agency', in which the individual who uses an innocent agent as a tool to commit a crime is punished as if he or she directly committed the crime and considered principal to the crime. Of this view: VAN SLIEDREGT E., *Individual Criminal Responsibility*, p. 72.

system the distinction between different modes of liability represents a "descriptive or linguistic differentiation" and does not necessarily correspond with pre-established degrees of blameworthiness[282].

According to this model, in a systemic context or in a collective structure (criminal organisations, companies, etc.), in order to assess the responsibility of an individual involved in the commission of a crime, it is necessary to depart from the direct perpetrator (such as the soldier on the ground) and go all the way up the causal chain to the individual occupying the very highest level, who in most cases operates in the background[283]. Due to these reasons, this model is also referred to as a "bottom-up system"[284].

On the basis of these brief observations, the perspective adopted by the majority can undoubtedly be considered the result of a normative approach to liability. Furthermore, such an approach has been the most favoured at the ICC, as evidenced by the *Lubanga* appeals judgment in 2014[285].

In international criminal law, however, it is not the first time that normative criteria have been used to interpret the term "commission". The JCE doctrine, established in the *Tadić* case and destined, since its first appearance, to play a leading role in the *ad hoc* Tribunals' case law, is also a reflection of the normative approach[286].

The control theory – adopted by the majority of the judges – is grounded on the normative concept of "control" or "domination" over the act (*Tatherrschaft*), pursuant to which it is possible to establish whether an individual is a principal or accessory to the crime. The ICC judges explicitly refer to the normative distinction between the two categories. For instance, the Appeals Chamber in the *Lubanga* case highlighted that indirect perpetration "requires a normative

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[282] STEER C., *Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes*, Vol. 9, Springer, Berlin Heidelberg, 2017, pp. 91 ff.

[283] VOGEL J., *How to Determine*, p. 154.

[284] OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, p. 740; VOGEL J., *How to Determine*, p. 154.

[285] *Lubanga* Appeals Judgment, paras. 465, 466, 471.

[286] OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, pp. 741-742; VOGEL J., *How to Determine*, p. 155; *Lubanga* Appeals Judgment, para. 471.

assessment of the relationship between the person actually carrying out the incriminated conduct and the person in the background, as well as of the latter person's relationship to the crime"[287]. Additionally, in her concurring opinion, Judge Van den Wyngaert specified that the control theory has been implemented to provide a normative criterion for distinguishing between principals (art. 25(3)(a) ICCSt) and accessories (art. 25(3)(b)-(d) ICCSt) [288].

The doctrinal approach to the provision adopted by the majority represents a clear attempt to further the development of a *Dogmatik* at the ICC[289] and it is favoured in particular by scholars with a German background[290].

In contrast, the minority approach (manifested in the dissenting opinions of Judge Fulford and Judge Van den Wyngaert) is based on a plain and more positivist reading of the provision, thereby adopting a more pragmatic view. Under this approach, it is not necessary to invoke the control theory in order to interpret art. 25(3) ICCSt and it is important to focus on the natural world. As a consequence, compared to the majority perspective, the dissenting judges go in the opposite direction, favoring a pragmatic reading of the provision. Furthermore, it has been claimed that the reliance on the sophisticated German theory creates a risk of over theorisation, in particular where the theory is analysed in the abstract[291].

As highlighted in academic literature with particular regard to the *Lubanga* judgment, the disagreement between the majority and the minority view focuses first of all on a question of principle, that is to say: "how much legal theory International Criminal Court…can reasonably take or, framed from a more theory-friendly perspective, how much does it need"[292].

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[287] *Lubanga* Appeals Judgment, para. 465.

[288] *Van den Wyngaert* Concurring Opinion, para. 22.

[289] VAN SLIEDREGT E., *Perpetration and Participation*, p. 499. On the importance of the development of an international or universal *Dogmatik*, capable in particular of establishing the elements of individual criminal responsibility: FLETCHER G., *New Court*, pp. 179-190.

[290] AMBOS K., *Ius Puniendi*, pp. 72-73; JAIN N., *Perpetrators and Accessories*, pp. 118-119.

[291] VAN SLIEDREGT E., *International Criminal Law*, p. 7.

[292] AMBOS K., *The First Judgment*, p. 142. More recently AMBOS K., *Ius Puniendi*, p. 72.

f) Concluding observations

The control over the crime, so far, is the leading criterion used by the ICC to differentiate between principals and accessories. However, although the Appeals Chamber recently confirmed that the theory constitutes "a convincing and adequate approach"[293], its implementation at the ICC is still controversial and is far from being unanimously recognised. In fact, its adoption is based on the presumption that art. 25(3) ICCSt endorses a differentiated model of participation and is hierarchically structured[294], with the only exception being the *Katanga* judgment.

The majority of judges initially sought to legitimise the control theory implementation on the basis of its alleged inclusion in the Rome Statute framework and on its broad application, relevant for the purpose of art. 21(1)(c) ICCSt. Recently, the majority attributed to the theory a less important clarifying role[295]. It serves to help judges interpret the provision, in addition to giving effectiveness to the differentiation contained in art. 25(3) ICCSt[296].

Regardless of the reasons adopted in the case law to legitimise the application of the control theory (these will be examined in further detail later), what is certain is that the dominant approach adopts a normative or doctrinal approach to liability. It is along these lines that the German theory has been used for the further aim of interpreting and applying the modes of liability provided in art. 25(3)(a) ICCSt. In light of this recent methodological choice, it becomes even more difficult to dismiss the control theory solely on the basis of its theoretical

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[293] *Lubanga* Appeals Judgment, para. 469.

[294] Ambos doubts that the control theory is related to a hierarchical structure. AMBOS K., *Ius Puniendi*, at p. 71, footnote n. 75.

[295] It is worth nothing that the possibility of relying on the *Organisationsherrschaftslehre*, as a possible way of interpreting indirect perpetration through a responsible person within the meaning of art. 25(3)(a), third alternative, ICCSt, has been also recognised by critics of the control theory: YANEV L., KOOIJMANS T., *Divided Minds*, p. 806; VAN SLIEDREGT E., *Perpetration and Participation*, p. 507; VAN SLIEDREGT E., *Individual Criminal Responsibility,* p. 86.

[296] *Lubanga* Appeals Judgment, paras. 469-473; *Katanga* Trial Judgment, paras. 1394-1395.

foundations[297]. Consequently, despite the fact that one could criticise the decision to rely on a specific doctrine for being the result of a "cherry picking" approach[298], one must also focus on the merits of the theory.

In contrast, the minority rejects the premises over which the control theory, as a criterion to differentiate principal from accessories, is adopted. In doing so, the minority relies on the ordinary meaning of the terms and considers it equally superfluous to resort on a doctrine for interpreting the provision and, with the exception of Judge Van den Wyngaert, to differentiate between principals and accessories. This positivistic approach and the reliance on causation might be particularly problematic when considering the macro-dimension of the crimes under the jurisdiction of the Court and the multiple roles of the individuals involved in their commission. Furthermore, the plain reading of the provision's terms might lead to different and misleading interpretations based on the perspective adopted by a single interpreter and his or her distinct legal background.

It is interesting to note that the dissenting judges' reliance on the VCLT led to a different result than that of the majority (which also relied on the same instrument). However, as will be seen throughout the present study, in international criminal law it is not uncommon for the same element or concept to be interpreted differently by practitioners and scholars with distinct legal backgrounds.

B. The interpretation and application of art. 25(3)(a), third alternative, ICCSt

The commission of the crime through another person represents "the most typical manifestation of the concept of control over the crime"[299]. The most used variants of the Roxin's theory before the ICC are "*funktionelle Tatherrschaft*" and "*Organisationsherrschaft*", which are applied, respectively, to better understand

[297] SADAT L.N., JOLLY J.M., *International Criminal Courts*, p. 757.

[298] This term dates back to Judge Scalia and is used by Ohlin: OHLIN J., *Co-Perpetration*, p. 527.

[299] *Lubanga* Confirmation of Charges, para. 339.

co-perpetration and indirect perpetration. In most cases, the two variants are employed in a combined way resulting in "indirect co-perpetration" [300]. Nevertheless, this part of the analysis focuses on the interpretation and application of indirect perpetration along the lines of the *Organisationsherrschaftslehre*[301]. Indeed, the most common forms of indirect perpetration used in the international criminal law arena "are those in which the perpetrator behind the perpetrator commits the crime through another by means of "control over the organisation" (*Organisationsherrschaf*)"[302].

The implementation of this variant of the German theory at the ICC is probably the clearest expression of the normative approach to liability[303].

A deep analysis of the ICC case law applying the *Organisationsherrschaftslehre* is fundamental in order to truly understand the following: (i) how the German doctrine has been used for interpreting and applying art. 25(3)(a), third alternative, ICCSt; (ii) which are the constitutive elements resulting from its concrete implementation in the case law relying on it; and (iii) how the doctrine resulting from its application differs from the original version.

Before coming to the core of the ICC case law analysis, I briefly introduce the German doctrine (that will be examined comprehensively in the second part of this study) and focus on its first appearance in the international criminal law arena. While it has been stated that the first (although implicit) application of this variant of the control theory is traceable all the way back to the *Justice* Trial's judgment[304], I will limit my analysis to the case law of the *ad hoc* Tribunals[305].

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[300] The doctrine distinguishes between indirect perpetration and joint indirect perpetration. See infra Section B., IV, a).

[301] It is applied the most frequently to charge those who are in a leadership position (despite the fact that, to date, there has been no conviction at the ICC on this basis). MORÃO H., *The ICC Decisions.*

[302] *Katanga and Ngudjolo* Confirmation of Charges, para. 498.

[303] AMBOS K., *Treatise, Vol. I*, p. 87 (according to the author this model is the representation of the "so-called normativist or supervisionist model of attribution").

[304] AMBOS K., *Treatise, Vol. I*, p. 114, pp. 155-156; AMBOS K., *Command Responsibility*, p. 143.

I. General remarks on the *Organisationsherrschaftslehre*

The *Organisationsherrschaftslehre* has been developed in many of Roxin's writings. However, his very first work on the topic stands out. The work, known as "*Straftaten im Rahmen organisatorischer Machtapparate*", appeared for the first time in the *Goltdammer's Archiv für Strafrecht* in 1963[306].

The *Organisationsherrschaftslehre* is not an isolated theory, but it is "part of a broader theory on how to distinguish principals from accessories" (the *Tatherrrschaftslehre*)[307]. It was developed in order to deal with macro-criminal contexts and to find a criterion to attribute principal responsibility to the leaders (of organised structures of power) who do not physically commit the crime[308]. Nevertheless, the application of this variant of the theory has since been applied in other contexts, including those of an economic nature[309]. In fact, it has been used for the purpose of punishing top-level individuals such as chief executives of corporations for crimes committed by their employees with their knowledge and in furtherance of the business' operations[310].

According to this variant, the control over the act is exercised by means of the control over the organisation. In macro-criminal contexts, it is unimaginable that the man in the background dominates the single act of each direct perpetrator. The lack of control over the direct perpetrator is balanced by the control exercised over the organisation of which the agent is part[311]. Because of this theory it is possible on one hand to link the responsibility of the crimes committed by the

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[305] At the Special Tribunal for Lebanon (STL) indirect perpetration by means has been dismissed on the basis of its lack of recognition both in art. 3(1) STLSt and in customary law. AMBOS K., *Treatise, Vol. I,* pp. 142-143.

[306] ROXIN C., *Crimes as Part*, pp. 193-205.

[307] WERLE G., BURGHARDT B., *Claus Roxin*, p. 191.

[308] ROXIN C., *Crimes as Part*, pp. 193-194, p. 198.

[309] The BGH played a fundamental role in the extension of the doctrine's application beyond the contexts for which it was conceived. ROXIN C., *Täterschaft*, pp. 748-751; ROXIN C., *Zur neuesten*, p. 396; SCHÜNEMANN B., *StGB § 25 Täterschaft*, pp. 1916-1918.

[310] For a critical view in English: OLÁSOLO H., *The Criminal Responsibility*, p. 134. For further references: WEIGEND T., *Perpetration through an Organization*, p. 99, footnote n. 34.

[311] AMBOS K., *Command Responsibility*, p. 144.

direct perpetrators (or subordinates) to the leaders of the organisation, and, on the other, to consider them responsible as principals and not only as "mere" accessories.

The control theory in the form of the control over an organisation appears as a mechanism used to attribute principal responsibility not only to the persons carrying out the objective elements of the crime, but also to those who, despite their absence from the scene of the crime, control or mastermind the commission of the worst atrocities[312]. Furthermore, the *Organisationsherrschaftslehre* has been widely accepted in the prosecution and punishment of grave and large violations of human rights occurring in military dictatorships and armed conflicts, notably in Argentina, Germany, Chile, Colombia, Peru, but also in Brazil[313].

II. The appearance of the *Organisationsherrschaftslehre* in international criminal law: a fable and uncertain attempt (the *ad hoc* Tribunals)

Before the control theory was introduced at the ICC, it timidly appeared in a few cases at the *ad hoc* Tribunals. In particular, the theory was adopted for the purpose of interpreting the term "*commission*" under art. 7(1) ICTYSt in the *Stakić* trial judgment[314], was further proposed by the ICTY Prosecutor in the *Milutinović et al.* case,[315] and was also mentioned in Judge Schomburg's separate opinion appended to the *Gacumbitsi* appeals judgement[316]. Because this innovative approach first appeared in a context dominated by JCE, it was destined

[312] WERLE G., BURGHARDT, *Indirect Perpetration*, p. 88; MANACORDA S., MELONI C., *Indirect Perpetration*, p. 171; AMBOS K., *The Fujimori Judgment*, p. 158.

[313] AMBOS K., *Treatise, Vol. I*, pp. 114-118; MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 113-135.

[314] *Stakić* Trial Judgment, paras. 438-440.

[315] *Prosecutor v. Milan Milutinović et al.*, No. IT-05-87-PT, Prosecution's Notice of Filing Amended Joinder Indictment and Motion to Amend the Indictment with Annexes, 16 August 2005.

[316] *Prosecutor v. Sylvestre Gacumbitsi,* No. ICTR-2001-64-A, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006 ('*Schomburg* Separate Opinion').

to be cast aside. Nonetheless, it deserves a closer look in order to analyse the theory's progression at the international level.

a) ICTY: the *Stakić* case and the *Milutinović et al.* case

The *Stakić* trial judgment is very important because it constitutes the first explicit attempt to apply the control over the crime theory at the ICTY. The judges adopted the new approach in order to provide a valid alternative to JCE and to overcome some of the critical aspects that the consolidated theory presented.

The trial judges' reasoning is based on a broad interpretation of "*commission*" within the meaning of art. 7(1) ICTYSt. In their view, JCE was only one of the possible readings of the term and there were no reasons to exclude "co-perpetration" and "indirect perpetration" from its interpretation[317]. They also gave a definition of "co-perpetration" based on Roxin's joint functional control over the crime (*funktionelle Tatherrschaft*) [318]. While they did not define indirect perpetration, they often made reference to it and to the German legal theory throughout the judgment[319].

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[317] *Stakić* Trial Judgment, paras. 438-439. Some scholars puts forth that the Chamber implicitly included in the term "*commission*" the combined application of indirect perpetration and co-perpetration: OLÁSOLO H., CEPEDA A.P., *The Notion of Control*, p. 516.

[318] *Stakić* Trial Judgment, para. 440.

[319] As an example, footnote n. 942 to para. 439 refers to "*Mittelbare Täterschaft"* or "perpetrator behind the perpetrator"; para. 741 reads that "In the present case, however, the Accused is not alleged to be the direct perpetrator of the crimes. Rather, as the leading political figure in Prijedor municipality, he is charged as the perpetrator behind the direct perpetrator/actor and is considered the co-perpetrator of those crimes together with other persons with whom he co-perpetrated in many leading bodies of the Municipality. The Trial Chamber deliberately uses both terms "perpetrator" and "actor" because it is immaterial for the assessment of the intent of the indirect perpetrator whether or not the actor had such a discriminatory intent; the actor may be used as an innocent instrument or tool only"; para. 742 further asserts that "In cases of indirect perpetratorship, proof is required only of the general discriminatory intent of the indirect perpetrator in relation to the attack committed by the direct perpetrators/actors"; para. 818 states that "these crimes formed part of a prosecutorial campaign headed *inter alia* by Dr. Stakić as co-

According to the Chamber, co-perpetration was the mode of liability that best represented *Stakić*'s involvement in the crimes[320] perpetrated as part of the persecution campaign conducted in Prijedor Municipality in 1992, with the purpose of establishing an area dominated and controlled by the Serbs[321].

The judges set the elements that had to be fulfilled by the defendant to be punished under this form of responsibility. Concerning the objective elements, they required "an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal act"[322]. Instead, with regards to the subjective elements, in addition to the *mens rea* of the specific crimes charged[323], they required the defendant's awareness "of the substantial likelihood that punishable conduct would [have] occur[ed] as a consequence of coordinated co-operation based on the same degree of control over the execution of common acts" and of the essentiality of his role "for the achievement of the common goal"[324]. As a result, co-perpetrators occupy similar, if not the same, position and have the ability to frustrate the success or the carrying out of the common plan by refusing or failing to perform their part. This allows them to exercise joint control over the crime[325].

Despite the judges' awareness of the partial overlap between JCE and co-perpetration, they considered the latter more compatible with the most legal systems' understanding of "committing"[326]. This also would remove any doubts regarding the implicit reintroduction – through JCE – of crimes not foreseen in the Statute, such as membership in a criminal organisation[327].

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perpetrator behind the direct perpetrators*"*.

[320] *Stakić* was convicted for the crimes against humanity of extermination, persecutions incorporating murder and deportation and for murder as violation of the laws and customs of war (*Stakić* Trial Judgment, p. 253).

[321] *Stakić* Trial Judgment, para. 468.

[322] *Ibid.*

[323] *Ibid.*, para. 495.

[324] *Ibid.*, paras. 442, 496-498.

[325] *Ibid.*

[326] *Ibid.*, para. 441.

[327] *Ibid.*, para. 441, footnote n. 950.

Nevertheless, the judgment does not contain a deep analysis of the Roxin's theory and despite the recourse to co-perpetration[328], in substance it seems to implicitly refer to a form of responsibility resulting from the combination of indirect perpetration and co-perpetration[329]. This is particularly evident in the part of the decision that deals with the crime of persecution[330].

The lack of clarity regarding the mode of liability applied by the *Stakić* Trial Chamber also results in the Prosecutor's proposed amended joinder indictment against *Oidanić, Milutinović and Pavković*. This may be seen in the part of the request specifying that the suggested mode of liability – namely "indirect co-perpetration" – should be used to "describe the form of indirect co-perpetration based on joint control as applied in Stakić"[331]. Furthermore, in the Prosecutor's view, the combined mode of liability can be considered part of customary law or a general principle of law[332].

On 22 March 2006, the innovative approach adopted by the Trial Chamber in the *Stakić* case, later reproposed and argued by the Prosecutor, was overturned by two important decisions: (i) the Appeals Chamber invalidated the *Stakić* Trial Chamber's decision as to the form of responsibility adopted[333]; and (ii) the Trial Chamber rejected the Prosecutor's request to amend the indictment resorting to

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[328] *Ibid.*, paras. 468, 826.

[329] *Ibid.*, paras. 741-744, 818, 822. In the same vein: OLÁSOLO H., CEPEDA A.P., *The Notion of Control*, pp. 512-526. According to the authors, the Chamber – although implicitly – included and applied the mode of liability resulting from the combination of indirect perpetration and functional control in the definition of "*commission*" (p. 510, p. 516, p. 526). This idea was reaffirmed in: OLÁSOLO H., *Reflection on the Treatment*, pp. 147-161, p. 149.

[330] *Stakić* Trial Judgment, paras. 741, 818.

[331] *Prosecutor v. Milan Milutinović et al*., Prosecution's Response to General Ojdanic's Preliminary Motion Challenging Jurisdiction: Indirect Co-Perpetration, 21 October 2005, para. 3, footnote n. 2.

[332] *Ibid.*, paras. 2-10.

[333] *Prosecutor v. Milomir Stakić*, No. IT-92-24-A, Judgment, Appeals Chamber, 22 March 2006, paras. 62-63 ('*Stakić* Appeals Judgment').

indirect co-perpetration based on joint control[334].

In particular, the Appeals Chamber refused to apply the control over the crime approach due to its lack of support in customary international law and its lack of consistency with the settled jurisprudence of the Tribunal[335]. As a result, because the judges agreed that the doctrine could not form part of the applicable law at the ICTY, they did not scrutinise its merits. They restored the well-known JCE doctrine without reflecting sufficiently on the potential of the new approach. In support of their decision, the judges further recalled that the defendant was originally charged pursuant to JCE and it was against this form of responsibility that he had to defend himself at the trial stage[336]. It was for these reasons that the Appeals Chamber invalidated the Trial Chamber's judgment as to the mode of liability employed[337].

A similar reasoning is contained in the Trial Chamber's "Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration". In this case, the Trial Chamber refused to apply the mode of liability proposed by the Prosecutor because of its lack of recognition in customary law at the time the alleged crimes took place[338].

b) ICTR: Judge Schomburg's separate opinion appended to the *Gacumbitsi* appeals judgment

Another attempt to introduce the control over the crime theory at the *ad hoc* Tribunals emerges in Judge Schomburg's separate opinion appended to the *Gacumbitsi* appeals judgment[339], which was handed down just a few months after the Appeals Chamber overturned the Trial Chamber decision in the *Stakić* case

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[334] *Prosecutor v. Milan Milutinović et al.*, No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, Trial Chamber III, 22 March 2006, paras. 40-41 ('*Milutinović* Decision on Jurisdiction').

[335] *Stakić* Appeals Judgement, para. 62.

[336] *Ibid.*

[337] *Ibid*.

[338] *Milutinović* Decision on Jurisdiction, paras. 40-41.

[339] See supra footnote n. 310.

and the ICC's issuance of an arrest warrant against *Lubanga*[340].

In his dissenting opinion, the German Judge promoted the adoption of the approach previously employed in the *Stakić* trial judgment. This is not surprising because at that time he was the presiding Judge of the ICTY Chamber that convicted *Stakić*. In his dissenting opinion, Judge Schomburg reaffirmed that "the concept of joint criminal enterprise is not expressly included in the Statute and it is only one possibility to interpret "committing" in relation to the crimes under the ICTR and ICTY Statutes"[341].

He highlighted how the concepts of co-perpetration and indirect perpetration have a "wide acknowledgment": they were used both in national and international law to interpret the term "committing" and were further codified in the Rome Statute[342].

In providing a definition of co-perpetration and indirect perpetration, the Judge explicitly relied on the Roxin's control over the crime theory and referred to his academic compatriot as "the worldwide accepted legal scholar"[343].

With regard to co-perpetration, he referred to the Roxin's joint functional control over the crime. In particular, he stated that "co-perpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and shared control over the criminal conduct" and that "each co-perpetrator must make a contribution essential to the commission of the crime"[344].

With regard to indirect perpetration, the Judge referred to a notion based on the control exercised by the indirect perpetrator "over the act and the will of the direct and physical perpetrator"[345]. The latter becomes a mere tool in the hands of the

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[340] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-US-Corr, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, Pre-Trial Chamber I, 24 February 2006, para. 96.

[341] *Gacumbitsi* Separate Opinion, para. 16.

[342] *Ibid.*, paras. 16-21.

[343] *Ibid.*, paras. 17-18.

[344] *Ibid.*, para. 17. The wording is similar to the *Stakić* Trial Judgment, para. 468.

[345] *Ibid.*, para. 18.

first. The allusion to the *Organisationsherrschaftslehre* is particularly clear in the part of the decision where the Judge endorsed the possibility of committing the crimes "through an organised structure of power", in which the direct perpetrators can also be criminally responsible and are considered mere "cogs in the wheel", therefore easily replaceable[346].

The Judge further invoked the application of this variant of the German theory in situations related to organised crimes, white collar crimes and state induced criminality[347]. In particular, he invoked its application in the Argentinian *Junta* trial, the German *Politbüro* case and the *Lubanga* case[348]. According to the German Judge, this mode of liability meets the needs of international criminal law in an especially effective manner[349].

Because the Judge recognised that JCE and the concepts of co-perpetration and indirect perpetration overlap in several ways, he proposed that they be harmonised in such a way that would combine the objective and subjective components[350]. This approach, in his view, would have been more compatible with the interpretation of the term "*commission*" and with the *Tadić* Appeal judgment in the part where it expressly refers to co-perpetrators[351].

In the end, he concluded that indirect perpetration was the form of responsibility that best characterised *Gacumbitsi*'s conduct in the genocidal campaign against the Tutsi. Although in the Judge's findings the reference to the *Organisationsherrschaftslehre* is manifest, he further stated that "in some respect the Appellant was also acting as a co-perpetrator"[352].

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[346] *Ibid*., para. 20.

[347] *Ibid*., para. 19.

[348] *Ibid*. paras. 19-20.

[349] *Ibid.*, para. 21.

[350] *Ibid*., para. 22. At footnote n. 41 the Judge underlined that the main difference between joint criminal enterprise on one hand, and co-perpetration and indirect perpetration on the other, is that in the first the attribution of responsibility is based on a subjective criterion, while in the second on an objective one.

[351] *Ibid.*, para. 23.

[352] *Ibid.*, para. 28.

c) Concluding observations

None of the abovementioned cases allow for a particularly in-depth analysis of the German theory and its constitutive elements[353]. Furthermore, the different alternatives of the control over the crime theory are not used in a precise manner. For instance, in the *Stakić* trial judgment, it is unclear whether there is a link between the mode of responsibility that has been applied (co-perpetration) and the one on which the judges seem to have relied in order to attribute criminal responsibility to the defendant (indirect co-perpetration). This confusion resulted in somewhat vague and blurred indictments against *Oidanić, Milutinović and Pavković*[354]. The separate opinion in *Gacumbitsi* contains a deeper analysis of the constitutive elements of indirect perpetration, in which despite resorting to a concept of indirect perpetrationship similar to the *Organisationsherrschaft*, the judge invoked co-perpetration as a mode of responsibility "in some respect" applicable to the accused[355].

The attempts to introduce the control theory at the *ad hoc* Tribunals were unsuccessful. The time was probably not yet ripe for a move away from the traditional JCE doctrine. Indeed, the effort to eradicate JCE in favor of the German theory in a context where the former played the role of protagonist and was already a dominant part of the Tribunals' case law was destined to fail from the beginning. Its rejection was not based on an in-depth analysis of the merits and the constitutive elements of the German theory, but primarily on its lack of recognition in international customary law and in the consolidated jurisprudence of the Tribunals[356]. Contrary to the sources of law applicable to ICC proceedings, customary international law is at the top of the hierarchy of the sources of law applicable at the *ad hoc* Tribunals.

At this stage, the adoption of an alternative approach to JCE, namely the control theory, seems to be more a reflection of the deciding judge's German legal

[353] JAIN N., *The Control Theory*, p. 181.

[354] *Ibid.*, p. 180.

[355] *Gacumbitsi* Separate Opinion, para. 28.

[356] *Stakić* Appeals Judgment, para. 62.

background than the result of a deep and grounded doctrinal reflection.

III. The introduction of the *Organisationsherrschaftslehre* in the jurisprudence of the ICC

Since the initial jurisprudence of the ICC the *Organisationsherrschaftslehre* has been used by the majority as a criterion for the interpretation and application of art. 25(3)(a), third alternative, ICCSt, given that it addresses instances where a crime is committed through a responsible person. This variant of the control theory implicitly appeared for the first time in the warrant of arrest decision against *Lubanga*[357]. The aforementioned decision is particularly important because it set – although in a rudimentary way – the requisite elements of indirect perpetration and served as a model for the Prosecutor's request of a warrant of arrest against *Al Bashir*[358].

The most elaborated analysis of the implementation of the *Organisationsherrschaftslehre* at the ICC is contained in the *Katanga and Ngudjolo* confirmation of charges decision and in the *Katanga* trial judgment. For a long time, the former had served as a benchmark for subsequent ICC case law (e.g., the *Al Bashir* warrant of arrest and the confirmation of charges in the *Muthaura, Kenyatta and Ali* and *Ruto, Kosgey and Sang* cases). Nevertheless, the *Katanga* trial judgment played a fundamental role in the determination and elaboration of the doctrine's constitutive elements, in spite of the defendant's conviction under an alternative form of responsibility (art. 25(3)(d) ICCSt).

The control over the organisation theory, resulting from the implementation of the *Organisationsherrschaftslehre*, has been applied in many other cases before

[357] *Lubanga* Warrant of Arrest Decision, paras. 94-96.

[358] *Situation in Darfur, Sudan*, ICC-02/05-157-AnxA, Public Redacted Version of the Prosecutor's Application under Article 58, Office of the Prosecutor, 14 July 2008, paras. 248-249, footnote n. 309. The latter explicitly refers to the Pre-Trial Chamber's decision on the issuance of the warrant of arrest against *Lubanga* ('*Al-Bashir* Prosecutor's Application').

the ICC, however, sometimes only as a potential and alternative form of responsibility[359].

In the dominant opinion, indirect perpetration does not only represent one of the principal forms of commission within the meaning of subparagraph (a) – it also serves as the mode of liability that best reflects the responsibility of those in a leadership position, in most cases far removed from the crime scene. Furthermore, this variant of the German doctrine is considered very useful when dealing with macro-criminal contexts because it reflects the collective character of the crimes under the jurisdiction of the ICC. It also accurately depicts the responsibility of senior and civilian leaders for the crimes committed by the members of the organisations they control[360]. It further provides a criterion fitting adequately in the wording of the provision dealing with indirect perpetration through a responsible individual[361].

To conduct an in-depth analysis of the doctrine's constitutive elements and properly evaluate its advantages and disadvantages, one must study the most relevant decisions on the implementation of the German theory at the ICC. This analysis is particularly important also in order to delineate a definition of the theory resulting in the control over the organisation comparable with the original version, since it notably differs from it.

While indirect perpetration has in most cases been applied jointly with co-perpetration[362], I focus the analysis on the former and only refer to the latter when

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[359] This is manifest in particular in the recent practice of the multiple charging of the same facts under different titles of responsibility.

[360] MAUGERI A.M., *La Responsabilità del Leader*, pp. 347-348.

[361] VAN SLIEDREGT E., *Perpetration and Participation*, p. 507; YANEV L., KOOIJMANS T., *Divided Minds*, p. 806, footnote n. 96 (according to the authors the term "*regardless*" included in art. 25(3)(a), third alternative, ICCSt "creates room for employing different theories that can fill the gap" and one of the possible theories is the *Organisationsherrschaftslehre*).

[362] *Inter alia*: *Ongwen* Confirmation of Charges, paras. 38-41 (23 March 2016); *Blé Goudé* Confirmation of Charges, paras. 136-158 (11 dic 2014); *Gbagbo* Confirmation of Charges, para. 230-241 (12 june 2014); *Ntaganda* Confirmation of Charges, paras. 101-135 (9 june 2014); *Muthaura, Kenyatta and Ali* Confirmation of Charges, para. 428 (23 jan 2012); *Gaddafi et al.* Warrant of Arrest Decision, para. 69-71 (27 giugno 2011); *Ruto, Kosgey and Arap Sang* Confirmation of Charges, para. 349 (23 jan 2012); *Abu Garda* Confirmation of Charges, paras.

necessary. In the following paragraphs, I will examine the case law in a chronological order. However, the pertinent decisions regarding different phases of the same proceeding are analysed together, as in the *Katanga* case, representing the leading case on this mode of liability.

a) The *Lubanga* case

The *Lubanga* case offers the most detailed and developed analysis on the interpretation of co-perpetration or joint commission within the meaning of art. 25(3)(a) ICCSt. Following the confirmation of charges hearing, Pre-Trial Chamber I found substantial grounds to believe that *Lubanga* was responsible as a co-perpetrator for the war crimes of conscripting and enlisting children under the age of 15 years into the *Force Patriotique pour la Libération du Congo* (FPLC) and using them to participate in hostilities under art 8(2)(e)(vii) ICCSt[363]. The mode of liability used by the Pre-Trial Chamber to attribute criminal responsibility to *Lubanga* was subsequently affirmed at trial and later on appeal.

Nevertheless, the decision authorising the issuance of a warrant of arrest against *Lubanga* is particularly relevant for the present study because it refers, for the first time, to the main components of indirect perpetration[364].

The judges based their findings on the recognition of the following elements: (i) the existence of "a hierarchically organised armed group" (UPC/FPLC) and a "hierarchical relationship" between *Lubanga* and the other members of the group; (ii) *Lubanga*'s position (President of the UPC, founder and Commander in Chief of the FPLC, military wing of the UPC) and his *de facto* authority allowing him to have "the final say about the implementation of the policies/practices of the UPC/FPLC"; and (iii) *Lubanga*'s awareness of his unique role within the

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154, 157 (8 feb 2010); *Al Bashir* Warrant of Arrest Decision, para. 223 (4 march 2009); *Katanga and Ngudjolo* Confirmation of Charges, para. 508 (30 sept 2008); *Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, Decision on the Prosecutor's Application for *Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, 10 June 2008 ('*Bemba* Warrant of Arrest Decision'). In the latter, however, we assist to a still rudimentary application of the combined mode of liability.

[363] *Lubanga* Confirmation of Charges, pp. 156-157.

[364] *Lubanga* Warrant of Arrest Decision, para. 96.

group[365]. Although the Pre-Trial Chamber opted for co-perpetration over indirect perpetration, its decision is nonetheless remarkable as it constitutes the foundation upon which the Prosecutor based its application for an arrest warrant for the President of Sudan, *Omar Al-Bashir*[366]. It is also important because, although in a rudimentary way and without explicitly referring to the *Organisationsherrschaftslehre*, it established, for the very first time, the constitutive elements of indirect perpetration through a responsible person.

b) The *Bemba* case

The Pre-Trial Chamber's decision on the Prosecutor's application for a warrant of arrest against *Bemba* relied on indirect perpetration and on co-perpetration as two alternative modes of liability [367]. The judges found reasonable grounds to believe that *Bemba* – President of the Movement for the Liberation of Congo (MLC) and commander in Chief of its military wing – was responsible, jointly with another person or through other persons, of several crimes against humanity and war crimes perpetrated by his troops in the Central African Republic (CAR) between 25 October 2002 and 15 March 2003[368]. However, the Chamber set the elements of a combined form of co-perpetration[369] and indirect perpetration, anticipating some of the elements subsequently developed in the following case law on indirect co-perpetration[370].

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[365] *Ibid*., paras. 94-96.

[366] *Al-Bashir* Prosecutor's Application, paras. 248-249, footnote n. 309.

[367] *Bemba* Warrant of Arrest Decision, para. 84.

[368] *Ibid.*, paras. 72-84, p. 38.

[369] In the decision it is possible to identify the constitutive elements of co-perpetration, namely: a plurality of individuals, a common agreement between *Bemba* and *Patassé*, the essential contribution and *Bemba*'s awareness of both his role and of the ongoing situation. These elements were subsequently developed in the confirmation of charges decision. Nevertheless, following to the legal recharacterisation of *Bemba*'s responsibility, the Pre-Trial Chamber applied art. 28(a) ICCSt. This is the mode of liability that was used to convict the military commander on 21 March 2016.

[370] The reference is to the *Katanga and Ngudjolo* Confirmation of Charges Decision of 30 September 2008.

On the basis of *Bemba*'s position and in light of the role he played within the organisation, the Chamber found "reasonable grounds to believe that, as a result of his authority over his military organisation, *Bemba* had the means to exercise control over the crimes committed by MLC troops deployed in the CAR"[371]. The Chamber further stated that the suspect was aware of the consequences of his decisions, that his troops previously committed acts of violence and that, in the normal course of events, they would have perpetrated war crimes and crimes against humanity[372]. Furthermore, *Bemba* was aware of his influential leadership role and used it in different ways[373].

No explicit reference was made to the *Organisationsherrschaftslehre*. Nonetheless, the formulation adopted by the judges lead us think to its implicit application[374].

c) The *Al Bashir* case

Omar Al Bashir, the President of the Republic of Sudan, is the first sitting head of state to have a warrant issued for his arrest by the ICC. The Prosecutor's application against *Al Bashir* is particularly significant because it represents the first time that the ICC Prosecution based an arrest warrant request exclusively on indirect perpetration, formulating all the counts on this mode of liability[375].

The application states that *Al Bashir* did not commit the crimes physically or directly, but "through the members of the state apparatus, the army and the Militia/Janiaweed" [376]. Nevertheless, according to the Prosecutor, three requirements must be met in order to charge an accused as an indirect perpetrator under art. 25(3)(a), third alternative, ICCSt: "(a) First, the Prosecution must establish the existence of a relationship such that the indirect perpetrator may

[371] *Bemba* Warrant of Arrest Decision, para. 78.

[372] *Ibid.*, paras. 80, 82.

[373] *Ibid.*, para. 83.

[374] In this vein: AMBOS K., *Treatise on International Criminal Law, Vol. I: Foundations and General P*art, Oxford University Press, Oxford, 2013, p. 156.

[375] *Al-Bashir* Prosecutor's Application, paras. 39, 62 (counts 1-10), 244.

[376] *Ibid*., paras. 39, 244.

impose his dominant will over the direct perpetrator to ensure that the crime is committed. Where, as in this Application, the indirect perpetrator is alleged to have committed the crime through an organisation or group, that institution must be "hierarchically organised"; (b) Second, the indirect perpetrator must have sufficient authority within the organisation such that he has "the final say about the adoption and implementation" of the policies and practices at issue; (c) Third, the indirect perpetrator must be "aware of his unique role within the [organisation] and actively use it" in furtherance of the crimes charged"[377].

The reference to the *Lubanga* warrant of arrest decision is important[378] because it served as a guideline for the Prosecutor in the determination of the constitutive elements of indirect perpetration. The leading decision on this mode of liability (the *Katanga and Ngudjolo* confirmation of charges decision) had yet to be issued at that time[379].

The Prosecutor established reasonable grounds to believe that *Al Bashir* – President of Sudan, Head of the National Congress Party and Commander in Chief of the armed forces for the entire period relevant for the application – had absolute control over, and personally directed, the Sudanese state hierarchical apparatus and the Militia/Janjaweed[380].

According to the Prosecution, *Al Bashir*, in his capacity as President of Sudan, exercised *de jure* and *de facto* sovereign authority[381] and, as Commander in Chief of the Armed Forces, the police and all other military and security forces, incorporated the Militia/Janjaweed into the reserve forces, ensuring their cooperation and coordination[382]. Furthermore, in the Prosecutor's view, *Al Bashir* exercised authority over the Security Committees (i.e., fundamental entities

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[377] *Ibid.*, para. 248.

[378] *Ibid.*, footnotes n. 309, 311-313. The Prosecutor's Application refers in particular to paras. 94-96 of the decision authorising the issuance of a warrant of arrest against *Lubanga*.

[379] The Prosecutor's request (14 july 2008) precedes the *Katanga and Ngudjolo* confirmation of charges decision (30 September 2008), but the Pre-Trial Chamber's decision on the issuance of the warrant of arrest follows it.

[380] *Al-Bashir* Prosecutor's Application, paras. 40-41, 266, 314, 402.

[381] *Ibid*., paras. 40, 250.

[382] *Ibid*., paras. 252-253.

composed by the representatives of the Armed Forces, the Police, the NISS and the Militia/Janaweed)[383]. *Al Bashir*'s *de jure* authority was manifest due to the fact that he held a position at the pinnacle of the hierarchical structure[384]. His *de facto* authority arose from the complex system of reporting, he created in order to remain informed and to maintain the control over the implementation of his plan to defeat the rebellion and stay in power, destroying the Fur, Masalit and Zaghawa ethnic groups[385].

Regarding the subjective element required to be prosecuted and punished under indirect perpetration, the Prosecutor stated that *Al Bashir* was aware of his supreme authority over the hierarchical structure, coordinated and used the different components of the GoS, the Armed Forces and the Militia/Janjaweed to achieve his goals[386]. In addition to the control he exercised over the political, military and security components of the state's apparatus[387], the Sudanese President also controlled the justice and the communication systems, eliminating all internal dissent and concealing the atrocities committed[388].

On the basis of the evidence provided, the Prosecutor claimed that there were reasonable grounds to believe that *Al Bashir* was responsible under article 25(3)(a), third alternative, ICCSt for war crimes, crimes against humanity and genocide and that the three above-mentioned elements were fully satisfied.

On 4 March 2009, Pre-Trial Chamber I issued the decision on the Prosecutor's application for a warrant of arrest against the President of Sudan[389]. The Chamber, by majority[390], found that there were reasonable grounds to believe that *Al Bashir*

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[383] *Ibid.*, paras. 254-263.

[384] *Ibid*., paras. 251

[385] *Ibid*., paras. 7, 264-265.

[386] *Ibid*., para. 269.

[387] *Ibid*., para. 268.

[388] *Ibid.*, paras. 314-346.

[389] *Al Bashir* Warrant of Arrest Decision.

[390] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Separate and Partly Dissenting Opinion of Judge Anita Ušacka to the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 ('Ušacka's Separate and Partly Dissenting Opinion').

was responsible either as an indirect perpetrator or as an indirect co-perpetrator under art. 25(3)(a) ICCSt for war crimes and crimes against humanity, except genocide[391]. Nevertheless, judge Ušacka disagreed with the majority on two points: (1) she found that there were reasonable grounds to believe that *Al Bashir* was responsible for genocide; and, (2) she believed that the appropriate and unique mode of liability applicable in the specific case was indirect perpetration[392]. According to the dissenting judge, there was no evidence clearly demonstrating that the control was shared between other individuals in addition to *Al Bashir*[393].

The choice of the Pre-Trial Chamber to extend the form of responsibility to indirect co-perpetration might be read in light of the Chamber's articulated decision on the combined mode of liability contained in the *Katanga and Ngudjolo* confirmation of charges decision[394]. Indeed, the latter was issued during the time period between the Prosecutor's application and the present decision. However, with regard to the specific elements required by the modes of liability used, the Chamber limited itself by relying only on its previous case law (in particular, the *Lubanga* and *Katanga and Ngudjolo* confirmation of charges decisions)[395]. As a result, the two concepts were not developed further, but the reference to the *Organisationsherrschaftslehre* is explicit[396].

In the second decision on the Prosecution's application for a warrant of arrest against *Al Bashir*, the Pre-Trial Chamber found reasonable grounds to believe that the President of Sudan was responsible as an indirect perpetrator or as an indirect co-perpetrator under art. 25(3)(a) ICCSt for the charges of genocide under art. 6(a), 6(b), 6(c) ICCSt[397], but nothing new was added in point of responsibility.

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[391] *Al Bashir* Warrant of Arrest Decision, para. 223.

[392] Ušacka's Separate and Partly Dissenting Opinion, paras. 103-106.

[393] *Ibid*., para. 104.

[394] In both cases (*Al-Bashir* and *Katanga and Ngudjolo*) the competent Chamber is the Pre-Trial Chamber I with the same panel of judges.

[395] *Al Bashir* Warrant of Arrest Decision, paras. 211-213.

[396] *Ibid*., footnote n. 307.

[397] *Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 43.

d) The *Katanga* and *Ngudjolo* cases

The *Katanga* and *Ngudjolo* cases offer the most important decisions on the implementation of the *Organisationsherrschaftslehre* at the ICC. The *Katanga and Ngudjolo* confirmation of charges decision and the *Katanga* trial judgment served as a model for subsequent case law on art. 25(3)(a), third alternative, ICCSt. The former is the most extensive and articulated decision on this mode of liability. The latter contributed both to the clarification of its constitutive elements, previously set by the Pre-Trial Chamber and to the consolidation of the German theory at the ICC.

For a better comprehension of the two decisions, and in order to properly analyse the implementation of the German doctrine at the ICC, it appears appropriate to revisit the main phases of the proceedings.

i) The factual background and procedural history

The *Katanga* and *Ngudjolo* cases only deal with one specific episode: the attack on Bogoro village perpetrated on 24 February 2003, in the context of the protracted armed conflict afflicting the Ituri district of Democratic Republic of Congo (DRC) from July 2002 to the end of 2003.

At the moment of the attack, *Katanga* and *Ngudjolo* were the alleged leaders of two different military groups involved in the armed conflict, respectively the *Force de Résistance Patriotique en Ituri* "the FRPI" (mainly composed of Ngiti combatants) and the *Front des Nationalistes et Intégrationnistes* "the FNI" (predominantly composed of Lendu fighters). Pre-Trial Chamber I issued a warrant of arrest for both accused[398], because it found reasonable grounds to believe that during the Bogoro attack the two Congolese commanders jointly committed war crimes and crimes against humanity under article 25(3)(a) ICCSt,

[398] *Prosecutor v. Germain Katanga,* ICC-01/04-01/07-1, Urgent Warrant of Arrest for Germain Katanga, Pre-Trial Chamber I, 2 July 2007 ('*Katanga* Warrant of Arrest')*; Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/07-260-tENG, Warrant of Arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007 ('*Ngudjolo* Warrant of Arrest').

or, alternatively, ordered their commission within the meaning of art. 25(3)(b) ICCSt[399].

On 10 March 2008, the Chamber joined the two cases[400] and on 30 September 2008 delivered the confirmation of charges decision. For the purpose of the latter, the Prosecutor adopted the same position regarding responsibility, that he had put forth in previous applications for arrest warrants. In his view, the two commanders played an essential role in the implementation of the shared common plan to "wipe out" Bogoro and should have been held responsible for the crimes perpetrated during the attack as co-perpetrators, or, in alternative, for ordering under art. 25(3)(b) ICCSt[401].

Nevertheless, the Chamber – with a partly dissenting opinion of judge Ušacka[402] – found substantial grounds to believe that, during the village attack, *Katanga* and *Ngudjolo* jointly committed through other persons (indirect co-perpetration) several war crimes and crimes against humanity[403]. The only crime to be charged under the title of joint perpetration (or co-perpetration) was the war crime of using children under the age of fifteen years to participate actively in hostilities (art. 8(2)(b)(xxvi) ICCSt)[404]. The Pre-Trial Chamber's findings on responsibility changed considerably over the course of the proceedings.

On 21 November 2012, following the closing statements, Trial Chamber II unanimously decided to separate the cases and stated that the charges against *Ngudjolo* had to be severed[405]. In contrast, with regard to *Katanga*, the majority of

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[399] *Katanga* Warrant of Arrest, pp. 6-7; *Ngudjolo* Warrant of Arrest, pp. 6-7.

[400] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-257, Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJIOLO CHUI, Pre-Trial Chamber I, 8 March 2008.

[401] *Katanga and Ngudjolo* Confirmation of Charges, paras. 33-36.

[402] According to the partially dissenting opinion of Judge Ušacka there were not sufficient elements to establish substantial grounds to believe that *Katanga* and *Ngudjolo* committed, through other persons, sexual slavery and rape both as crimes against humanity and war crimes with the knowledge that they would have occurred in the ordinary course of events.

[403] *Katanga and Ngudjolo* Confirmation of Charges, paras. 575-576, 579-580.

[404] *Ibid.*, para. 574.

[405] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3319-tENG/FRA, Decision on the implementation of regulation 55 of the Regulations of the Court and

the Chamber (with the exception of the dissenting opinion of Judge Christine Van den Wyngaert) invoked Regulation 55 and recharacterised the mode of liability applied to the accused (changing it from indirect co-perpetration, under art. 25(3)(a) ICCSt, to art. 25(3)(d) ICCSt), while the mode of liability used to charge the crime under art. 8(2)(b)(xxvi) ICCSt remained the same (co-perpetration)[406].

On 18 December 2012, the Chamber acquitted *Ngudjolo* of all charges[407] and on 7 March 2014 it convicted *Katanga*[408].

The *Katanga* and *Ngudjolo* cases are quite complex and controversial for many procedural and substantial reasons, which cannot be discussed here[409]. Nevertheless, the development of the two cases provides a good example of the difficulties the Prosecutor and judges face when determining the specific mode of liability to attribute to individuals under art. 25(3) ICCSt. It is sufficient to consider that in the course of the entire proceedings, *Katanga* has been charged with all types of liability, with the exception of art. 25(3)(c) ICCSt[410].

In the following paragraphs I limit the analysis and focus only to the interpretation and application of art. 25(3)(a), third alternative, ICCSt in the main phases of the proceedings and on its substantial implications.

ii) The *Katanga and Ngudjolo* confirmation of charges decision

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severing the charges against the accused persons, Trial Chamber II, 21 November 2012, paras. 9, 59-63, p. 30.

[406] *Ibid.*, paras. 6-7, p. 29.

[407] *Ngudjolo* Trial Judgment, p. 197.

[408] *Katanga* Trial Judgment, pp. 658-659.

[409] For an overview: STAHN C., *Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment*, in *JICJ*, 12 (2014), pp. 809-834.

[410] In the arrest warrant decision, the Pre-Trial Chamber I established reasonable grounds to believe that *Katanga* was responsible – allegedly as a co-perpetrator – under article 25(3)(a) ICCSt, or, in the alternative under art. 25(3)(b) ICCSt; in the confirmation of charges decision the Chamber applied art. 25(3)(a), second and third alternative, ICCSt in a combined way resulting in the indirect co-perpetration, with the only exception of the crime provided by art. 8(2)(b)(xxvi) ICCSt charged under co-perpetration; but, following the implementation of Regulation 55, *Katanga* was convicted according to art. 25(3)(d) ICCSt.

The importance of the *Katanga and Ngudjolo* confirmation of charges decision with respect to criminal responsibility lies in particular in its broad interpretation of art. 25(3)(a) ICCSt and in its significant reliance on the Roxin's control theory in the form of the *Organisationsherrschaftslehre*.

First of all, as mentioned above, in this decision Pre-Trial Chamber I confirmed the control over the crime theory as the most appropriate approach for distinguishing between principals and accessories to a crime, therefore continuing along the path previously outlined in the *Lubanga* case[411].

Subsequently, in contrast to the Prosecutor's request[412], the Pre-Trial Chamber considered it more appropriate to resort to joint commission thorough another person[413]. The adoption of this mode of liability was possible thanks to the judges' "weak or inclusive" interpretation of the "or" connecting joint commission and commission through another person within the meaning of art. 25(3)(a) ICCSt[414]. Furthermore, in the Chamber's view, there were no reasons to limit the concept of joint commission of a crime solely to cases in which "the perpetrators execute a portion of the crime by exercising direct control over it"[415].

The combined form of responsibility allowed the judges to adequately attribute all crimes committed by the two military groups to both suspects[416]. The mutual attribution of the criminal conduct would have not been possible by relying only on indirect perpetration. This is due to the different ethnicity of the FRPI and

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[411] *Ibid.*, paras. 480-486. According to the Chamber, principals to a crime are only those who commit the offence in the modes listed in art. 25(3)(a) ICCSt. Being present at the crime scene and actually carrying out the offence's objective elements are not necessarily required elements for belonging to this category. Therefore the individuals far removed from the physical perpetration of the crimes must be considered as principal perpetrators when, despite their absence, they control or mastermind the commission of the offence by deciding "whether and how the offence will be committed".

[412] The Prosecutor charged *Katanga* and *Ngudjolo* with co-perpetration within the meaning of art. 25(3)(a), second alternative, or, in the alternative, under art. 25(3)(b) ICCSt.

[413] *Katanga and Ngudjolo* Confirmation of Charges, paras. 489, 491,

[414] *Ibid.*, para. 491.

[415] *Ibid.*, para. 492.

[416] *Ibid*.

FNI's combatants who were, in most cases, faithful only to their respective leaders[417]. The two accused therefore fully controlled only their troops.

With regard to indirect perpetration, the Chamber declared that "the cases most relevant in international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of "control over an organisation" ('*Organisationsherrchaft*')"[418]. Nevertheless, the inclusion of the possibility to commit a crime through another person by means of an organisation in art. 25(3)(a), third alternative, ICCSt further expanded the provision's interpretation.

The judges' implementation of the *Organisationsherrschaftslehre* in the present decision is based on several reasons[419]: (i) its incorporation in the framework of the ICCSt, in the part where it establishes the possibility of committing a crime through another responsible person[420]; (ii) its broad acceptance and application by national jurisdictions in order to attribute principal responsibility – rather than secondary responsibility – to the leaders[421]; (iii) its recognition in certain jurisprudence of the international tribunals[422]; and (iv) its

[417] *Ibid.*, para. 493.

[418] *Ibid.*, para. 498.

[419] *Ibid.*, paras. 500-510.

[420] *Ibid.*, paras. 499 (this variant of the doctrine "has been codified in article 25(3)(a)"), 501 ("it has been incorporated into the framework of the Statute"), 508 ("the Rome Statute expressly provides for this specific mode of liability").

[421] *Ibid.*, paras. 502, 504-505, footnote n. 666. In particular, footnote n. 666 lists a series of national cases applying the theory to charge those in a leadership position, but they all concern Germany or countries heavily influenced by German law and legal theories (such as Argentina, Perù, Chile and Spain). Paras. 504-505 refer to the Argentine Junta Trial and to the East German Border Trials; however, in the first of the two mentioned cases the National Supreme Court overturned the decision of the Federal Appeals Chamber.

[422] *Ibid.*, paras. 506, footnote n. 672. Para. 506 refers to the ICTY *Stakić* Judgment and footnote n. 672 to the separate opinion of Judge Schomburg appended to the ICTR *Gacumbitsi* Judgment. It is worth noting that the first was overturned on appeal because the theory was not part of customary international law and it was inconsistent with the previous case law.

endorsement in the *Bemba* case[423]. Nevertheless, as is explained later in this study, the original theory was not applied in its entirety.

The objective elements set by the Pre-Trial Chamber to be prosecuted and punished for the commission of the crime through another person, regardless of whether that other person is criminally responsible, are the following: (i) the exertion of control over the organisation; (ii) the existence of an organised and hierarchical apparatus of power; and (iii) the execution of the crimes secured by almost automatic compliance with the orders[424].

Concerning the first element, the Chamber highlighted the fundamental importance of the control or authority exercised by the leaders over the organisation. However, the judges did not develop or deeply analyse the concept of control that was mentioned several times in the decision. They briefly touched on it when specifying that the means through which a leader can exercise the control over the organisation "may include his capacity to hire, train, impose discipline, and provide resources to his subordinates" and stated that it can be also manifest in the subordinates' compliance with the superior's order[425]. The judges further claimed that "the leader must use his control over the apparatus to execute crimes"[426].

As to the second and third elements, the Chamber established that the organisation must have a hierarchical structure and a dimension capable of providing a sufficient number of replaceable subordinates, ready to "automatically" secure the execution of the superior's orders[427]. Thanks to this mechanism, those in the leadership position may be certain that their orders will be implemented because if one subordinate refuses to act, another will immediately take over and execute the order[428].

In such a system, the organisation becomes an independent identity, different and autonomous from the physical executors, who are considered anonymous,

[423] *Ibid.*, para. 509.

[424] *Ibid.*, paras. 495-518.

[425] *Ibid.*, para. 513.

[426] *Ibid.*, para. 514.

[427] *Ibid.*, paras. 512-516.

[428] *Ibid.*, para. 516.

interchangeable and fungible figures, or, in other words, "gears in a giant machine"[429]. Such a structure guarantees the automatic compliance with the leaders' orders and the consequent fulfilment of the third element required by this mode of liability, namely the execution of the crimes secured by the almost automatic compliance with the superior's orders[430]. Nonetheless, the Chamber further stated that the latter is not obtainable only through the replaceability of the organisation's members, but also "through intensive, strict, and violent training regimens" [431].

According to the Chamber, the main difference between indirect perpetration by means of an organisation and ordering under art. 25(3)(b) ICCSt is based on the concept of the control exercised by the superior over his or her subordinates, allowing him or her not only to order the commission of the crime, but also to decide "whether and how the crime would be committed"[432].

Once the Pre-Trial Chamber established the objective criteria to attribute criminal responsibility for the crimes committed by combatants of the FRPI and FNI to their respective leaders – *Katanga* and *Ngudjolo* – it resorted to co-perpetration in order to attribute all atrocities to both of them[433]. As a result, the Chamber required two additional elements: (i) the existence of a common plan between the suspects; and (ii) a coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime[434]. For this purpose, the judges heavily relied on the previous case law on co-perpetration[435].

With respect to the first element, the judges recalled that a common plan may exist also between individuals "that carry out the elements of the crime through another individual". The common plan must include the commission of a crime,

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[429] *Ibid.*, paras. 515-517.

[430] *Ibid.*, para. 517.

[431] *Ibid.*, para. 518.

[432] *Ibid.*, paras. 517-518.

[433] *Ibid.*, paras. 519-520.

[434] *Ibid.*, paras. 522-526.

[435] The Pre-Trial Chamber relied on the concept of co-perpetration as interpreted and applied in the *Lubanga* confirmation of charges decision.

but it does not need to be explicit[436]. As to the second requirement, the Chamber established that the essential contribution of each individual must result in the realisation of the crime's objective elements[437]. Moreover, the essential nature of one's contribution has to be evaluated both before and during the execution stage of the crime. Where the perpetrators are absent from the scene of the crime, it "may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes"[438].

With regards to the subjective elements, the Chamber ruled that the suspects must meet the following requirements: (i) they must carry out the subjective elements of the crimes charged[439]; (ii) they must be mutually aware of the common plan and mutually accept that the implementation of their common plan will result in the realisation of the crimes' objective elements; (iii) they must engage in their activities with the specific intent of accomplishing the crimes' objective elements or be aware that their realisation is the outcome of their acts[440]; and (iv) they must be aware of the factual circumstances enabling them to exercise joint control over the crime committed through another person. This can include factors such as the awareness of the essential role played in the implementation of the common plan and the ability to frustrate its fulfilment, the awareness of their organisations' character, their position within the organisation and the "factual circumstances enabling near automatic compliance with their order"[441].

iii) The *Ngudjolo* trial judgment

The *Ngudjolo* trial judgment does not elaborate deeply on joint commission through other persons adopted in the confirmation of charges decision. It focuses more on the factual circumstances surrounding the criminal activity than on a

[436] *Ibid.*, paras. 522-523.

[437] *Ibid.*, para. 524.

[438] *Ibid.*, paras. 525-526.

[439] *Ibid.*, paras. 527-532.

[440] *Ibid.*, para. 533, 536.

[441] *Ibid.*, paras. 534, 538-539.

comprehensive examination of legal issues. Regarding criminal responsibility, the Chamber analysed the facts on the basis of the implicit recognition of the constituent elements required by the mode of liability applied to the defendant only to show that he had to be acquitted, but it did not focus on their legal analysis.

The two modes of liability applied in a combined way by the Pre-Trial Chamber were considered separately in the judgment. With regards to indirect perpetration, the judges established that such a concept, as interpreted by the Pre-Trial Chamber, could not be applied to the defendant, regardless of how art. 25(3)(a) ICCSt is constructed, because it was not possible to establish, beyond a reasonable doubt, that *Ngudjolo* was the leader of the Lendus participating in the Bogoro attack[442].

Regarding joint commission, the judges further stated that *Ngudjolo*'s involvement in the implementation of the plan to "wipe out Bogoro" was strictly related to his alleged leading role within the military group[443]. However, because the defendant's leadership position could not be proved beyond a reasonable doubt, the Chamber established that it was unnecessary to further analyse the elements of this mode of liability[444]. Indeed, the "mainstay of the case" against *Ngudjolo* was the alleged position of authority wielded in his group[445].

In her concurring opinion appended to the judgment, Judge Van den Wyngaert strongly disagreed with the Pre-Trial Chamber's reliance on the concept of "*'Organisationsherrschaft'* as a constituent element of commission through another person under Article 25(3)(a)"[446]. Nevertheless, she did not discard the relevance of the concept of control over an organisation and attributed an evidentiary function to the latter, stating that "it could be an important evidentiary factor to demonstrate that the accused did in fact dominate the will of certain individuals who were part of his organisation"[447].

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[442] *Ngudjolo* Trial Judgment, para. 110.

[443] *Ibid.,* para. 111.

[444] *Ibid.,* paras. 111, 490-503.

[445] *Ibid.,* paras. 492, 496.

[446] *Van den Wyngaert* Concurring Opinion*,* paras. 7, 52, 55, 57.

[447] *Ibid.,* para. 55.

The Belgian judge further specified that "the level of discipline within an organisation and the accused's role in maintaining it are elements of proof and not legal criteria"[448]. From this perspective, the concept of control over the organisation is considered nothing more than an element of proof.

iv) The *Katanga* trial judgment

The *Katanga* judgment made a remarkable contribution to the interpretation of art. 25(3) ICCSt and to the consolidation of the control theory at the ICC. The judgment further specified and developed the constituent elements of indirect perpetration within the meaning of art. 25(3)(a) ICCSt set by the Pre-Trial Chamber, despite the *Katanga*'s conviction under art. 25(3)(d) ICCSt[449].

The Chamber's majority – as examined above – confirmed that the control over the crime approach is the best criterion to both differentiate principals from accessories and to interpret the modes of liability provided in subparagraph (a)[450]. In the judges' view, such a criterion is more compatible with the Rome Statute and more precisely with arts. 25 and 30 ICCSt[451].

With regards to the constituent elements of indirect perpetration, the judges established that in order to be prosecuted and punished under art. 25(3)(a), third alternative, ICCSt the individual must:

"- exert control over the crime whose material elements were brought about by one or more persons, which, in the case at bar, will be met where the commission of the crime is secured through the exertion of control over an apparatus of power;

- meet the mental elements prescribed by article 30 of the Statute and the mental elements specific to the crime at issue;

- be aware of the factual circumstances which allow the person to exert control

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[448] *Ibid*.

[449] *Katanga* Trial Judgment, paras. 1398-1416. It had not been possible to establish that in February 2003 the Ngiti constituted an organised apparatus of power and that *Katanga* controlled the commission of the crimes through the control exerted over the militia (para. 1420).

[450] *Ibid*., paras. 1394, 1396.

[451] *Ibid*., para. 1394.

over the crime"[452].

Concerning the first element, the Chamber distinguished between different – but "not mutually exclusive" – forms of control[453].

A typical form of control identified by the judges is the exertion of control over the will of the direct perpetrator, which, in most cases, is a non-responsible person or a person who can be "exonerated of some or all responsibility"[454]. In such cases, the physical executor becomes a tool in the hands of the indirect perpetrator, or in other words, an instrument for the commission of the offence[455].

Besides these traditional cases, the judges further referred to the leader's exertion of control over the act by means of an organised apparatus of power[456]. In their view, considering the collective nature of the crimes within the jurisdiction of the Court, there are no reasons for excluding the possibility to commit the crime through a considerable number of persons – and thus through an organisation – from the interpretation of art. 25(3)(a) ICCSt[457]. Consequently they claimed that the concept expressed by *Organisationsherrschaft* is adequate to reflect the most common scenarios characterising macro-criminal contexts and well fits in subparagraph (a)[458].

The judges, however, further specified that reading the provision along the lines of the control over the organisation theory only constitutes a possible "legal solution"[459]. Therefore, it does not have to be considered "as an essential constituent element of commission by an intermediary"[460]. According to the Chamber, the only indispensable criterion is "the indirect perpetrator's exertion, in or other some fashion, including from within an organisation, of control over the

[452] *Ibid*., paras. 1399, 1416.

[453] *Ibid*., para. 1401.

[454] *Ibid*., para. 1402.

[455] *Ibid*.

[456] *Ibid*., para. 1403. The Chamber also referred to cases in which an individual exerts control over an organisation that is composed of both responsible and non-responsible members (para. 1404).

[457] *Ibid*.

[458] *Ibid*., paras. 1404-1405.

[459] *Ibid*., para. 1406.

[460] *Ibid*.

crime committed through another person"[461]. This approach notably differs from the one adopted by the Pre-Trial Chamber. Indeed, according to the latter, the control over the organisation theory had been implemented in the legal framework of the Statute[462].

The Trial Chamber further focused on the nature and on the features of the organisation in order to establish when their leaders can be charged under indirect perpetration within the meaning of art. 25(3)(a), third alternative, ICCSt. It stated that the organisation must be composed by a number of interchangeable and replaceable individuals capable to guarantee the automatic execution of the superior's orders[463]. This structure guarantees the "functional automatism" of the organisation, that is the key securing the superior's control over the crime[464].

The organisation becomes a sort of independent and autonomous apparatus that exists independently from any personal relationship between its members and "somehow operates autonomously"[465]. Furthermore, in the judges' opinion, this structure would be consistent with "the very varied manifestations of modern-day group criminality wherever it arises"[466]. As a consequence it would not be limited to reflect only the bureaucratic apparatus of power used by Roxin as a model to develop his theory[467]. Nevertheless, at the same time, the judges recognised that "the modalities of control over persons can be increasingly varied and sophisticated and that it is particularly difficult to conceive of and grasp the nature and internal dynamics of contemporary organisations"[468].

Regarding the control exercised over the organisation, the judges established that the indirect perpetrator must "use at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of a crime, without leaving one of the subordinates at liberty to decide whether the

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[461] *Ibid*.

[462] *Katanga and Ngudjolo* Confirmation of Charges, paras. 499, 501, 508.

[463] *Katanga* Judgment, para. 1408.

[464] *Ibid*.

[465] *Ibid*., para. 1409.

[466] *Ibid*., para. 1410.

[467] *Ibid*.

[468] *Ibid*.

crime is to be executed"[469]. Moreover the control has to be effective, undisturbed and exercised at least over a part of the apparatus of power for the purpose to execute the crime[470].

According to the Chamber, it is only if an individual wields such a power over an apparatus of power that he or she can be considered an indirect perpetrator due to his or her "control over the course of events occasioning the crime" [471] and to the fact that his or her subordinates do not have the freedom of deciding whether the crime will be committed[472].

Last but not least, in order for an individual to be punished according to art. 25(3)(a) ICCSt, the Chamber required the fulfilment of the following subjective elements: (i) the mental elements prescribed by art. 30 ICCSt and by the provisions on specific crimes; and (ii) the awareness of the factual circumstances allowing the indirect perpetrator to exert control over the crime, such as the position held in the organisation and the essential characteristics ensuring its functional automatism[473].

In her minority opinion appended to the present judgment, Judge Van den Wyngaert added nothing to the interpretation of art. 25(3)(a), third alternative, ICCSt and repeated the idea previously expressed in her concurring opinion attached to the *Ngudjolo*'s acquittal[474].

e) The *Gaddafi* case

In the warrant of arrest decision against *Muammar Gaddafi* ("*Gaddafi"*), *Saif*

[469] *Ibid*., para. 1411.

[470] *Ibid*., para. 1412.

[471] *Ibid*.

[472] *Ibid*., para. 1411.

[473] *Ibid*., paras. 1413-1415.

[474] *Van den Wyngaert* Minority Opinion, paras. 277-281. She refused the indirect co-perpetration and the control theory relying on the plain reading of the provision. However, it is worth nothing that at the same time she claimed that "Even if it were conceded that the control theory was available when interpreting the Statute, in the Majority's interpretation it is harder than ever to see what advantage there is to using this theory to interpret article 25(3)" (para. 281).

Al-Islam Gaddafi ("*Saif Al-Islam*") *and Abdullah Al-Senussi* ("*Al-Senussi"*) the Pre-Trial Chamber found reasonable grounds to believe that *Gaddafi* and *Saif Al-Islam* were responsible as indirect co-perpetrators for the crimes against humanity of murder (art. 7(1)(a) ICCSt) and persecution (art. 7(1)(h) ICCSt) committed in Libya from 15 February 2011 until at least 28 February 2011, and that *Al-Senussi* was responsible as indirect perpetrator for the same crimes committed by the members of his forces from 15 February 2011 until at least 20 February 2011[475].

According to the Chamber, *Gaddafi* "had absolute, ultimate and unquestioned control over the Libyan state apparatus of power, including the Security Forces", while *Saif Al-Islam* – although not in an official capacity – exerted control over fundamental parts of the state apparatus, playing the role of the "*de facto* Prime Minister"[476].

The Libyan state apparatus was composed of several units, all subject to *Gaddafi*[477]. However, *Saif Al-Islam*, despite being subordinate to his father, had the power to issue orders to all the subordinates of *Gaddafi* and to activate the state machinery[478]. According to the judges, *Gaddafi* was in the position to give orders to each level of the hierarchical power structure he created and was in a position to be certain that such orders would have been implemented[479]. Furthermore, in the judges' view, the interchangeability of the different members of the units composing the Libyan Security Forces was secured by "strict and intensive military and paramilitary training"[480]. This feature guaranteed the

[475] *Gaddafi et al.* Warrant of Arrest Decision, para. 71. It is worth noting that according to the Prosecutor, *Gaddafi* was responsible as indirect perpetrator, while *Saif Al-Islam* and *Al-Senussi* as indirect co-perpetrators. In the Prosecutor's view *Gaddafi* had "absolute control over the Libyan State apparatus, included its Security Forces" and was in a position to issue "orders to his subordinates integrated within the State structure, including Saif Al-Islam Gaddafi and Abdullah Al-Senussi". The latter, in turn, controlled "relevant parts of the State apparatus and Security Forces" (the first as *de facto* Prime Minister, the second as head of the Military Intelligence) and in the Prosecutor's perspective had to be considered indirect co-perpetrators (paras. 66-67).

[476] *Ibid*., para. 72.

[477] *Ibid*., para. 73.

[478] *Ibid*.

[479] *Ibid*., para. 74.

[480] *Ibid*., para. 75.

automatic functioning of the different branches of the Libyan state apparatus and the compliance with *Gaddafi* and *Saif Al-Islam*'s orders[481].

The Chamber further stated that *Gaddafi* and *Saif Al-Islam* were part of an inner circle and shared the common plan "to deter and quell, by all means, the civilian demonstrations against the regime which began in Libya"[482]. They both played an essential role in the commission of the crimes and thus in the implementation of the plan[483]. In fact, they "had the power to frustrate the commission of the crime by not performing their tasks"[484].

Concerning the subjective aspects, the Chamber found reasonable grounds to believe that the suspects intended to realise the crimes[485]. They "knew that the crimes were part of a widespread and systematic attack against the civilian population pursuant to the state policy, set up by them, of targeting civilians perceived to be political dissidents"[486]. Moreover, they were aware of the position they played within the structure and of the power they exerted over it[487].

With regards to *Al-Senussi*, the Chamber found reasonable grounds to believe that, in spite of being subordinate to *Gaddafi*, he was the "highest authority of the armed forces" and all members were under his command[488]. The judges further claimed that *Al-Senussi* was in the position to order the commission of the crimes, that was ensured by the interchangeability of the direct agents[489]. He executed the orders given by *Gaddafi* whose purpose was to advance the implementation of the plan[490].

As to the subjective elements, the judges found reasonable grounds to believe that the suspect intended to execute the objective elements of the crimes, that he

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[481] *Ibid*.

[482] *Ibid*., para. 76.

[483] *Ibid*., paras. 78-80.

[484] *Ibid*., para. 78.

[485] *Ibid*., para. 81.

[486] *Ibid*.

[487] *Ibid*.

[488] *Ibid*., para. 85.

[489] *Ibid*., para. 86.

[490] *Ibid*., para. 87.

knew that "his conduct was part of a widespread and systematic attack against the civilian population pursuant to a state policy targeting civilians perceived to be political dissidents", and, last but not least, that he was aware of his position and power within the organisation[491].

It is interesting to note that the Chamber relied on indirect perpetration, despite recognising that *Al-Senussi* was subordinate to *Gaddafi* and to his orders[492]. For this purpose, the judges focused in particular on the power exercised by Al-Senussi over the armed forces and on his position of supremacy. From his position *Al-Senussi* could control the commission of the crimes of his subordinates and be sure that his orders were almost automatically followed[493]. In other words, *Al-Senussi* played an essential role and "had the power to determinate whether and how the crimes were committed"[494].

As to the constitutive elements required by the two modes of liability, the judges heavily relied on the *Katanga and Ngudjolo* and *Lubanga* confirmation of charges decisions, nothing adding to the previous case law[495]. Nevertheless, from a factual perspective, this decision is important because it applied indirect perpetration to *Al-Senussi* despite his subordination to *Gaddafi*'s orders. Moreover, although the Chamber mentioned in several parts of the decision, that *Gaddafi* exerted absolute power over the state apparatus and that *Saif Al-Islam* was subordinate to him[496], it relied on indirect co-perpetration, considering *Saif*

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[491] *Ibid*., para. 88.

[492] *Ibid*., para. 89.

[493] *Ibid*.

[494] *Ibid*. The Chamber in this case refers to the "essential" role played by *Al-Senussi* in the execution of the crimes. This feature is typical of co-perpetration.

[495] *Ibid*., para. 69.

[496] According to the Chamber *Gaddafi* "had absolute, ultimate and unquestioned control over the Lybian State apparatus of power, including the Security Forces" and was recognised as "the 'ultimate authority or ruler', 'political head of the government in Lybia' or 'ideological and spiritual head of the movement'" (para. 72). It further stated: "Saif Al-Islam Gaddafi is subordinated only to Muammar Gaddafi" (para. 73); "Within the various units of the State apparatus, especially the Security Forces, there are only vertical lines of communication and command, all of which ultimately lead to Muammar Gaddafi" (para. 75).

Al-Islam on his same level[497].

f) The *Muthaura, Kenyatta and Ali* case and the *Ruto, Kosgey and Sang* case (the *Kenya* cases)

The *Kenya* cases arose in the context of the post-election violence that afflicted several Kenyan Provinces in 2007-2008. None of the six accused in the two cases (*Muthaura, Kenyatta and Ali* case and *Ruto, Kosgey and Sang* case) was convicted. Pre-Trial Chamber II declined to confirm the charges against *Ali*[498] and *Kosgey*[499], Trial Chamber V granted the Prosecutor's request to withdraw the charges against *Muthaura*[500], the Prosecutor withdrew the charges against *Kenyatta*[501]; and, lastly, Trial Chamber V(A), by majority, declared vacant the charges against *Ruto* and *Sang*[502]. Nevertheless, the two decisions on the confirmation of charges are relevant for the purposes of the present study. They both rely on the concept of indirect co-perpetration to attribute the responsibility

[497] According to Olásolo, the judges' decision to apply indirect co-perpetration to *Gaddafi* and *Al-Islam* is justified by the large extension and magnitude of the criminal action and by the impossibility of directing it only by a single person: OLÁSOLO H., *Tratado de autoría y participación en derecho penal internacional*, Tirant lo Blanch, Valencia, 2013, pp. 234-235.

[498] *Muthaura, Kenyatta and Ali* Confirmation of Charges, paras. 427, 430.

[499] *Ruto, Kosgey and Sang* Confirmation of Charges, para. 293.

[500] *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta,* ICC-01/09-02/11-696, Decision on the withdrawal of the charges against Mr. Muthaura, Trial Chamber V (Judge Kuniko Ozaki partially dissenting), 18 March 2013. The Trial Chamber V granted the Prosecutor's request and terminated the proceedings against *Muthaura*: *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-687, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, Office of the Prosecutor, 11 March 2013.

[501] *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-983, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, Office of the Prosecutor, 5 December 2014. The Trial Chamber V(B) noted the Prosecutor's withdrawal of the charges against Kenyatta and terminated the proceedings: *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-1005, Decision on the withdrawal of the charges against Uhuru Muigai Kenyatta, 13 March 2015.

[502] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red-Corr, Decision on Defence Applications for Judgments of Acquittal, Trial Chamber V(A), by majority (Judge Herrera Carbuccia dissenting), 5 April 2016.

of crimes against humanity respectively to *Muthaura* and *Kenyatta* in the first case[503] and to *Ruto* in the second[504].

Before focusing more in-depth on indirect perpetration and on the single case's analysis, it is worth noting the objective and subjective elements required by Pre-Trial Chamber II to incur criminal liability as an indirect co-perpetrator: "(i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organisation; (iv) the organisation must consist of an organised and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s)"[505].

In the *Muthaura, Kenyatta and Ali* case, the Pre-Trial Chamber, by majority[506], found substantial grounds to believe that *Muthaura* and *Kenyatta* were responsible as indirect co-perpetrators for the crimes against humanity of murder, deportation or forcible transfer of population, rape, inhumane acts and persecution,

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[503] *Muthaura, Kenyatta and Ali* Confirmation of Charges, paras. 398, 428.

[504] *Ruto, Kosgey and Sang* Confirmation of Charges, para. 349. The Pre-Trial Chamber II found substantial grounds to believe that Sang was responsible of crimes against humanity under art. 25(3)(d) ICCSt (paras. 366-377).

[505] *Muthaura, Kenyatta and Ali* Confirmation of Charges, para. 297; *Ruto, Kosgey and Sang* Confirmation of Charges, para. 292.

[506] Judge Kaul in his "Dissenting Opinion by Judge Hans-Peter Kaul" appended to the *Muthaura, Kenyatta and Ali* Confirmation of Charges reaffirmed that, in his view, the Court lacked jurisdiction *ratione materiae* because the crimes charged did not constitute crimes against humanity under the Rome Statute. According to the German Judge the Mungiki did not constitute an "organisation" within the meaning of art. 7(2)(a) ICCSt (paras. 14-19) ('*Kaul* Dissenting Opinion Kenya 1').

committed between 24 and 28 January 2008 in or around Nakuru and Naivasha[507]. According to the judges, the two suspects shared a common plan to commit the aforementioned crimes in the two localities[508] and engaged in essential and coordinated contributions resulting in the implementation of the plan[509]. They further stated that the essential contribution of the individual who commits the crime through another person "may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes", and that in order to be essential, the contribution does not need to be performed at the execution stage of the crime[510].

Concerning the elements more closely related to indirect perpetration by means of an organised apparatus, the Chamber recalled its previous findings on the concept of "organisation" as developed in the section of the decision dealing with the contextual elements of crimes against humanity[511]. In the judges' view, the Mungiki constituted a hierarchically and territorially structured organisation "capable of carrying out complex operations without depending on the will of the individual members"[512]. In contrast, judge Kaul referred to the Mungiki as a violent criminal gang, somewhat structured, operating in a small area, having a limited influence and relying on external funding[513].

Moreover, according to the majority, a series of mechanisms secured the compliance with the rules of the organisation and the leaders' orders: the oath of loyalty to the group and to its rules, strengthened by the threat of death if violated, the initiation ceremonies and the establishment of a sort of internal judicial system

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[507] *Muthaura, Kenyatta and Ali* Confirmation of Charges, para. 428. The Pre-Trial Chamber II declined to confirm the charges against *Ali* (para. 430).

[508] *Ibid*., paras. 399-400.

[509] *Ibid*., paras. 401-406.

[510] *Ibid*., para. 402.

[511] *Ibid*., para. 408 recalls paras. 191-223.

[512] *Ibid*., para. 204.

[513] *Kaul* Dissenting Opinion Kenya 1, paras. 17-19. The dissenting Judge's considerations concern the concept of "organisation" according to art. 7(2)(a) ICCSt. However, his findings are also relevant in order to object the fulfilment of one of the constituent elements of the control over the organisation theory, that is to say the existence of an organised and hierarchical apparatus of power.

in order to enforce the organisation's rules[514].

According to the Chamber, at the relevant time, *Muthaura* and *Kenyatta* wielded control over the organisation and directed the commission of the crimes by having the power to decide whether and how the direct perpetrators would commit the offences[515]. However, the suspects did not rely on a single individual's action, but on the functioning of the organisation as an autonomous identity[516]. In fact, in such a system, the members of the Mungiki were considered replaceable, anonymous and fungible figures[517]. As a consequence, the commission of the crimes was secured by the use of the "pre-existing hierarchical and organized structure" that safeguarded the plan's implementation[518].

Subsequently, the Chamber focused on the subjective elements required by the mode of liability applied. First of all, in its view, the suspects' conduct fulfilled the subjective elements of the crimes charged[519]. This finding is based, *inter alia*, on: (i) the *Muthaura* and *Kenyatta*'s agreement stipulated with Maina Njenga (the Mungiki's top leader) for the purpose of using the Mungiki to attack Nakuru and Naivasha; (ii) the role they played in the direction of the Mungiki's commission of the crimes; (iii) the indications they gave to several mid-level perpetrators in order to ensure the implementation of the plan; (iv) the institutional support and the contributed funds provided respectively by *Muthaura* and *Kenyatta* for the commission of the crimes[520].

The Chamber further established that, since the evidence showed that the crimes were perpetrated with the required mental element and were part of a shared common plan, it was not necessary to analyse whether the suspects "were

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[514] *Muthaura, Kenyatta and Ali* Confirmation of Charges, paras. 207-213.

[515] *Ibid.*, paras. 408-409, 341, 375-397.

[516] *Ibid.*, para. 409.

[517] *Ibid.*, paras. 204, 409. The Chamber claims that "the evidence demonstrates that when a number of Mungiki members who were mobilized in Thika left the group before arriving in Naivasha, the execution of the common plan was not frustrated as they were promptly replaced" (para. 409).

[518] *Ibid.*, para 409.

[519] *Ibid.*, para. 412.

[520] *Ibid.*, paras. 413-417.

mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crime"[521].

Lastly, the judges found that *Muthaura* and *Kenyatta* were aware of the essential nature of their contributions and of their capability to frustrate the commission of the plan "by refusing to activate the mechanisms that led to the commission of the crimes"[522]. While this analysis focuses more on the constitutive elements of co-perpetration, one can see that the judges implicitly inferred the suspects' awareness of the factual circumstances enabling them to joint control the commission of the crime through another person.

In the second case, the majority of the Pre-Trial Chamber[523] found that there were substantial grounds to believe that *Ruto* was responsible as indirect co-perpetrator for the crimes against humanity of murder, deportation or forcible transfer of population and persecution committed in different localities between 30 December 2007 and 16 January 2008[524].

In particular, the judges claimed that, on the basis of the evidence, it was possible to establish that *Ruto*: (i) was part of a common plan with other individuals of the organisation (the "Network")[525]; (ii) carried out an essential contribution for the implementation of the common plan[526]; (iii) had control over the "Network", that constituted "an organised and hierarchical structure of

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[521] *Ibid*. para. 418.

[522] *Ibid.*, para. 419.

[523] Judge Kaul in his "Dissenting Opinion by Judge Hans-Peter Kaul" appended to the *Ruto, Kosgey and Sang* Confirmation of Charges reaffirmed that, in his view, the Court lacked jurisdiction *ratione materiae* because the crimes charged did not constitute crimes against humanity under the Rome Statute. According to the German Judge the "Network" did not constitute an "organisation" within the meaning of art. 7(2)(a) ICCSt. (paras. 8-13) ('*Kaul* Dissenting Opinion Kenya 2').

[524] *Ruto, Kosgey and Sang* Confirmation of Charges, para. 349.

[525] *Ibid.*, paras. 301-304.

[526] *Ibid.*, paras. 305-312. Also in this case the Pre-Trial Chamber recalled that: "where the persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes", furthermore the contribution to be essential does not need to be performed at the execution stage of the crime (para. 306).

power"[527]; (iv) had a position of dominance enabling the almost automatic compliance with his orders[528]; (v) fulfilled the subjective elements of the crimes against humanity[529]; (vi) was aware and accepted "that implementing the common plan would [have] result[ed] in the realisation or fulfillment of the material elements of the crime"; and, last but not least, (vii) was aware of the factual circumstances that allowed him to jointly exert control over the organisation[530].

With particular regard to the constituent elements of indirect perpetration by means of an organisation, in the majority's view, the "Network" was an organisation that had a "hierarchical structure and apparatus of power"[531]. In contrast, judge Kaul uphold that it was "essentially an amorphous alliance of coordinating members of a tribe with a predisposition towards violence with a fluctuating membership which existed temporarily" for the purpose of assisting and supporting a specific ethnic community during the elections[532].

The majority did not spend too much time on this concept in the part of the decision on individual criminal responsibility. In fact, the judges pointed to the analysis regarding the organisation made in Section VI(C)(i), dealing with the contextual elements of crimes against humanity, along the lines of the *Muthaura, Kenyatta and Ali* case[533]. In that part of the decision, they established that the "Network" was hierarchically structured and that *Ruto* was the appointed leader "in charge of securing the establishment and efficient functioning of the Network as well as the pursuit of its criminal purposes"[534]. They inferred *Ruto*'s control

[527] *Ibid.*, para. 315.

[528] *Ibid*., paras. 314-317, 327-332. On the mechanisms activated by the suspect to secure the automatic compliance with his orders see in particular paras. 318-326.

[529] *Ibid*., paras. 338-347.

[530] *Ibid.*, para. 348.

[531] *Ibid.*, para. 315.

[532] *Kaul* Dissenting Opinion Kenya 2, para. 12. The dissenting Judge's considerations concern the concept of 'organisation' according to art. 7(2)(a) ICCSt. However, his findings are relevant also in order to object the fulfilment of one of the constituent elements of the control over the organisation theory, that is to say the existence of an organised and hierarchical apparatus of power.

[533] *Ruto, Kosgey and Sang* Confirmation of Charges, paras. 315.

[534] *Ibid.*, para. 197.

over the organisation not only from his position and dominant role within the "Network", but also from the implementation of two strategic mechanisms[535]. The first concerned a payment system established by the suspect to pay the members of the organisation[536]. The second consisted of a punishment system used against those who did not comply with the orders[537].

The judges further highlighted *Ruto*'s power to "appoint commanders and military commanders assigning them to specific areas and locations respectively", to give "orders to the direct perpetrators" and to decide "where and how the weapons he distributed*"* had to be employed[538]. In the judges' view, the two-fold mechanisms, jointly with the suspect's position within the "Network", guaranteed the almost automatic compliance with *Ruto*'s orders, that resulted in the commission of the crimes[539].

The reference to the automatic compliance with the orders is employed to satisfy two requirements of indirect co-perpetration[540]. On one hand, it is used as a parameter to establish whether the indirect co-perpetrator's contribution is essential for the purpose of the plan's implementation[541]. On the other hand, it is a specific constitutive objective element required by the Pre-Trial Chamber to establish indirect perpetration by means of an organisation ("the execution of the crime must be secured by almost automatic compliance with the orders issued by the suspect")[542]. Unlike the *Muthaura, Kenyatta and Ali* confirmation of charges decision, in this decision there is no reference to the interchangeability or fungibility of the direct perpetrators.

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[535] *Ibid.*, paras. 316-317, 327, 330-331.

[536] *Ibid*., para. 320-323.

[537] *Ibid*., para. 324-326.

[538] *Ibid.*, para. 328.

[539] *Ibid.*, paras. 316-317.

[540] The two elements are: "the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime" and "the execution of the crime must be secured by almost automatic compliance with the orders issued by the suspect".

[541] *Ibid.*, paras. 306, 308.

[542] *Ibid.*, paras. 292, 313-314, 316-317, 328.

The Pre-Trial Chamber's reasoning pertaining to the subjective elements is similar to the one presented in the other case. It must therefore not be analysed.

IV. Art. 25(3) ICCSt in light of the *Organisationsherrschaftslehre* implementation

a) The application of the control over the organisation theory: indirect co-perpetration and joint indirect perpetration

Before focusing on the definition of indirect perpetration based on control over the organisation, it is important to concentrate on the concept's concrete application because it would be helpful to better understand the contents of its constitutive elements.

In most cases before the ICC, indirect perpetration by means of an organisation is applied jointly with co-perpetration in the form of indirect co-perpetration. The combined mode of liability has become the "established jurisprudence of the Court"[543]. Thus far, it is the mode of liability that is most frequently applied in order to attribute criminal responsibility to those in a leadership position for crimes committed by their organisations or subordinates[544]. This concept was developed in the *Katanga and Ngudjolo* confirmation of charges decision[545] to attribute to both *Katanga* and *Ngudjolo* criminal responsibility for crimes committed by the members of the two organisations over which they exercised their control: respectively "the FRPI" (mainly composed by Ngitis) and "the FNI" (predominantly composed by Lendus). It is important to remind that in most cases the combatants of the two military groups – because of their ethnicity – accepted only their own leader's orders. As a consequence the suspects wielded control only on the members of the organisation they allegedly headed. Thanks to indirect co-perpetration it has been possible to face this peculiar situation and mutually ascribe the crimes committed by the members of each military group to both

[543] *Gbagbo* Confirmation of Charges, para. 230.

[544] See supra footnote n. 362.

[545] It previously appeared at the ICTY in the *Stakić* Trial Judgment, para. 741.

suspects: a sort of "cross-liability"[546].

The Pre-Trial Chamber grounded its reasoning on the peculiar meaning attributed to the connective "or" included in the formulation of art. 25(3)(a) ICCSt between the second and third alternative. In the judges' view, the word "or" is an "inclusive disjunction", and therefore joint commission through other persons constitutes a "mode of liability in 'accordance with the Statute'"[547].

In contrast, in *Katanga*, the accused favoured a different reading of the connective and stated that it "means in plain language 'either one or the other, but not both', and not 'either one or the other, and possibly both'"[548].

Judge Van den Wyngaert further claimed that indirect co-perpetration, as adopted by her colleagues to face the specific situation, constitutes a new mode of liability, a "fourth alternative" to the ones provided in art. 25(3)(a) ICCSt, and "a radical expansion" of the provision[549]. In the judge's view, the Pre-Trial Chamber went far beyond the mere combination of the two modes of liability and violates the legality principle[550]. However, it is worth noting that the judge appears to have accepted the possibility of combining the second and third alternatives of art. 25(3)(a) ICCSt in the case of the junta model[551].

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[546] OHLIN J.D., VAN SLIEDREGT E., WEIGEND T., *Assessing the Control-Theory*, p. 735; *Katanga and Ngudjolo* Confirmation of Charges, paras. 492-493.

[547] *Katanga and Ngudjolo* Confirmation of Charges, para. 491.

[548] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1578-Corr, Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, 30 October 2009, para. 15.

[549] *Van Den Wyngaert* Concurring Opinion, paras. 59, 61.

[550] *Ibid*., paras. 63-64. For a dubitative and critical view on joint indirect perpetration: MANACORDA S., MELONI C., *Indirect Perpetration*, p. 175 (the authors, where referring to the concept of 'commission', wonder "whether indirect co-perpetration overly broadens the parameters of this notion").

[551] *Van Den Wyngaert* Concurring Opinion, para. 62. Nevertheless, in her partly dissenting opinion appended to the *Blé Goudé* Confirmation of Charges Decision, the Belgian Judge claimed that "this notion [of indirect co-perpetration] is incompatible with article 25(3)(a) of the Statute". *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-186-Anx, Partly Dissenting Opinion of Judge Christine Van den Wyngaert, 11 December 2014, footnote n. 3. It is interesting to note that in the specific case the Chamber applied indirect perpetration in the form of the Junta model.

Despite Pre-Trial Chamber I's referral to a combination of the two modes of liability[552], there are different views on the nature of this form of responsibility. On one hand, there are those who, in accordance with the Pre-Trial Chamber, believe that this is simply a combination of two modes of liability[553], and, on the other, there are those who believe that this is a new form of participation in a crime[554] or "a fourth manifestation of the notion of control over the crime"[555].

The application of indirect co-perpetration is not exclusive to the *Katanga and Ngudjolo* confirmation of charges decision[556] – it has been used also to reflect other scenarios.

In the *Al Bashir* case, the majority of the judges invoked indirect co-perpetration – as an alternative to indirect perpetration – to characterise the involvement of the President of Sudan and other high-ranking Sudanese political and military leaders gravitating around him during the commission of the crimes[557]. Indirect co-perpetration has been used to mirror a situation where "some or all of the co-perpetrators carry out their respective essential contributions to the common plan through another person"[558]. In this kind of situation, several individuals, constituting a collective entity (such as, for example, a collegial organ, or, as it has been referred to in case law, a "Network"[559] or an "inner circle" [560]) and sharing a common plan, jointly control the physical perpetrators through which they commit the crimes[561].

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[552] *Katanga and Ngudjolo* Confirmation of Charges, para. 492.

[553] AMBOS K., *Article 25*, p. 997; AMBOS K., *Treatise, Vol.*, p. 157; WEIGEND T., *Problems of Attribution*, p. 260 (according to the author "in German understanding, indirect co-perpetration is not a novel creation but simply a sub-category of joint perpetration"); WEIGEND T., *Perpetration through an Organization*, p. 110. The constituent elements of this mode of liability result in the sum of the elements required by co-perpetration and indirect perpetration. This consideration would be in favour of the combined nature of this mode of liability.

[554] *Van den Wyngaert* Concurring Opinion, paras. 59, 61.

[555] OLÁSOLO H., *Joint Criminal Enterprise*), p. 268.

[556] Following *Ngudjolo*'s acquittal, the trial judgment did not further develop this mode of liability.

[557] *Al Bashir* Warrant of Arrest Decision, paras. 214-223.

[558] *Ibid.*, para. 213. According to Ambos it is "questionable if this combined mode of perpetration can really be inferred" from the present decision: AMBOS K., *Article 25*, p. 998.

[559] *Ruto, Kosgey and Sang* Confirmation of Charges, paras. 302, 307, 309, 315-316.

This interpretation of indirect co-perpetration has been subsequently applied in the confirmation of charges decisions in the *Kenya* cases[562], in the decision on the issuance of the warrant of arrest against *Gaddafi*[563] and, more recently, in the *Ongwen*[564], *Ntaganda*[565], *Gbagbo*[566] *and Blé Goudé*[567] confirmation of charges decisions.

Scholars distinguish between the different situations mentioned above – brought together by the case law under indirect co-perpetration (indirect co-perpetration *lato sensu*) – referring to two distinct concepts: (1) indirect co-perpetration ("*mittelbare Mittäterschaft*"); and (2) joint indirect perpetration (indirect perpetration jointly, indirect perpetration in co-perpetration, "*mittelbare Täterschaft in Mittäterschaft*", "junta model")[568]. The first concept is used to reflect situations like the one presented in the *Katanga and Ngudjolo* case. The second is applied in scenarios such as those presented in the *Al Bashir* and *Gbagbo* cases. The two models identify different mechanisms of attribution of liability.

The first is used when A and B (eventually C, D and others) agree to commit a crime, but A acts through X and B through Y. However, the crimes committed by X and Y are part of the agreement and it is for this reasons that they are equally attributed to both A and B. The mutual attribution of the crimes to A and B is based on the common plan and shared intent, that become key elements. This is the reason for which this form of indirect co-perpetration could be considered "a

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[560] *Gbagbo* Confirmation of Charges, paras. 79-86.

[561] AMBOS K., *Treatise, Vol. I*, p. 157.

[562] *Muthaura, Kenyatta and Ali* Confirmation of Charges, paras. 398-419, 428; *Ruto, Kosgey and Sang* Confirmation of Charges, paras. 299, 301-349.

[563] *Gaddafi et al.* Warrant of Arrest Decision, paras. 71-83.

[564] *Ongwen* Confirmation of Charges, paras. 38-41;

[565] *Ntaganda* Confirmation of Charges, paras. 101-135.

[566] *Gbagbo* Confirmation of Charges, paras. 226, 230-241.

[567] *Blé Goudé* Confirmation of Charges, paras. 136-158.

[568] WERLE G., JESSBERGER F., *Principles*, pp. 211-213; AMBOS K., *Treatise, Vol. I*, p. 157; see also ELDAR S., *Indirect Co-Perpetration*, pp. 610-613.

modified form of joint commission" within the meaning of art. 25(3)(a), second alternative, ICCSt[569].

In contrast, the second model is used when A and B (eventually C, D and others) agree to commit a crime through X by jointly controlling the latter's will. The crimes committed by X are encompassed in the agreement, and, as a result, they are attributed equally to A and B. In this situation, the control over the direct perpetrators is exercised jointly by the co-perpetrators on the basis of the functional division of their role.

The main value of indirect co-perpetration *lato sensu* relies on its ability to reflect and capture the double dimension that might characterise certain scenarios of international crimes: the horizontal dimension connecting the members operating at the leadership level with the vertical dimension linking the crimes committed by the physical perpetrators to the men in the background[570]. Nevertheless, while the model developed in the *Katanga and Ngudjolo* case places a powerful tool in the judges' hands, it should be applied with caution[571]. It has been noted that, in reciprocal vertical/horizontal imputation, the principle of culpability requires "a solid proof of each defendant's mens rea towards the criminal act committed by the other organisation respectively"[572].

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[569] WERLE G., JESSBERGER F., *Principles*, p. 211; WEIGEND T., *Indirect Perpetration*, p. 554; WEIGEND T., *Perpetration Through an Organization*, p. 110 (In the author's view, it appears as though it was sufficient to rely on co-perpetration in order to properly reflect these situations); MAUGERI A.M., *La Responsabilità dei Leader*, pp. 359-362 (the author does not distinguish between the two versions of indirect co-perpetration *lato sensu*). This view is supported also by the *Katanga and Ngudjolo* confirmation of charges decision in the part it established that "Co-perpetration based on joint control over the crime involves the division of essential tasks between two or more persons, acting in a concerted manner, for the purpose of committing that crime. As explained above, the fulfilment of the essential task(s) can be carried out by the co-perpetrators physically or they may be executed through another person" (para. 521); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1541, Prosecution's Pre-Trial on the Interpretation of Article 25(3)(a), Office of the Prosecutor, 19 October 2009, para. 20.

[570] MANACORDA S. , MELONI C., *Indirect Perpetration*, p. 174.

[571] For a critical view: MAUGERI A.M., *La Responsabilità dei Leader*, p. 362.

[572] AMBOS K., *Article 25*, p. 997.

b) The elements of the control over the organisation theory: in search of a definition

The task of defining the elements of indirect perpetration by means of an organisation through the case law is quite difficult. Despite the judges' efforts, their decisions sometimes lack of linear and analytical reasoning on substantive legal issues. The same holds true for the requirements of the doctrine under examination. In certain parts we witness overlapping information that can often confuse the reader[573]. This is particularly blatant in the aforementioned case law. From its analysis, it follows a frequent overlap in the examination of the different elements. Consequently, considering them separately is not straightforward, in part because in some cases they might be interrelated. Furthermore, it is noteworthy that the *Organisationsherrschaftslehre* has not been applied in its entirety and that the doctrine's implementation has been subject to some judicial revision and creativity.

Nevertheless, because the control over the organisation has been developed and elaborated in case law, the analysis of the latter is essential for defining the theory.

On the basis of case law examined above, it is possible to identify five constituent elements that need to exist in order to impose criminal liability under indirect perpetration based on control over the organisation:

i) the existence of an organised and hierarchical apparatus of power;

ii) the commission of the crime must be secured by almost automatic compliance with the indirect perpetrator's orders;

iii) the indirect perpetrator's control over the organisation;

[573] In some cases the subtitle of a section refers to a peculiar element, but its content focuses superficially on that component and more extensively on other aspects of the doctrine. For example, in the *Katanga and Ngudjolo* confirmation of charges decision, part b., on "Organised and hierarchical apparatus of power" (paras. 511-514), does not contain a deep analysis on the organisation's features, but, at the same time, focuses on the means through which the indirect perpetrator can control the organisation and to the compliance of the direct perpetrators with the leader's orders, further examined in part. c.

iv) the indirect perpetrator's fulfilment of the subjective elements of the crimes, including any required additional intent (such as *dolus specialis*[574]);

v) the indirect perpetrator's awareness of the factual circumstances enabling him to exercise control over the crime through the organisation.

It is important to note that the judgment issued by the Trial Chamber in the *Katanga* case required only three constituent elements for an accused to be responsible as indirect perpetrator[575]. Nevertheless, it appears that in the trial decision the first two elements (mentioned above) played a role in establishing the third element – i.e., the indirect perpetrator's control over the organisation.

For the purpose of clarity, in the following paragraphs, I will analyse the five requirements listed above separately. Furthermore, in contrast to existing case law, I will deal with the control over the organisation (third element) only after examining the first and second elements because these elements are essential for determining whether the accused indeed exercised control over the organisation as an indirect perpetrator.

i) The existence of an organised and hierarchical apparatus of power

[574] The term *dolus specialis* is used here to refer to the "*specific* goal" pursued by the agent "that goes beyond the result of his conduct". For more on this definition: CASSESE A., *Cassese's International*, p. 44. Although the two concepts are equal at the international level, *dolus specialis*, special intent and specific intent refer to different situations. For more details: SICURELLA R., *Per una teoria*, pp. 268 ff.; PICOTTI L., *Il dolo specifico*.

[575] *Katanga* Trial Judgment, para. 1416. According to the judges the individual must:

"- exert control over the crime whose material elements were brought about by one or more persons, which, in the case at bar, will be met where the commission of the crime is secured through the exertion of control over an apparatus of power;

- meet the mental elements prescribed by article 30 of the Statute and the mental elements specific to the crime at issue; and

- be aware of the factual circumstances which allow the person to exert control over the crime".

In order to be considered an indirect perpetrator according to the doctrine analysed in the present study, the organisation used to perpetrate the crimes must meet specific requirements.

In the *Katanga and Ngudjolo* confirmation of charges decision, the Pre-Trial Chamber established that it must be structured in a hierarchical manner [576] and of such a dimension that allows for a sufficient number of replaceable subordinates who are ready to "automatically" ensure the execution of the superiors' orders[577]. It is because of this mechanism that those in leadership positions can be certain that their orders will be carried out. If one of the members refuses to act, there is another one who is ready and able to immediately take over[578]. It is not important who carries out the action or how the action is carried out. What is important is that the leaders' orders result in the execution of the crimes.

In the Trial Chamber's view, the interchangeability of the direct perpetrators is not considered a constitutive element as such, but one of the "key features of the organisation"[579]. In other words, this is one of factors used by the judges to verify whether the organisation meets certain requirements, including the ability to operate autonomously and function automatically. In fact, in this system, the organisation becomes an independent identity, distinct and autonomous from the physical executors who are considered anonymous, interchangeable and fungible figures, in other words "gears in a giant machine"[580]. This structural dynamic guarantees the fulfilment of another requirement of this mode of liability, that is to say the automatic compliance with the leaders' orders[581]. These features have been further used by the Chamber to establish whether the defendant exerts control over the organisation.

In the *Katanga* trial judgment, the Chamber stated that the theory is applicable also to the "contemporary criminal organizations" and it is not limited to the

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[576] The importance of this element was already underlined in the *Lubanga* Warrant of Arrest Decision, para. 96.

[577] *Katanga and Ngudjolo* Confiramtion of Charges, paras. 512-516.

[578] *Ibid.*, para. 516.

[579] *Katanga* Trial Judgment, para. 1409.

[580] *Katanga and Ngudjolo* Confiramtion of Charges, paras. 515-517.

[581] *Ibid.*, para. 517.

bureaucratic apparatus of power used by Roxin as a model for his elaboration[582]. In the Chamber's view, the judges should ascertain whether the organisations' requirements are fulfilled in the case[583]. Nevertheless, it recognised that "the modalities of control over the persons can be increasingly varied and sophisticates"[584]. Therefore, the Trial Chamber broadened the scope of the theory including the possibility of applying it also to non-state actors[585].

ii) The commission of the crimes must be secured by almost automatic compliance with the indirect perpetrator's orders

The almost automatic compliance with the indirect perpetrator's orders can be secured by different elements, such as his or her position within the organisation, the replaceability of the organisation's members[586] and "intensive, strict, and violent training regimes"[587].

The reliance on Roxin's *Organisationsherrschaftslehre* in the *Katanga and Ngudjolo* confirmation of charges decision and in the *Katanga* trial judgment is particularly manifest where the decisions refer to the concept of interchangeability. Both decisions report parts of the German scholar's reasoning

[582] *Katanga* Trial Judgment, para. 1410.

[583] *Ibid.* According to the judges "It is the existence of an organised and hierarchical apparatus of power, characterised by near-automatic obedience to the orders it hands down, which will allow a court to find certain members of the structure responsible as perpetrators of crimes whose material elements were committed by their subordinates".

[584] *Katanga* Trial Judgment, para. 1410.

[585] STAHN C., *Justice Delivered*, p. 824. In the cases above analysed the doctrine has been applied mainly to state actors, such as presidents of states (i.e., *Al Bashir* case, *Gaddafi* case, *Kenya* cases, *Gbagbo* case).

[586] *Katanga and Ngudjolo* Confirmation of Charges, para. 518; *Katanga* Trial Judgment, para. 1408.

[587] *Katanga and Ngudjolo* Confirmation of Charges, para. 518 (as an example the Chamber referred to "abducting minors and subjecting them to punishing training regimes in which they are taught to shoot, pillage, rape, and kill").

on this crucial element[588]. According to the concept of interchangeability, the physical perpetrators of the crimes – despite being in most cases fully responsible individuals – are considered anonymous, interchangeable and fungible figures, in other words "mere gears in a giant machine"[589].

As opposed to what may occur in traditional example of indirect perpetratorship (i.e., coercion and deception), in this kind of structure the indirect perpetrator does not need to coerce or trick the direct agent in order to be sure that the crime will be committed because the indirect perpetrator does not rely on the single perpetrator's action. We assist to a sort of "mechanization" in which if one subordinate were to refuse to implement the leader's order, another one would be immediately ready to step in and take over[590]. As a consequence, the indirect perpetrator relies on the action of the organisation, which becomes an autonomous identity that acts independently and functions almost automatically[591]. In other words, as further established by the Trial Chamber, the "functional automatism" of the organisation is the "key of the superior's securing of control over the crime"[592]. This mechanism enables the almost automatic compliance with the leaders' orders and ensures that the crimes will be committed.

In the *Ruto, Kosgey and Sang* confirmation of charges decision – in contrast to the *Muthaura, Kenyatta and Ali* confirmation of charges[593] – no reference is made to the fungibility and interchangeability of the organisation's members. Nevertheless, the judges relied on the automatic compliance with the leader's

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[588] *Katanga and Ngudjolo* Confirmation of Charges, para. 515 (the reference is to p. 245 of Roxin's *Täterschaft und Tatherrschaft*, 8th ed.); *Katanga* Trial Judgment, paras. 1408-1409 (the reference is, in particular, to p. 204 of Roxin's *Crimes as Part of Organized Power Structures*; nevertheless, the judgment focuses more on the independent existence of the organisation and on its "functional automatism").

[589] *Katanga and Ngudjolo* Confirmation of Charges, paras. 515-517; *Katanga* Trial Judgment, para. 1408.

[590] *Katanga and Ngudjolo* Confirmation of Charges, para. 516; *Katanga* Trial Judgment, para. 1408.

[591] *Katanga and Ngudjolo* Confirmation of Charges, para. 517; *Katanga* Trial Judgment, para. 1409.

[592] *Katanga* Trial Judgment, para. 1408.

[593] *Muthaura, Kenyatta and Ali* Confirmation of Charges, paras. 204, 409.

order, inferring it from *Ruto*'s position within the "Network"[594] and the payment and punishment mechanisms activated to secure the crimes commission[595]. In the *Muthaura, Kenyatta and Ali* confirmation of charges decision, the Pre-Trial Chamber further relied on other methods used to secure the automatic compliance with the leaders' orders: the oath of loyalty to the group and its rules, the initiation ceremonies, the establishment of an internal judicial system that ensured that the rules were enforced[596]. The indirect perpetrator's position within the organisation is another factor contributing to the determination of the direct agent's compliance with his orders. The approach of the case law with respect to this constituent element is flexible and includes several factors[597].

Furthermore, it is worth noting that in cases of indirect co-perpetration, the automatic compliance with the leader's order is used also to establish whether the defendant played an essential role[598].

iii) The indirect perpetrator's control over the organisation

The concept of *Tatherrschaft* is the cornerstone of Roxin's theory and varies according to the different manner by which a crime is committed (direct perpetration, co-perpetration and indirect perpetration)[599]. The determination of such a concept in the *Organisationsherrschaftslehre* – the most frequent variant in macro-criminal contexts[600] – is particular problematic[601]. In fact, in contrast to the traditional and widely accepted examples of indirect perpetration, in most cases

[594] *Ruto, Kosgey and Sang* Confirmation of Charges, paras. 314-317, 327-332.

[595] *Ibid.*, para. 318-326.

[596] *Muthaura, Kenyatta and Ali* Confirmation of Charges, paras. 207-213.

[597] VAN DER WILT H.G., *The Continuous Quest*, p. 312.

[598] *Ibid.*, para. 306; *Muthaura, Kenyatta and Ali* Confirmation of Charges, para. 402.

[599] *Katanga* Trial Judgment, para. 1401 (the Chamber further stated that "the control exerted over a crime committed through one or more other persons may take several forms", para. 1414).

[600] *Katanga and Kgudjolo* Confirmation of Charges Decision, para. 498. As highlighted by the Pre-Trial Chamber "the cases most relevant to international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of 'control over an organisation' (Organisationsherrschaft)".

[601] AMBOS K., *Treatise, Vol. I*, p. 159.

the direct perpetrators are criminally responsible and the control is not wielded over a single agent, but over the organisation as a whole. In other words, the indirect perpetrator "through his control over the organisation, essentially decides whether and how the crime would be committed", in a way that allows him or her to exert control over the crime carried out by the direct agent[602].

In the *Katanga and Ngudjolo* confirmation of charges the Pre-Trial Chamber did not analyse this element in-depth. The judges established that the control must be used for the purpose of securing the crimes' execution[603]. It can be manifest in the compliance of the subordinates with the leader's orders and in his capability to "hire, train, impose discipline, and provide resources to his subordinates"[604].

In the *Katanga* trial judgment, the judges claimed that the individual's control may be inferred by the peculiar nature of the organisation, its functioning and by its structural dynamics[605]. In this context the "persons wielding control over the apparatus of power are […] those in the organisation who conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution"[606].

In the *Ruto, Kosgey and Sang* confirmation of charges the Pre-Trial Chamber inferred *Ruto*'s control over the organisation not only on his position, but also with respect to two strategic mechanisms: (1) a payment system used to compensate the organisation's members, and (2) a punishment system[607]. In the *Muthaura, Kenyatta and Ali* confirmation of charges decision, the Pre-Trial Chamber referred to other methods used to secure the automatic compliance with the leaders' orders: the oath of loyalty to the group and its rules, the initiation ceremonies, the establishment of an internal judicial system that ensured that the rules were enforced[608].

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[602] *Katanga and Kgudjolo* Confirmation of Charges Decision, para. 518. *Katanga* Trial Judgment, para. 1405.

[603] *Katanga and Kgudjolo* Confirmation of Charges Decision, para. 514.

[604] *Ibid.*, para. 513.

[605] *Katanga* Trial Judgment, para. 1409.

[606] *Ibid.,* para. 1412.

[607] *Ruto, Kosgey and Sang* Confirmation of Charges, paras. 316-317, 320-327, 330-331.

[608] *Muthaura, Kenyatta and Ali* Confirmation of Charges, paras. 207-213.

Another element used to establish that the indirect perpetrator exerts control over the organisation concerns his or her position within the entity and the dominant role played[609].

This theory has been applied also to individuals who are not at the top of the hierarchy, or, in other words, individuals who may be subordinate to those occupying a higher position[610]. As a result, in this perspective, the analysis must not be limited to the *de jure* sovereignty, but it has to be extended to the *de facto* authority. Furthermore, the indirect perpetrator is not required to wield authority over the entire apparatus of power[611]. It is enough for the indirect perpetrator to control and use part of the organisation to commit the crime "so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed"[612]. This standard, introduced by the Trial Chamber, as compared to the previous case law, seems to be more stringent[613]. In any case, the control exercised over the organisation must be real and effective[614]. The Trial Chamber contributed significantly to the determination of the concept of control. Nonetheless, such a concept requires further analysis and elaboration.

iv) The indirect perpetrator's fulfilment of the subjective elements of the crimes, including any required additional intent

In order for an individual to be held criminally responsible as an indirect perpetrator with respect to the control over an organisation, he or she must also

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[609] *Ibid.*, paras. 316, 327; *Bemba* Warrant of Arrest Decision, paras. 78.

[610] *Gaddafi et al.* Warrant of Arrest Decision, paras. 73, 85. The reference is made to *Saif Al-Islam* and *Al-Senussi*, both subordinate to *Gaddafi*.

[611] *Katanga* Trial Judgment, paras. 1411-1412; *Gaddafi et al.* Warrant of Arrest Decision, para. 73.

[612] *Katanga* Trial Judgment, para. 1411. The reference to Roxin is explicit.

[613] STAHN C., *Justice Delivered*, p. 824. The Pre-Trial Chamber previously claimed only that the indirect perpetrator "through his control over the organisation, essentially decides whether and how the crime would be committed" (*Katanga and Ngudjolo* Confirmation of Charges Decision, para. 518).

[614] *Katanga* Trial Judgment, paras. 1411-1412.

fulfil the mental elements required by art. 30 ICCSt and by the crimes carried out by the direct agent[615]. This must include the *dolus specialis* or any other additional intent required by the provision of the crime committed[616]. As a result, the individual in the background must act with the intent of carrying out the objective elements of the crime, or must be aware that their realisation is the consequence of his or her action[617].

v) The indirect perpetrator's awareness of the factual circumstances enabling him or her to exercise control over the crime through the organisation

Another subjective element required by the judges for an individual to be held criminally responsible as an indirect perpetrator by means of an organisation is the individual's awareness of the factual circumstances allowing him or her to control the crime, such as his or her position within the organisation and the specific features of the latter enabling its functional automatism[618]. The Trial Chamber further notes that the awareness of the indirect perpetrator may vary according to the different forms of the control exercised over the organisation[619].

c) A definition of the control over the organisation theory on the basis of the relevant case law

According to the case law analysed, an individual can incur in criminal liability under indirect perpetration based on control over the organisation when he or she exerts control at least over a part of an organised and hierarchical apparatus of power and is certain that the orders will be automatically complied with, thereby ensuring that the crimes will be committed. The apparatus must be hierarchically

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[615] *Ibid.*, paras. 1413-1414.

[616] *Katanga* Confirmation of Charges, para. 527.

[617] *Ibid*., para. 536.

[618] *Katanga* Trial Judgment, paras. 1414-1415.

[619] *Ibid.*

structured and must have a sufficient number of replaceable individuals. The fungibility of the members – as well as other factors (such as, *inter alia*, violent training regimes) – contributes to secure the functional automatism of the apparatus and therefore the automatic compliance with the superior's orders.

With regards to the subjective elements, the indirect perpetrator must act with intent and knowledge according to art. 30 ICCSt and fulfil the mental elements of the crimes carried out by the direct agents. Furthermore, the indirect perpetrator has to be aware of the factual circumstances enabling him or her to exercise control over the crime through the organisation and securing the almost automatic compliance with his or her orders.

V. Critical observations and open questions

Whether the introduction of commission through a responsible person in art. 25(3)(a), third alternative, ICCSt was necessary is disputable. Nevertheless, because this mode of liability was included in the provision and is broadly applied at the ICC, it cannot be ignored.

Academic literature has noted that this "expansion of the concept of perpetration is necessary in legal systems where accomplices may only be given a lower sentence than is available for principal perpetrators"[620]. Interestingly, the same cannot be said about the system that was built around the Rome Statute[621]. Furthermore, the *Organisationsherrschaftslehre* was elaborated in order to accompany the traditional categories of criminal law, not always capable of facing large-scale criminality and adequately capturing the senior leaders' responsibility[622]. In other words, it was created to deal with the specific needs of the German legal system[623]. Nonetheless, this variant of Roxin's theory has so far played a leading role in the interpretation and application of indirect perpetration through a responsible person within the meaning of art. 25(3)(a), third alternative,

[620] CRYER R., *An Introduction*, p. 367.

[621] *Ibid.*

[622] WEIGEND T., *Indirect Perpetration*, p. 551.

[623] *Fulford* Separate Opinion, paras. 10-11.

ICCSt. However, its implementation has been controversial since its first appearance at the ICC[624].

Such criticism usually relates to both its theoretical consistency with the system established by the Rome Statute and substantial issues more directly related to its constitutive elements, and therefore to its merit.

The first aspect will be the focus of the following section on the theoretical foundations of the theory. In this part of the study, I only mention the most problematic aspects regarding substantial issues that will be discussed in depth in later sections in light of the analysis of the original version of the theory, its constitutive elements, evolution and empirical application.

One of the strongest critics of the theory concerns the concept of organisation[625] and the possibility of applying Roxin's theory beyond its original reach (i.e., the bureaucratic state apparatus of power, strictly and hierarchically organised). Critics contend that the transposition of the *Organisationsherrschaftslehre* at the ICC would be problematic, since in most cases the Court deals with crimes committed in African countries by less structured entities such as militias, non-state actors and groups of rebels[626].

In an effort likely addressing such criticism, the *Katanga* trial judgment explicitly established that the theory is capable of reflecting "the varied manifestation of modern-day group criminality wherever it arises" and its application is not limited to organisational settings similar to Roxin's bureaucratic apparatus of power[627]. It further stated that for the purpose of its application, the

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[624] Pre-Trial Chamber I has previously highlighted – although only in a footnote – that the implemented theory was controversial: *Katanga and Ngudjolo* Confirmation of Charges, para. 499, footnote n. 660.

[625] The concept of organisation has been further criticised for being vague, not easily definable and very unpredictable at the domestic level as well: WEIGEND T., *Indirect Perpetration*, p. 553. See also: ELDAR S., *Holding Organized*, p. 219.

[626] VAN SLIEDREGT E., *International Criminal Law*, p. 7; CRYER R., *An Introduction*, p. 368; JAIN N., *Individual Responsibility*, p. 865; JAIN N., *The Control Theory*, pp. 193-195; WEIGEND T., *Perpetration through an Organization*, p. 107; MANACORDA S., MELONI C., *Indirect Perpetration*, p. 171; OSIEL M., *Making Sense*, p. 100; OSIEL M., *The Banality of Good*, pp. 1833-1837.

[627] *Katanga* Trial Judgment, para. 1410.

organisation must meet the structural requirements identified by the Chamber[628]. Nevertheless, various pieces of academic literature have pointed out that these features would not always be capable of reflecting "the decentralized nature of modern collective violence"[629]. What is certain is that the control over the organisation has been used at the ICC both to deal with state-organisations (i.e., *Al Bashir*) and non-state organisations (i.e., *Katanga and Ngudjolo*)[630].

Another critical aspect of the theory under examination concerns the concept of "fungibility". In the Trial Chamber's view, the interchangeability of the direct perpetrators is not considered a constituent element of the theory as such, but as one of the "key features of the organisation"[631]. In other words, it is one of the factors used by the Chamber to verify whether the organisation operates autonomously and function automatically, securing the implementation of the crimes[632]. Furthermore, the interchangeability is used also as a criterion to ensure the automatic compliance with the leaders' orders, thus demonstrating their control over the organisation[633].

This element has been strongly criticised because in most cases the specific qualification and role played by members of the organisation makes them irreplaceable[634]. This is particularly evident in smaller organisations[635]. There might be a few interchangeable subjects within the same apparatus, but it is not possible to give this element a general validity at least from an empirical point of view[636]. In addition, if the organisation is not structured in a strictly and hierarchical manner it is not easy to prove the interchangeability of its members

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[628] Otherwise put "it is the existence of an organized and hierarchical apparatus of power, characterized by near-automatic obedience to the orders it hands down, which will allow a court to find certain members of the structure responsible as perpetrators of crime whose material elements were committed by their subordinates", *Katanga* Trial Judgment, para. 1410.

[629] STAHN C., *Justice Delivered*, p. 824.

[630] AMBOS K., *Treatise, Vol. I*, pp. 158-159.

[631] *Katanga* Trial Judgment, para. 1409.

[632] *Ibid*., paras. 1408-1409.

[633] *Ibid*., paras. 1408.

[634] AMBOS K., *Command Responsibility*, pp. 145-146.

[635] OSIEL M., *Making Sense*, p. 101.

[636] AMBOS K., *Command Responsibility*, p. 148.

and the "mechanization" of the organisation[637]. This is the reason why the judges relied also on other factors capable of ensuring the automatic compliance with the leaders' orders, such as "intensive, strict and violent regimes"[638] and payment and punishment mechanisms[639].

It is important to note that these factors (namely "soft or weak factors") contribute to establish whether the indirect perpetrator exerts control over the organisation[640]. This concerns organisations where the task of delineating a strict and hierachical structure may be particularly difficult[641].

According to the control over the organisation theory, the attribution of criminal responsibility to the individual in the background for the crimes directly committed by his or her subordinates is based on a normative assessment[642]. Indeed, although in most cases the direct perpetrators are culpable agents, their crimes are attributed to the indirect perpetrator as if they were his or her own[643]. As a result, in such cases, the concept of control is peculiar and its determination is particularly problematic, as is reflected in the analysed case law, not adequately elaborated on such an aspect. Despite the judges' effort to identify the factors that would allow one to establish whether the individual in the background exerts control over the organisation, the concept remains flawed. This is likely due also to the diversity of scenarios analysed by the Court.

The determination of the concept of control is also important in order to establish whether the individual should be charged under art. 25(3)(a), third alternative, ICCSt or under another subparagraph, for instance art. 25(3)(b) ICCSt

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[637] MANACORDA S., MELONI C., *Indirect Perpetration*, p. 172.

[638] *Katanga and Ngudjolo*, Confirmation of Charges, para. 518.

[639] *Ruto, Kosgey and Sang* Confirmation of Charges, paras. 318-326 (the decision does not contain any reference to the fungibility and interchangeability of the organisation's memebrs).

[640] KISS A., *Indirect Perpetration*, p. 12, pp. 18-20; AMBOS K., *Zur „Organisation"*, pp. 848-849; OSIEL M., *Making Sense*, p. 103.

[641] KISS A., *Indirect Perpetration*, p. 20; AMBOS K., *Zur „Organisation"*, pp. 848-849.

[642] *Lubanga* Appeals Judgment, paras. 458, 465.

[643] AMBOS K., *Treatise, Vol. I*, p. 159 (the author highlights the similarities between the control exercised by the *Hintermann* over the direct perpetrators and the relationship between the superior and his subordinates according to art. 28 ICCSt).

(ordering)[644]. It is noteworthy that not all criminal action carried out by the members of an organisation are necessarily committed under the full control of their leaders. Therefore, to determine whether a conduct may be attributed to leaders (as indirect perpetrators), it is necessary to confirm that such control indeed exists and that it is exercised by them in practice [645].

The ICC Trial Chamber considered it sufficient that the indirect perpetrator controls and uses part of the organisation to commit the crime "without leaving one of the subordinates at liberty to decide whether the crime is to be executed"[646]. However, the requisite level of command for an individual to be considered an indirect perpetrator under the current doctrine is unclear[647]. The test set by the pre-trial judges appears to be more stringent compared to the previous case law[648]. It has been highlighted how this standard "seems to imply the existence of a partial command line between the indirect perpetrator and the immediate perpetrator", that when transposed to state actors could have important repercussions[649]. It could be difficult to consider indirect perpetrators senior civilian leaders for the crimes committed by military agents not operating under their authority[650].

The theory is further criticised for setting a very high threshold [651]. In particular, it would be difficult to differentiate at the evidentiary stage between indirect perpetrators within the meaning of art. 25(3)(a), third alternative, ICCSt

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[644] *Katanga and Ngudjolo* Confirmation of Charges, paras. 517-518; ESER A., *Individual Criminal Responsibility*, p. 795.

[645] WEIGEND T., *Indirect Perpetration*, p. 553.

[646] *Katanga* Trial Judgment, paras. 1411-1412. The reference to Roxin is explicit.

[647] On this aspect AMBOS K., *Command*, pp. 148, 151-154.

[648] STAHN C., *Justice Delivered*, p. 824.

[649] *Ibid.*

[650] *Ibid.*; GIAMANCO T., *The Perpetrator Behind the Perpetrator*, pp. 241-242 (the author refers in particular to the difficulties that the Prosecutor might face proving *Al Bashir*'s control over the militia Janjaweed).

[651] CRYER R., *An Introduction*, p. 368. In the same vein, with reference to the control theory, *Fulford* Separate Opinion, para. 3; in a similar vein appears to be also GIAMANCO T., *The Perpetrator Behind the Perpetrator*, p. 233, pp. 241-245 (the author refers in particular to the difficulties that the Prosecutor might face proving *Al Bashir*'s control over the militia Janjaweed).

and accessories under art. 25(3)(b) ICCSt[652]. According to Judge Van den Wyngaert, the doctrine's constitutive elements, such as the control exerted over the organisation, should be considered as evidentiary factors[653].

To verify whether the theory under examination constitutes an "infatuation" posing more problems than it solves[654], and to establish whether it is better to consider other concepts to interpret art. 25(3)(a), third alternative, ICCSt, one must focus on the original version of the *Organisationsherrschaftslehre*, its development and its application in macro-criminal contexts.

Moreover, another question arises, that of whether the theory can be applied despite the refusal to interpet art. 25 ICCSt in a hierarchical manner (typical of the differentiated participation model), as done by the *Katanga* Trial Chamber.

C. The theoretical foundations of the control over the organisation theory

One of the most critical issues related to the implementation of the control over the organisation theory at the ICC regards its consistency with the Rome Statute[655] and the inadequacy of the majority's reasoning for establishing the foundations of the doctrine according to the sources of law provided by the Statute.

The prevailing reliance on the control theory is particularly problematic. The Rome Statute – in contrast to art. 38(1)(d) ICJSt – does not refer to "*the teachings of the most highly qualified publicists' as subsidiary source of law*". In addition to art. 21 ICCSt, it codifies the principle of legality (art. 22 ICCSt), and, because it is an international treaty, it is subject to the VCLT and to its interpretative

[652] MANACORDA S., MELONI C., *Indirect Perpetration*, pp. 171-172.

[653] *Van den Wyngaert* Concurring Opinion, para. 55.

[654] WEIGEND T., *Indirect Perpetration*, p. 553, pp. 555-556 (according to the author the ICC judges should "concentrate on the key requirement of indirect perpetration: control over another person" and on the control over the will test).

[655] According to some German scholars – and scholars with a German background – the wording of art. 25(3)(a) ICCSt reminds Roxin's *Organisationsherrschaftlehere*: KRESS C., *Claus Roxin Lehre*, p. 307; WEIGEND T., *Perpetration through an Organization*, p. 95. In this vein, more recently, KISS A., *Indirect Perpetration*, p. 2.

techniques. The Rome Statute represents a tangible example of how international criminal law is the expression of both criminal and international law. Moreover, the ICC Statute built a complex and unique system which diverges from previous experiences, and contains features typical of both a criminal code and a constitution. As will be seen in the course of the analysis, all these peculiarities must be taken into account when dealing with the interpretation of art. 25(3)(a), third alternative, ICCSt.

I. The theoretical foundations of the control over the organisation theory according to case law

In the first decision that adopted the control theory – the *Lubanga* confirmation of charges decision – the judges failed to make any reference to the mechanisms of interpretation provided for in the VCLT. No allusion is made to an apparent *lacuna* in art. 25(3)(a) ICCSt justifying the reliance on the subsidiary sources of law. They simply implemented the doctrine without explicitly invoking the sources of law listed in art. 21(1)(b)-(c) ICCSt. Nevertheless, the Chamber relied on the broad application of the doctrine in several legal systems[656], but only quoted judge Schomburg's isolated separate opinion and a few other doctrinal sources (in particular Fletcher and Werle)[657]. The decision does not contain an in-depth analysis of the theory's adoption by other legal systems. As a result, it is difficult to establish whether the judges intended to attribute the status of general principle of law to the control theory. A few additional references to the doctrine are included in the part of the decision which deals with co-perpetration and its constitutive elements[658]. The Chamber's doctrinal approach is particularly manifest in this part of the decision, where the judges relied on Roxin's writings among the scholars quoted and on the *Stakić* trial judgment issued by the ICTY[659].

[656] *Lubanga* Confirmation of Charges, para. 330.

[657] *Ibid.*, footnote n. 418.

[658] *Ibid.*, paras. 342-367 and related footnotes.

[659] *Ibid.*

In its decision on the confirmation of charges in the *Katanga and Ngudjolo* case, the Pre-Trial Chamber continued along the path drawn in the *Lubanga* case and followed the approach it previously adopted[660]. In applying the control theory, the Chamber analysed its consistency with the Statute, being the primary source of law upon which to rely according to art. 21(1)(a) ICCSt[661]. The judges further specified that the "application of the Statute requires not only resorting to a group of norms by applying any of the possible meanings of the words in the Statute but also requires excluding at least those interpretations of the Statute in which application would engender an asystematic *corpus juris* of unrelated norms"[662]. As a result, after invoking the objective, subjective and control over the crime approaches – as possible criteria used for distinguishing between principals and accessories – the judges opted for the third option, deciding that it was the most consistent with the Statute[663]. Moreover, in justifying the application of the combined mode of liability (indirect co-perpetration) used to attribute the crimes to *Katanga* and *Ngudjolo*, the judges relied primarily on a textual interpretation[664].

The main difference between the methodology adopted for the purpose of applying the German theory in the *Lubanga* and in the *Katanga and Ngudjolo* confirmation of charges decisions lies in the larger number of doctrinal references contained in the latter compared to the former[665]. Nevertheless, the decision mainly quotes German and Spanish literature.

Even in this case the judges did not expend a lot of energy verifying whether the doctrine adopted was indeed a principle of law according to art. 21(1)(c) ICCSt[666]. They merely referred to the domestic jurisdictions, whose practitioners

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[660] *Katanga and Ngudjolo* Confirmation of Charges, paras. 480-486.

[661] *Ibid*., para. 481.

[662] *Ibid*.

[663] *Ibid*., paras. 482-486. The Pre-Trial Chamber followed its previous decision: *Lubanga* Confirmation of Charges, paras. 328-341.

[664] *Katanga and Ngudjolo* Confirmation of Charges, para. 491 (the Chamber adopts a "*weak or inclusive*" interpretation of "*or*" connecting joint commission and commission through another person within the meaning of art. 25(3)(a) ICCSt).

[665] *Ibid*, para. 485, footnote n. 647.

[666] *Ibid.*

has relied on the control over the organisation theory when seeking to attribute criminal responsibility to leaders for crimes committed by their subordinates (Germany, Argentina, Peru, Chile and Spain)[667]. However, it is important to note that the Chamber only quoted countries that were heavily influenced by German law and doctrine[668]. In support of its rationale, the Chamber referred to the feeble attempt to implement the theory at the ICTY (the *Stakić* case) and to the *Bemba* case[669], only implicitly endorsing the control over the organisation theory in the warrant of arrest decision[670]. The judges further confirmed that the control over the organisation is encompassed in the legal framework of art. 25(3)(a), third alternative, ICCSt[671].

The inadequacy of the Chamber's reasoning laying the doctrine's theoretical foundations is manifest in both confirmation of charges decisions. Such a deficiency also characterises the case law that followed the decisions and was based on their reasoning. This tendency could be somewhat justified by the peculiar role played by the Pre-Trial Chambers. Their task is not that of discussing in depth substantive legal issues[672], but rather one of verifying whether there is sufficient evidence to establish substantial grounds to believe that the suspect committed the crime charged and consequently to send the case on to the trial stage. Nevertheless, as will be seen, this has been a thorny issue at the stages of the proceedings that followed the pre-trial phase, as the trial and appeals judgments also failed to pay significant attention to the theoretical foundations of the doctrine and to elaborate more on important points.

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[667] *Ibid.*, paras. 500, 502-505 and related footnotes.

[668] *Ibid*. paras. 502-505 and related footnotes.

[669] *Ibid.*, paras. 500, 506-509.

[670] *Bemba* Warrant of Arrest Decision, paras. 78.

[671] *Katanga and Ngudjolo* Confirmation of Charges, paras. 500-501, 508, 510.

[672] With particular regard to the confirmation hearing it has been stated that it "is neither a 'trial before the trial' nor a 'mini trial'": *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chiu*, ICC-01/04-01/07-412, Decision on the admissibility for the confirmation hearing of the transcripts of deceased Witness 12, Pre-Trial I (Single Judge Steiner), 18 April 2008, p. 4; see also *Katanga and Ngudjolo* Confirmation of Charges, para. 64.

In the *Lubanga* case, the Trial Chamber highlighted the importance of resorting to art. 31(1) VCLT in order to interpret the Rome Statute and its provisions. As a result, the Trial Chamber stated that art. 25(3)(a) ICCSt must be interpreted "in good faith in accordance with the ordinary meaning to be given to the language of the Statute, bearing in mind the relevant context and in light of its object and purpose"[673]. Interestingly, the judges further claimed that arts. 25 and 28 ICCSt "should be interpreted in a way that allows properly expressing and addressing the responsibility for the crimes"[674]. This statement clearly reflects a teleological approach to the provisions on individual criminal responsibility.

In the *Katanga* judgment, the methodology behind the Trial Chamber's reliance on the German doctrine is particularly peculiar and innovative. The majority justified it not by pointing to the broad recognition and application of the doctrine in national legal systems (as done in previous decisions[675]), but rather on its role of "guiding principle" in the distinction between principals and accessories, and in the interpretation of the modes of liability listed in art. 25(3) ICCSt[676]. This part of the judgment must be read in conjunction with the section dealing with the "Method of Interpretation on the Founding Texts of the Court"[677].

In particular, the judges claimed that because art. 25 ICCSt does not contain a *lacuna*, it is not necessary to rely on the subsidiary sources of law provided by art. 21(1)(b)-(c) ICCSt[678]. As a result, the implementation of the control theory did not need to be based on its recognition in customary law, nor on its presumed status as a general principle of international law. In conformity with the prevailing case law, the bench drew attention to the importance of the methods of interpretation contained in arts. 31-32 VCLT[679]. It stated that in order to interpret

[673] *Lubanga* Trial Judgment, para. 979.

[674] *Ibid.*, para. 976.

[675] *Lubanga* Confirmation of Charges, para. 330; *Katanga and Ngudjolo* Confirmation of Charges, para. 485.

[676] *Katanga* Trial Judgment, paras. 1388, 1395.

[677] *Ibid.,* paras. 37-57.

[678] *Ibid*., para. 39-40.

[679] *Ibid*., paras. 43, 53, 57.

the provision, the judges have to consider several factors, including the ordinary meaning of the terms, their context, the object and the purpose of the treaty[680].

The Chamber further invoked the principle of effectiveness, requiring good faith in the interpretation and the refusal of all interpretative solutions resulting in the violation or nullity of other provisions[681]. In addition, the Chamber recalled the importance of the principle of legality and the protection of internationally recognised human rights in the interpretative process of the Rome Statute and in the limitation on judicial creativity[682]. The principle has been further invoked in order to justify the adoption of the control theory to distinguish principals from accessories[683].

In the Chamber's view "the 'control over the crime' criterion appears the most consonant with article 25 of the Statute, taken as a whole, and best takes its surrounding context into account, in due consideration of the terms of article 30"[684]. It is the "guiding principle" enabling "the body of relevant provisions of this article concerning individual criminal responsibility to take full effect"[685]. The judges did not consider as decisive the fact that the theory had been recognised by various domestic legal systems[686].

While the Chamber initially appeared sceptical of the teleological approach[687], it appears likely that in substance such an approach played a role (along with the contextual approach) in justifying the application of the control theory[688]. This is

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[680] *Ibid.*, para. 45.

[681] *Ibid*., para. 46.

[682] *Ibid*., paras. 50-57.

[683] *Ibid*., para. 1388.

[684] *Ibid*., para. 1394.

[685] *Ibid*., para. 1395.

[686] *Ibid*.

[687] *Ibid*., paras. 54-55 (the Chamber claimed that "a teleological approach entailing consideration of the need to end impunity for the perpetrators of the most serious crimes could be considered antithetical to the principle of legality and, more specifically, to the rule of strict construction and in dubio pro reo", para. 54; it further stated that "the aim of the Staute […] can under no circumstance be used to create a body of law extraneus to the terms of the treaty or incompatible with a purely literal reading of the text", para. 55).

[688] *Ibid*., paras. 1394-1395.

particularly true in the part of the decision where the judges claimed that, considering the collective nature of the crimes under the ICC jurisdiction and the wording of art. 25(3)(a), third alternative, ICCSt, there were no reasons for excluding the possibility of committing a crime through an organisation from the meaning of the provision[689]. However, they further specified that this was only one possible "legal solution", capable of giving shape to indirect perpetration through a responsible person under art. 25(3)(a), third alternative, ICCSt[690].

The Trial Chamber's methodological choice adopted in the *Katanga* case[691] has been followed also in the *Lubanga* appeals judgment. In fact, the Appeals Chamber referred to the control theory as the principle that "better fits" in the provision[692], rather than resorting to art. 21 ICCSt and general principles of law to justify the adoption of the theory. The methodology used by the Chamber to support its reasoning regarding the implementation of the theory at the Court is not particularly sophisticated.

The judges made clear that they were "not proposing to apply a particular legal doctrine or theory as a source of law". In contrast, they attributed to the German theory the role of guidance in the interpretation of the provision[693]. The Chamber stated that, it is "appropriate to seek guidance from approaches developed in other jurisdictions in order to reach a coherent and persuasive interpretation of the legal texts"[694]. In the judges' view, this practice and the reliance on the normative approach do not result in the violation of the principle of liability under art. 22 ICCSt[695]. Moreover, the Chamber emphasised the importance of this approach in

[689] *Ibid*., paras. 1403, 1405.

[690] *Ibid*., para. 1406.

[691] In favour of the Chamber's methodological approach: GIL GIL A., MACULAN E., *Current Trends*, p. 367. For a critical view on this regard: STAHN C., *Justice Delivered*, p. 825 (according to the author "it would have been preferable to ground individual elements of Roxin's theory more carefully in comparative analysis").

[692] *Lubanga* Appeals Judgment, paras. 472-473.

[693] *Ibid*., para. 470.

[694] *Ibid*.

[695] *Ibid*., para. 471.

distinguishing between principals and accessories, and recalled that the JCE doctrine is also a reflection of the normative approach[696].

The methodological approach adopted by the Trial and Appeals Chamber constitutes a turning point and an attempt to overcome some of the critiques previously raised with respect to the Pre-Trial Chamber's decisions – in particular the inconsistency of the German doctrine with the Rome Statute, which dissenting judges had already highlighted.

The prevailing approach had been heavily contested even prior to the *Katanga* trial judgment and the *Lubanga* appeals judgment. Such criticism was put forth in the dissenting opinions of Judge Fulford and Judge Van den Wyngaert, both of whom claimed that the theory was not supported by the Rome Statute[697]. They further criticised the dominant approach for its lack of adherence to the provision's ordinary meaning[698].

In order to challenge the majority opinion, the judges relied in particular on art. 31(1) VCLT and invoked the plain textual reading of art. 25(3)(a) ICCSt[699]. According to the judges, their colleagues went far beyond the ordinary meaning of the provision[700]. Judge Fulford underscored how the theory had been introduced in Germany to address the peculiar needs of its legal system and how they diverge from the needs of the Rome Statute[701]. Judge Van den Wyngaert focused on the universal mission of the Court and on the danger of implementing a particular national model[702]. She further highlighted that it is very unlikely that the control theory aspires to obtain the status of general principle of law within the meaning of art. 21(1)(c) ICCSt[703]. She stated that the extension of "the scope of certain

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[696] *Ibid*.

[697] *Fulford S*eparate Opinion, paras. 3, 6-12; *Van den Wyngaert* Concurring Opinion, paras. 6, 67.

[698] *Fulford S*eparate Opinion, para. 10; *Van den Wyngaert* Concurring Opinion, para. 8.

[699] *Fulford S*eparate Opinion, paras. 7, 13; *Van den Wyngaert* Concurring Opinion, paras. 8, 11, 30, 57, 69.

[700] *Fulford S*eparate Opinion, para. 12; *Van den Wyngaert* Concurring Opinion, para. 17.

[701] *Fulford S*eparate Opinion, paras. 10-11.

[702] *Van den Wyngaert* Concurring Opinion, para. 5.

[703] *Ibid.*, para. 17.

forms of criminal responsibility" entails "an inappropriate expansion of the Court's jurisdiction"[704].

In the Belgian judge's view, the majority's implementation of the control theory and the broad interpretation of art. 25(3)(a) ICCSt – including indirect co-perpetration – violates art. 22(2) ICCSt[705]. She established that the principles of strict construction and of *in dubio pro reo* must apply also to the modes of liability and prevail on the methods of treaty interpretation provided by the VCLT, in particular, on the teleological method[706]. In this regard, the judge expressly stated that it is not possible to invoke the "fight against impunity" to justify the teleological interpretation of the provisions on individual criminal responsibility[707].

On the basis of the analysed case law, it is not possible to identify a unique methodological approach to the interpretation of art. 25(3) ICCSt. It is not always clear whether the majority, in choosing to apply the control theory, relied on principles of treaty interpretation, general principles of law derived from national legal systems or whether this approach represents an attempt to develop an international *Dogmatik*[708]. Moreover, the difficulty of implementing it only on the basis of a purely plain reading of art. 25(3)(a) ICCSt is manifest[709]. What emerges in the case law is an insufficient justification of the methodology adopted by the judges in the part of the decisions where the doctrine's theoretical foundations at the Court are discussed.

Furthermore, regarding the analysed case law, it is also possible to identify certain trends[710]. For example, in most cases the "techniques formally identified

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[704] *Ibid.*

[705] *Ibid.*, paras. 6-7, 64, 68.

[706] *Ibid.*, para. 18.

[707] *Ibid.*, para. 16.

[708] It has been highlighted by Ohlin in particular with regard to the interpretation of co-perpetration, but his reasoning can be extended to the concept of indirect perpetration: OHLIN J.D., *Co-Perpetration*, pp. 517-518, p. 525.

[709] POWDERLY J., *The Rome Statute*, p. 473.

[710] On the difference between "*finding of the law*" and "*justification of the law*": HEINZE A., *International Criminal Procedure*, pp. 75-76.

are 'not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means"[711]. In this regard, it is interesting to note how the Trial Chamber has used the principle of legality to justify its application of the control theory[712]; this is also the case with Judge Van den Wyngaert's rejection of the theory[713]. Art. 31(1) VCLT has been invoked in order to support both the approach favouring the control theory implementation[714] and the opposite one rejecting it[715]. This is not novel. The judges of the *ad hoc* Tribunals have also invoked different approaches to interpretation contained in art. 31(1) VCLT when justifying their different views[716]. Nevertheless, an excessive divergence in the methodology adopted for interpreting a provision is likely to create confusion, leading to contrasting results. This is the reason for which it is desirable to ensure future uniformity on this matter. The development of a theory of interpretation would help prevent the current fragmentation, in particular in a multicultural context – such as the one characterising the ICC – where the legal background of the judges and their legal officers notably influence the adoption of a certain approach or theory, further increasing their diverging views.

Academic literature has attempted to do this. Some scholars have proposed seven canons of interpretations upon which the judges should rely when interpreting the Statute[717]. These canons – functioning as core principles – would determine a uniform understanding of the statutory provisions. They would allow one to go beyond the divergent and fragmentary solutions resulting in the

[711] POWDERLY J., *The Rome Statute*, p. 466; in a similar vein SAFFERLING C., *Internationales Strafrecht*, pp. 76-77.

[712] *Katanga* Trial Judgment, para. 1388.

[713] *Van den Wyngaert* Concurring Opinion, paras. 19-20, 61 (according to the Belgian Judge indirect co-perpetration constitutes "a totally new mode of liability" radically expanding art. 25(3)(a) ICCSt and violating the legality principle).

[714] *Katanga* Trial Judgment, para. 57.

[715] *Van den Wyngaert* Concurring Opinion, paras. 10, 11, 52, 57.

[716] GROVER L., *Interpreting Crimes*, 2014, pp. 43-44.

[717] SADAT L.N., JOLLY J.M., *International Criminal Courts*, pp. 755-788.

application of different interpretative methods, in particular when dealing with substantive law and thus with art. 25 ICCSt[718].

Nevertheless, for verifying whether and how it is possible to lay the foundations of the control over the organisation theory in the Rome Statute and implementing it in art. 25(3)(a), third alternative, ICCSt without violating the principle of legality, it is first of all necessary to focus on the Rome Statute sources of law regime, the VCLT techniques of interpretation and art. 22(2) ICCSt, examining how they operate.

II. Art. 21 ICCSt and the sources of law regime provided by the Rome Statute

With the introduction of art. 21 in the Rome Statute it is the first time that a provision on applicable law appears in the founding text of an international criminal tribunal and also the first time that the sources of international criminal law are codified[719].

This innovative article – notably influenced by art. 38 ICJSt – plays a fundamental role in the interpretation and application of the Rome Statute. It contains the sources of law upon which the judges rely in their judicial activity, restraining their discretionary power and creativity[720]. Nonetheless, the provision

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[718] *Ibid*.

[719] DEGUZMAN M.M., *Article 21*, p. 935; FRONZA E., *Le fonti*, p. 60; CATTIN D.D., *Il diritto applicabile*, pp. 269-311. For the drafting history of the provision: CARACCIOLO I., *Applicable Law*, pp. 212-224.

[720] Art. 21 ICCSt ("*Applicable Law*") states as follows:

"1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

does not explicitly provide for the methods of interpretation, with the only exception of art. 21(3) ICCSt, which requires that "*the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights*"[721]. As a result, because the ICC is a treaty-based institution and the Rome Statute is an international treaty, the interpretative techniques set by arts. 31-33 VCLT are applicable also before the Court[722].

Art. 21 ICCSt has a peculiar structure and contains several different hierarchical levels[723]. The first hierarchy consists of the internal sources of law found in subparagraph (a): the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. They are ranked in a decreasing order of importance. The Statute is therefore paramount, and is followed by the Elements of Crimes and then by the Rules of Procedure and Evidence[724].

A second hierarchy exists between internal sources (subparagraph (a)) and external sources of law (subparagraph (b)-(c)), where the first category prevails over the second. Within the external sources of law, one can make out two categories: (1) "*applicable treaties, principles and rules of international law, including the established principles of international law of armed conflict*" (subparagraph (b))[725]; and (2) "*general principles of law derived by national legal systems of the word including, as appropriate, the national laws of the states that*

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3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

[721] On the concept of "internationally recognized human rights": BAILEY S., *Article 21(3) of the Rome Statute: A Plea for Clarity*, in *ICLR*, 14 (2014), pp. 513-550.

[722] WERLE G., JESSBERGER F., *Principles*, p. 66.

[723] BITTI G., *Article 21*, pp. 411-443. For a slightly different structural approach to the provision see: VERHOEVEN J., *Article 21*, pp. 11-13.

[724] Art. 21 ICCSt has to be read together with arts. 9 and 51 ICCSt.

[725] According to the widespread opinion customary international law is included within this category: DEGUZMAN M.M., *Article 21*, p. 939; SCHABAS W.A., *An Introduction*, p. 193; PELLET A., *Applicable Law*, p. 1072.

would normally exercise over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards" (subparagraph (c)).

Given the primacy of art. 21(1)(a) ICCSt, and thus of the Statute, the Elements of Crimes and the Rules of Procedure and Evidence, the following subparagraphs (b)-(c), containing subsidiary sources of law, are applicable only when there is a *lacuna* or gap in the provisions of the sources listed in subparagraph (a)[726].

A gap "may be defined as an 'objective' which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules, thus obliging the judges to resort to the second or third source of law – in that order – to give effect to that objective. In short, the subsidiary sources of law described in Article 21(1)(b) or (c) cannot be used just to add other procedural features to those already provided for in the Statute and the Rules"[727].

In order to determine whether there is a gap or a *lacuna* in art. 21(1)(a) ICCSt, judges must resort to the mechanisms of interpretation provided by the Statute and the VCLT, in particular to arts. 31 and 32[728]. As a consequence, they are unable to rely on art. 21(1)(b) ICCSt unless they have failed to find an answer in subparagraph (a). Similarly, they may not rely on art. 21(1)(c) ICCSt unless they failed to find an answer in both subparagraphs (a) and (b). In fact, subparagraph

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[726] *Inter alia*, *Katanga* Trial Judgment, para. 39.

[727] BITTI G., *Article 21*, p. 426. This definition has been adopted also by other scholars dealing with this topic: GROVER L., *Interpreting Crimes*, p. 7 (however the author quotes a previous article of Bitti on this subject containing the same definition: BITTI G., *Article 21 of the Statute of International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC*, in C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publisher, Leiden, Boston, 2009, pp. 285-304, at p. 295).

[728] BITTI G., *Article 21*, p. 426. In the case law, *inter alia*: *Van den Wyngaert* Concurring Opinion, para. 10; *Al Bashir* Warrant of Arrest Decision, para. 126; *Situation in the Democratic Republic of Congo*, ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, 13 July 2006, para. 33 ('*Situation in the Democratic Republic of Congo* Appeals Judgment').

(c) contains the sources of law of last resort which require a comparative analysis of different legal systems[729].

General principles of law have not been frequently used at the ICC for filling gaps and *lacunae*. Thus far, ICC judges have restrained the reliance on subsidiary sources of law favouring the Rome Statute and the Rules, highlighting their primacy in accordance with the intention of the States when drafting the treaty[730]. In contrast, due to the rudimentary, fragmentary and vague wording of their statutes, the *ad hoc* Tribunals have resorted to subsidiary sources of law quite often[731].

According to art. 21(2) ICCSt, "*the Court may apply principles and rules of law as interpreted in its previous decisions*". This part of the article provides judges with a methodological parameter with which to interpret the provisions[732]. The bench is free to decide whether to rely on earlier decisions[733]. Nevertheless, the case law on individual criminal responsibility analysed above offers a clear example of how initial decisions may heavily influence subsequent judicial rulings. Indeed, the approach based on the control theory – elaborated for the first time in the *Lubanga* confirmation of charges decision – has been further developed, albeit on different premises, in later case law, and been affirmed by the Appeals Chamber.

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[729] In the determination of the general principles of law derived from national legal systems within the meaning of art. 21(1)(c) ICCSt the comparative analysis plays a fundamental role: SCHABAS W.A., *An Introduction*, p. 193; AMBOS K., *Treatise, Vol. 1*, pp. 77-78. On general principles of law see also: JAIN N., *Judicial Lawmaking*, pp. 111-150. More in general on the interaction between comparative law and international law: DELMAS MARTY M., *Droit comparé*, pp. 11-26.

[730] BITTI G., *Article*, p. 427.

[731] RAIMONDO F.O., *General Principles*, pp. 45-59.

[732] SAFFERLING C., *International Criminal Procedure*, p. 114.

[733] In contrast, at the *ad hoc* Tribunals the judges are bound to rely on precedents. In particular, the Appeals Chamber should follow its previous decisions, except in cases where it is necessary to depart from them in the interest of justice. The Trial Chambers must rely on the Appeals Chamber's decisions, but not on the decisions of other Trial Chambers. Moreover, each Trial Chamber should follow its previous decisions. WERLE G., JESSBERGER F., *Principles*, pp. 63-64.

Last but not least, according to art. 21(3) ICCSt "*the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights*". As a consequence, international human rights are not only considered a source of law within the meaning of principles of international law under art. 21(1)(b) ICCSt[734]. The attention paid by the ICC to the protection of internationally recognised human rights has also been manifest throughout the interpretative process. In fact, such a process cannot be underestimated since "the ICC, to gain state support, has to be careful in its interpretations, as states are unlike to support a Court that looks like a loose interpretative cannon"[735].

As aforementioned, art. 21(3) ICCSt contains the only mechanism of interpretation endorsed in the Rome Statute. It plays a primary and fundamental role, functioning as a guide in the interpretation of the law. This holds true in particular with respect to the interpretation of art. 25 ICCSt relating to individual responsibility, which is at the centre of the entire system built by the Rome Statute. Moreover, it is possible to believe that the principle of legality assumes greater relevance in light of the fact that the provision implicitly endorses it[736]. Therefore, the result of the interpretative process must be consistent with the principle.

Despite the uniqueness of art. 21 ICCSt in the international criminal law arena, it is not possible to apply it without considering the broader context in which it operates. In other words, art. 21 ICCSt must be considered as "a part of a system of international criminal law enforcement" and not as "something closed to a self-contained regime"[737].

For the sake of completeness, when dealing with the sources of law regime provided by the Rome Statute it is worth mentioning art. 10 ICCSt. According to this provision "*nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other*

[734] *Ibid.*, p. 71.

[735] CRYER R., *Royalism and the King*, p. 392.

[736] GALLANT K.S., *The Principle of*, pp. 331-332.

[737] CRYER R., *Royalism and the King*, p. 394.

than this Statute"[738]. This provision contributes to limit the extent of the judges' interpretative activity, since it does not allow them to affect "*existing or developing customary law*"[739].

III. The Vienna Convention on the Law of Treaties (VCLT)

In contrast to the Statutes of the *ad hoc* Tribunals, the Rome Statute is an international treaty[740]. As a consequence it is subjected also to the VCLT[741] and in particular to art. 31 ("*General Rule of Interpretation*") [742] and art. 32

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[738] Although the scope of art. 10 ICCSt appears to be limited to Part 2 of the Statute (namely "*Jurisdiction, admissibility and applicable law*"), its application might be extended also to provisions contained in other Parts of the Statute, such as art. 25 ICCSt, in particular paragraph (4) reading that "*no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law*". In this vein: TRIFFTERER O., HEINZE A., *Article 10*, pp. 650-651, p. 656.

[739] *Ibid.*, p. 651. In this vein: PICOTTI L., *I diritti fondamentali*, p. 267.

[740] Nevertheless, while the ICTYSt and ICTRSt are not treaties, both Tribunals recognised the applicability of arts. 31-33 VCLT when interpreting their Statutes. GROVER L., *Interpreting Crimes*, p. 40; GROVER L., *A Call to Arms*, p. 546, footnote n. 8.

[741] On the Vienna Rules see generally: GARDINER R.K., *Treaty Interpretation*.

[742] Art. 31 VCLT *"General Rule of Interpretation"* states as follow:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

("*Supplementary Means of Interpretation*")[743]. As part of customary law these provisions are generally recognised and accepted[744]. Nevertheless, because they do not provide an exhaustive list of interpretative techniques, but only some of the key principles of treaty interpretation[745], they do not prevent the interpreter from relying on different interpretative means when said means do not conflict with one another. The VCLT provisions are quite flexible and their content rather generic because the Convention was drafted in order to be applied to all kinds of international treaties.

Art. 31 VCLT represents the cornerstone of treaty interpretation enclosing the primary methods of interpretation. The content of the "*General Rule*" indicated in the title of the article is set in paragraph (1). Paragraphs (2)-(3) better specify the essence of the first by explaining what is meant by context. Paragraph (4) refers to the drafters' intent and to the meaning they wished to attribute to the terms.

According to art. 31(1) VCLT, the interpretation of a treaty must be carried out in good faith, considering the meaning of the terms used, their context and in light of the object and purpose of the treaty. There are several interpretative approaches in this provision: (1) textual analysis of the terms (literal interpretation); (2) context of the terms to be analysed (contextual interpretation); and (3) object and purpose of the treaty (teleological interpretation)[746].

These methods of interpretation are not ordered according to their importance. Rather, they should be considered as occupying the same positions, as complementing one another[747]. The ordinary meaning of the terms must be

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[743] *Article 32 VCLT Supplementary Means of Interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

[744] MARCHISIO S., *Corso di diritto internazionale*, p. 124; *Tadić* Appeals Judgment, para. 303.

[745] VAN DAMME I., *Treaty Interpretation,* p. 639.

[746] CASSESE A., *International Law*, p. 179.

[747] ILC, *Report of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session*, Yearbook of the International Law Commission (1966) II, p. 219

determined in light of their context and having regard to the object and purpose of the treaty rather than in the abstract[748]. It seems to be quite natural that the first step of the interpretative process consists of the attribution of a meaning to the term employed in the provision. Nevertheless, to be better understood, it needs to be examined within its context and having regard to the object and purpose of the treaty.

Art. 32 VCLT provides for the supplementary means of interpretation, such as the preparatory works (*travaux préparatoires*) and the circumstances under which the treaty was concluded. It is possible to rely on such *travaux* only for the purpose of confirming the meaning attributed to a certain term or provision according to the methods provided by art. 31 VCLT or when ambiguities remain after its application[749]. The reference to the *travaux préparatoires* occurs frequently also in the case law of ICC, in most cases to corroborate the adoption of a certain position.

In light of the foregoing, it is possible to infer several approaches to interpretation from the rules of interpretation contained in arts. 31-33 VCLT[750], guiding the judges in their interpretative activity. As correctly highlighted "with

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("the application of the means of interpretation in the article would be a single combined operation"), the document is available at:
http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf

[748] AUST A., *Modern Treaty*, p. 209.

[749] DÖRR O., *Art. 32*, pp. 617-618.

[750] Art. 33 VCLT ("*Interpretation of treaties authenticated in two or more languages*") states as follows:

"1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

varying degrees of success, international courts and tribunals have responded well to these principles, using them as guidance and justification, as tools to build credibility and to exercise and assert their judicial function, as instruments to achieve accountability, as techniques to order and structure their reasoning process, and, as aids to making their decisions acceptable and comprehensible"[751].

The abovementioned case law is a clear example of how the judges relied on the VCLT in order to support and justify their different approaches to art. 25(3) ICCSt. They have been invoked both to justify[752] and reject[753] the application of the control theory at the ICC. The importance of resorting to the mechanisms of interpretation provided by art. 31 VCLT in order to apply the Rome Statute has also been highlighted by the Appeals Chamber[754]. Nevertheless, the Rome Statute is the first international treaty with a criminal nature that has appeared in the international arena. As a result, the application of the mechanisms of interpretation provided by the provisions VCLT encounters the limit of the principle of legality, as well as the limits imposed by the respect of internationally recognised human rights, both of which are embraced by the Rome Statute.

IV. The principle of legality

Arts. 22-24 ICCSt codify, for the first time in the history of international criminal law, the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) and its corollaries[755]. The introduction of the principle of legality in Part

[751] VAN DAMME I., *Treaty Interpretation*, p. 639. Already quoted by Grover: GROVER L., *Interpreting Crimes*, p. 40.

[752] *Katanga* Trial Judgment, para. 57.

[753] *Van den Wyngaert* Concurring Opinion, paras. 10, 11, 52, 57.

[754] *Situation in the Democratic Republic of Congo* Appeals Judgment, para. 33.

[755] AMBOS K., *Treatise, Vol. I*, pp. 90-93; CATENACCI M., *Il principio di legalità*, pp. 3 ff.; CATENACCI M., *"Legalità"*, pp. 188-199 (the author focuses with particular attention on the relationship between art. 21 and art. 22 ICCSt); OLÁSOLO H., *A Note on the Evolution*, pp. 306-313; ESPOSITO A., *Il principio di legalità*, p. 217, pp. 251-268; ANDREINI V., *Il principio di legalità*, pp. 921 ff.; MANTOVANI F., *The General Principles*, p. 30; CAIANIELLO M., FRONZA E., *Il principio di legalità*, pp. 320 ff.

III of the Rome Statute represents a major victory in the path towards the progressive strengthening of the human rights protection in the international criminal law arena. This principle is at the centre of the major legal systems and is endorsed – although with slightly different formulations – in core international human rights instruments [756]. Furthermore, because the application and interpretation of the Rome Statute "*must be consistent with internationally recognized human rights*" and the principle of legality is implicitly incorporated in the provision [757], it is important to consider it when dealing with the interpretative process. In other words, the principle of legality "is a central component of the interpretative regime of the Rome Statute"[758].

Among the corollaries of the principle under examination are: 1) the principle of non-retroactivity set out in arts. 11(1)[759], 22(1)[760] and 24(1)[761] ICCSt; (2) the principle of strict construction or specificity; (3) the ban of analogy; and (4) the in *dubio pro reo* principle contained in art. 22(2) ICCSt[762]. Nonetheless, the present

[756] Among the most important: art. 11 of the Universal Declaration of Human Rights (UDHR); art. 15 of the International Covenant on Civil and Political Rights (ICCPR); art. 7 of the European Convention on Human Rights (ECHR); art. 49 of the Charter of the Fundamental Rights of the European Union; art. 9 of the American Convention on Human Rights (ACHR). With regard to the peculiarity of the legality principle adopted at the ICC compared to the same principle implemented at the domestic level: DI MARTINO A., *Postilla sul principio*, pp. 329-332; PICOTTI L., *I diritti fondamentali*, pp. 271-272. More in general on the principle of *nulla poena sine lege* in international criminal law: AMBOS K., *Nulla Poena*, pp. 17-35.

[757] GALLANT K.S., *The Principle of Legality*, pp. 331-332.

[758] POWDERLY J., *The Rome Statute*, p. 490.

[759] Art. 11(1) ICCSt: "*The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute*".

[760] Art. 22(1) ICCSt: "*A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court*".

[761] Art. 24(1) ICCSt: "*No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute*".

[762] Art. 22(2) ICCSt: "*The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted*".

study is limited to the corollaries strictly related to the interpretation of art. 25(3) ICCSt: the principles of strict construction and of in *dubio pro reo*.

a) The principles of strict construction and of *in dubio pro reo*

The principle of strict construction contained in art. 22(2) ICCSt limits the judges' interpretative activity and, as a result, their creativity[763]. According to this principle, judges cannot expand the definitions of the crimes under the jurisdiction of the Court beyond their original meaning or create new law amending the Statute's provisions[764]. Differently stated, the provision "sets a further restriction on the bench's role of interpreting by requiring it, upon complete analysis, to discard any meaning deriving from a broad interpretation that is to the detriment for the accused"[765].

While art. 22(2) ICCSt explicitly refers to the definitions of the crimes, Judge Van den Wyngaert has used it to reject the application of the control theory in the form of the control over the organisation in art. 25(3), third alternative, ICCSt. In fact, according to the Belgian Judge, the inclusion of the possibility of committing a crime through an organisation in the wording "*through another person*" constitutes a violation of the principle of strict construction[766]. The latter was also raised in the *Bemba* case for the purpose of refusing a broad interpretation of art. 30 ICCSt, including *dolus eventualis* and recklesness[767].

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[763] BROOMHALL B., *Article 22*, p. 953; POWDERLY J., *The Rome Statute*, p. 497; CATENACCI M., *"Legalità"*, pp. 157-158. In the case law: *Katanga* Trial Judgment, paras. 50-51; *Van den Wyngaert* Concurring Opinion, para. 19.

[764] *Iinter alia*, Katanga Judgment, para. 52 (according to the Chamber "the primary task of the bench in criminal cases is the application and interpretation of the law but, under no circumstances, creation of the law, since the sole purpose of the bench's interpretative activity is to impart meaning to the existing law"). The amendment procedure of the Rome Statute provisions is regulated by arts. 121-122 ICCSt and the review of the Statute by art. 123 ICCSt. In these procedures the Assembly of State Parties plays a central role.

[765] *Katanga* Trial Judgment, para. 50.

[766] *Van den Wyngaert* Concurring Opinion, para. 52.

[767] *Bemba* Confirmation of Charges, para. 369.

The *in dubio pro reo* principle "is an accepted consequence of the rule of strict construction"[768]. It can be used when doubts regarding the meaning that is attributed to a term or a provision remain after having applied the aforementioned interpretative techniques[769]. In case of ambiguity, the meaning most favourable to the accused must be chosen[770].

A question has been raised as to whether the principle of legality overrides the traditional methods of interpretation contained in the VCLT. In the *Katanga* judgment, the Trial Chamber answered this question in the negative, claiming that the interpretation resulting from the application of the General Rule provided by the VCLT must be consistent with the principle of legality, coming into play only as a secondary consideration[771]. The Chamber noted how it would be difficult misinterpreting the Statute applying the methods of interpretation provided in the VCLT[772]. Moreover it claimed that the compliance with the General Rule provides a tool for safeguarding the principle of strict construction[773].

In contrast, according to judge Van den Wyngaert, the principles of strict construction and in *dubio pro reo* are paramount when "interpreting articles dealing with criminal responsibility"[774]. In academic literature this position has been taken to the extreme by those who believe that "the existence of the principle of legality justifies the non-application of the VCLT" to the international criminal statutes[775].

I think that although sometimes there might be some tensions between the VCLT's interpretative techniques and the principle of legality, the first step in the interpretative process should be the invocation of the interpretative methods contained in the VCLT. Art. 22(2) ICCSt and the protection of internationally

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[768] BROOMHALL B., *Article 22*, p. 962. In academic literature, this principle is also referred as "*favor rei* principle": CASSESE A., *Cassese's International*, p. 29.

[769] *Katanga* Trial Judgment, para. 53; WERLE G., JESSBERGER F., *Principles*, p. 72.

[770] *Katanga* Trial Judgment, para. 53.

[771] *Ibid.*, paras. 51, 53.

[772] *Ibid.*, para. 56.

[773] *Ibid*, para. 57.

[774] *Van den Wyngaert* Concurring Opinion, para. 18.

[775] JACOBS D., *International Criminal Law*, pp. 467-470.

recognised human rights, nonetheless, serve to limit the result of the statutory provision interpretation, conducted according to such interpretative methods.

b) Is the prevailing interpretation of art. 25(3) ICCSt in conflict with the principle of legality?

The subject of much debate is whether art. 22(2) ICCSt applies also to the provisions contained in Part III of the Rome Statute, including art. 25 ICCSt. Some scholars maintain that the application of art. 22(2) ICCSt would be limited to arts. 6-8 *bis* ICCSt, without involving the provisions set in the "*General Principles of Criminal Law*"[776]. In contrast, there are those who believe that it regards also art. 25 ICCSt[777].

The possibility of applying the principle of strict construction to the "the definition of criminal responsibility" has been strongly affirmed by judge Van den Wyngaert in her concurring opinion[778]. It is worth noting that the principle of strict construction has been used to deal with other provisions contained in Part III of the Statute. For example – as above mentioned – it has been invoked in the *Bemba* case for the purpose of rejecting a broad interpretation of art. 30 ICCSt including *dolus eventualis* and recklessness[779]. In this case, however, the acceptance of *dolus eventualis* in the provision would have led to the expansion of the provision's scope and would have lowered the threshold of culpability required under the Rome Statute.

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[776] BROOMHALL B., *Article 22*, p. 960; WERLE G., JESSBERGER F., *Principles*, p. 72; SADAT L.N., JOLLY J.M., *International Criminal Courts*, pp. 759-760.

[777] SCHABAS W.A., *The International Criminal Court*, pp. 547-548; POWDERLY J., *The Rome Statute*, p. 494; *Van den Wyngaert* Concurring Opinion, paras. 18, 52; in this vein seems to be also *Katanga* Trial Judgment, para. 57.

[778] *Van den Wyngaert* Concurring Opinion, para. 18 (furthermore, according to the Belgian Judge, the interpretation of art. 25(3)(a), third alternative, ICCSt along the lines of the *Organisationsherrschaft* "violates the principle of strict construction contained in Article 22(2) of the Statute", para. 52, and indirect co-perpetration "is based on an expansive interpretation of Article 25(3)(a) of the Statute which is inconsistent with Article 22 of the Statute", para. 64).

[779] *Bemba* Confirmation of Charges, para. 369.

With regard to the principle of individual criminal responsibility here it is only possible to demonstrate that if art. 22(2) ICCSt were applicable to art. 25(3) ICCSt, the principle of strict construction would not be violated by the inclusion of the control over the organisation theory in art. 25(3), third alternative, ICCSt. Indeed, the implementation of the control over the organisation theory in the latter case would entail a completely different outcome compared to the acceptance of *dolus eventualis* in art. 30 ICCSt for at least two reasons. First of all, art. 25(3)(a), third alternative, ICCSt provides for the possibility of committing a crime through a responsible person. The organisation is normally composed of responsible persons, and, as a consequence, such an interpretation seems to be compatible with the wording of the provision. Second, its inclusion in the provision does not broaden the scope of art. 25(3)(a) ICCSt, thereby leading to the expansion of the indirect perpetrator's criminal responsibility. In contrast, it has the function of restricting the application of this mode of liability, requiring the Prosecutor to establish several elements – which is quite a high burden of proof. Therefore, it is not possible to establish that the implementation of the doctrine in the provision would constitute a violation of the principle of legality: it does not imply a violation of the principle of strict construction and such an interpretation is not against the accused.

In any case, I think that the implementation of the control over the organisation theory in art. 25(3)(a), third alternative, ICCSt is more a question of whether it is preferable to adopt a pragmatic or a doctrinal approach to the provision. In other words, "the legality principle does not prescribe either of the two solutions" and, as a consequence, it is not possible to establish in abstract whether the solution chosen conflicts with the principle and "the judges are relatively free to decide which course they whish to take"[780].

[780] WEIGEND T., *Indirect Perpetration*, p. 555.

V. Conclusion

The interpretative process plays a fundamental role in the application of the Rome Statute. It represents the bridge that connects a rule and its application[781]. As correctly emphasised in academic literature, "the application of law is dependent on a preceding act of interpretation, since it is necessary 'to form an understanding of what the authoritative text requires in order to apply it'"[782]. In such a process the judges play a leading role. However, their task is to interpret "rather than to add or subtract"[783]. The interpretative process is not "an exact science" and is highly influenced by the individual background of the interpreter. As a result, the interpretative techniques and the principles analysed above serve to guide the judges' interpretative activity, and, at the very same time, limit their creativity.

Art. 25(3)(a), third alternative, ICCSt does not contain a definition of indirect perpetration, determining what is meant by commission "*through another person regardless of whether that other person is criminally responsible*". Nevertheless, the same holds true for the national penal codes that endorse this mode of liability[784]. The wording of art. 25(3)(a), third alternative, ICCSt is sufficiently detailed and reflects formulations similar to those adopted at the domestic level.

It is possible to believe that art. 25(3)(a), third alternative, ICCSt does not contain a gap or a *lacuna*[785]. Therefore it is unnecessary to determine whether the control over the organisation theory is part of customary law under art. 21(1)(b) ICCSt or whether it carries the status of a general principle of law derived from

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[781] MARMOR A., *Interpretation and Legal Theory*, p. 112.

[782] POWDERLY J., *The Rome Statute*, p. 445.

[783] ASHWORTH A., *Interpreting Criminal Statutes*, p. 420.

[784] *Inter alia*: art. 25(1) StGB reads that a crime can be committed "*durch einen anderen*"; art. 28 of the Spanish Penal Code provides the possibility to commit a crime "*por medio de otro del que sirven como instrument*"; art. 29 of the Colombian Penal Code establishes that "*es autor quien realice la conducta punible por sí mismo o utilizando a otro como instrumento*".

[785] In this vein: *Katanga* Trial Judgment, para. 40.

national legal systems according to art. 21(1)(c) ICCSt[786]. Its wide application in several domestic legal systems can certainly be evaluated – as it will be done in the course of this study – but in order to examine its validity and persuasiveness.

Once the applicable law in art. 25(3)(a), third alternative, ICCSt, has been determined, it must be analysed along the lines of the conventional techniques of interpretation provided by art. 31 VCLT. In this specific case, it is worth noting that the subsidiary sources of law set in art. 32 VCLT cannot be invoked either to confirm or clarify the meaning of this part of the provision. In fact, no detailed attention has been paid to the introduction of this mode of liability during the negotiations and nothing in the *travaux préparatoires* indicates that the negotiators intended to incorporate the control thoery into the Rome Statute[787].

At this point, it is possible to choose between a positivist and a doctrinal approach to the provision. The first focuses more on the plain reading of the terms, while the second relies on theoretical inquiries in order to attribute the proper meaning to the words[788]. These are also the two possible approaches identifiable in the case law analysed above.

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[786] As to the possibility of considering the control theory a general principle of law under art. 21(3)(c) ICCSt: AMBOS K., *The First Judgment*, p. 143; critic on this point DI MARTINO A., *Lubanga e i bambini*, p. 1036. According to some scholars, due to the control theory's limited application in legal systems heavily influenced by German legal criminal law and legal theory (such as Spain and other Latin American countries), in any case, it would have not been possible to categorise it as a principle of international law within the meaning of art. 21(1)(c) ICCSt. In this vein: MANACORDA S., MELONI C., *Indirect Perpetration*, p. 170.

[787] AKSENOVA M., *The Modes of Liability*, p. 655; YANEV L., KOOIJMANS T., *Divided Minds*, p. 804; VAN SLIEDREGT E., *Individual Criminal Responsibility*, para. 3; *Van den Wyngaert* Minority Opinion, paras. 5-6.

[788] Ambos highlights the importance to rely on the doctrinal approach, or at least on guiding principles, in the interpretation of the terms contained in the statutory provisions. He states that the "law is not a natural science which can be approached in an entirely empirical-naturalistic manner. Legal Statutes are riddled with highly normative terms and for this reason alone are theoretical inquires necessary to find the most plausible and reasonable meaning". AMBOS K., *Ius Puniendi*, pp. 72-73 (he is sceptical towards the "extreme positivist 'plain reading' of the Statute which makes any theory, as means of statutory interpretation superfluous"). AMBOS K., *The First Judgment*, pp. 142-143.

As aforementioned, the application of the control over the organisation theory does not conflict with the text of art. 25(3)(a), third alternative, ICCSt and is consistent with its formulation. However, this argument alone is not enough to justify the reliance on such a theory at the ICC. For this reason, it is necessary to take into account the context of the provision, as well as the object and purpose of the Statute.

According to a systematic interpretation, it is noteworthy that indirect perpetration is contained in a broader context represented by art. 25(3) ICCSt, where – in the dominant opinion – subparagraph (a) lists the principal modes of liability and subparagraphs (b)-(d) those of an accessorial nature. After highlighting the need to find a criterion for distinguishing between these two categories and rejecting the subjective and objective approaches, the majority of the judges decided to apply the approach based on the control theory. It is along these lines that the control over the organisation theory has been applied for the purpose of interpreting the third variant of art. 25(3) ICCSt [789].

Nevertheless, the strongest argument for the application of the control over the organisation theory is found in the object and purpose of the Rome Statute. According to the Statute's preamble, the ICC has been established for the purpose of punishing "*the most serious crimes of concern to the international community as a whole*" and "*to put an end to impunity for the perpetrators of these crimes*"[790]. Considering the macro-dimension of the crimes under the jurisdiction of the Court and the ability of the control theory in the form of the control over the organisation to capture such a magnitude, it is possible to introduce a teleological reasoning which is not only based on the "fight against impunity" but that also focuses on "properly expressing and addressing the responsibility for the

[789] It is worth noting that the possibility of relying on the *Organisationsherrschaftslehre* to interpret indirect perpetration through a responsible person within the meaning of art. 25(3)(a), third alternative, ICCSt, has been recognised also by those criticising the control theory: YANEV L., KOOIJMANS T., *Divided Minds*, p. 806 (however the authors base the implementation of the control over the organisation theory on different premises, namely the alleged "gap" represented by the adverb "regardless", leaving room for the possible inclusion of the German theory in the provision); VAN SLIEDREGT E., *Perpetration and Participation*, p. 507.

[790] Paragraphs 4-5 of the Preamble to the ICCSt.

crimes"[791]. From this perspective, the control over the organisation represents a possible solution[792], which on one side captures the macro-dimension of international crimes, and on the other, reflects the responsibility of the perpetrators behind the desk who are in most cases among the (most) responsible for these atrocities.

As a result and in light of both the text and the context of the provision, as well as the object and purpose of the treaty, there are no reasons for excluding the control over the organisation theory from the overall doctrine of indirect perpetration under art. 25(3)(a), third alternative, ICCSt[793]. As highlighted above, this approach does not broaden the provision's scope and does not conflict with the principle of legality. Contrary to what has been argued by some scholars[794], at this stage of the analysis there is no reason to believe that the implementation of the theory (through the provision itself) would compromise the rights of the accused.

In light of the foregoing, it is not possible to agree with those who dismiss the theory on the basis of formal reasons, such as its alleged lack of support in the Rome Statute[795] or its German origin[796]. In contrast, it is essential to discuss the

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[791] In this vein, *Lubanga* Trial Judgment, para. 976; critical on the teleological approach, although based only on the "fight against impunity", *Van den Wyngaert* Concurring Opinion, para. 16 (the Belgian Judge claimed that "even if the 'fight against impunity' is one of the over-arching raison d'être of the Court which may be relevant for the interpretation of certain procedural rules, this cannot be the basis for a teleological interpretation of the articles dealing with criminal responsibility").

[792] *Katanga* Trial Judgment, para. 1405 (as to the reliance on the control over the organisation, the Chamber stated that it "does not mean that the theory of the control over the organisation is the one and only legal solution that allows the provisions of article 25(3)(a) concerning commission by an intermediary to be constructed. As such, the theory need not be held up as an essential constituent element of commission by an intermediary*"*).

[793] In this vein: *Katanga* Trial Judgment, para. 1403.

[794] SADAT L.N., JOLLY J.M.*, International Criminal Courts*, p. 784.

[795] *Ibid.*, p. 757 (according to the authors "it was improper for the ICC to incorporate the so-called 'control theory' into its interpretation of Article 25, regardless of the merits of that theory in describing the complexity of system criminality").

[796] In this vein seems to be Judge Fulford: *Fulford* Separate Opinion, para. 10-12.

control over the organisation theory in light of its merits, effectiveness and persuasiveness. Such an approach would help establish whether the theory can indeed play a leading role in the interpretation of art. 25(3)(a), third alternative, ICCSt and set the foundation for the development of an international criminal law doctrine, or whether it is preferable to adopt a more pragmatic approach to the provision.

PART TWO

THE CONTROL OVER THE ORGANISATION THEORY AND THE *ORGANISATIONSHERRSCHAFTSLEHRE*

A. The *Organisationsherrschaftslehre*

I. The context and the origin

The *Organisationsherrschaftslehre* is part of the broader doctrine developed by Roxin for the purpose of distinguishing principals from accessories[797]: the control over or domination of the act theory ("*Tatherrschaftslehre*")[798]. According to the German scholar the difference between principals and accessories hinges on the concept of control over the crime that is exercised by the former and not by the latter. While all perpetrators dominate the commission of the act, it is not possible to provide a unique definition of control. Indeed, perpetration is not limited to the physical execution of the crime by an individual, but also includes different forms of both direct and indirect perpetration. This is why Roxin adopted an "open concept" ("*offener Begriff*") of control, which is sufficiently broad and abstract to be capable of representing different forms of perpetration[799]. In other words, this concept is more "a guiding principle than a fixed rule with precise inferences"[800].

The three main forms of control identified by the German scholar are: (1) the control over the act ("*die unmittelbare Täterschaft als Handlungsherrschaft"*) characterising the direct and physical perpetration of a crime (the commission *propria manu* of the crime); (2) the control over the will of the direct perpetrator ("*die mittelbare Täterschaft als Willensherrschaft"*) characteristic of indirect perpetration, where the individual in the background ("*Hintermann*") controls the

[797] WERLE G., BURGHARDT B., *Claus Roxin*, pp. 191-192.

[798] The first version of Roxin's seminal work "*Täterschaft und Tatherrschaft*" dates back to the 1963, the ninth – and last – edition of this book is the one taken as a reference in the present chapter.

[799] ROXIN C., *Täterschaft*, p. 122, p. 251.

[800] AMBOS K., *Ius Puniendi*, p. 71; SEMINARA S., *Tecniche normative*, pp. 158-159.

crime through the control he or she exercises over the will of the physical perpetrator ("*Vordermann*"); and (3) the functional control over the act ("*die Mittäterschaft als funktionalle Tatherrschaft*") based on the functional division of roles played by several individuals acting together[801].

It is within the second category mentioned above that in 1963 Roxin developed a new and autonomous form of indirect perpetration based on the control over the will by means of organised power structures ("*die Willensherrschaft kraft organisatorisher Machapparate"*)[802]. The latter must be added to the most traditional hypothesis of indirect perpetration: "*die Willensherrschaft kraft Nötigung*", where the executor acts under duress or coercion and "*die Willensherrschaft kraft Irrtums*", where the direct perpetrator acts under mistake due to deceit by the man in the background or where the man in the background takes advantage of a pre-existing mistake of the direct executor[803].

According to this "new" formulation, an individual can be considered indirect perpetrator when he or she commits the crime through the organised power structure at his or her disposal, despite the full criminal responsibility of its members and thus of the executors of the crime. In this scenario, the indirect perpetrator controls the will of the direct agents by means of the control exerted over the organisation. This innovative version of Roxin's theory broadens the concept of perpetration, going beyond the traditional forms of indirect perpetration, where the direct agent is innocent or otherwise not criminally responsible. Nevertheless, according to this form of indirect perpetration, the direct and responsible agent may also be considered as a tool to commit the crime. Or better yet, the direct perpetrator is simply considered a cog in the machinery (the organisation) used by the individual in the background, thereby operating as

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[801] ROXIN C., *Strafrecht Allgemeiner Teil*, pp. 19-105.

[802] ROXIN C., *Crimes as Part*, pp. 193-205. For an updated discussion on the theory: ROXIN C., *Täterschaft*, pp. 242-252, pp. 736-743. See also: ROXIN C., *Strafrecht Allgemeiner Teil*, pp. 46-58. For a recent overview of the doctrine and its application: MUÑOZ CONDE F., *La Autoría Mediata*, pp. 199-227; MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 113-135.

[803] ROXIN C., *Strafrecht Allgemeiner Teil*, pp. 46-47; JOECKS W., *StGB § 25 Täterschaft*, p. 1264.

an instrument to execute the crime[804].

According to Roxin, the responsibility of the indirect perpetrator and that of the direct perpetrator can coexist without any problems because they are grounded on different premises. The responsibility of the former is based on the control exercised over the apparatus of power ("*Organisationsherrshaft*") and the responsibility of the latter on the control exerted over the crime committed *manu propria* ("*Handlungsherrschaft*")[805].

As will be seen throughout the course of the present study, this theory has been the point of departure for additional elaborations carried out by Roxin in the years following its first appearance[806] and by other scholars proposing revised versions of the theory[807], as well as the object of vibrant criticism, both at the domestic and international levels. For the purpose of this investigation, however, it is neither possible, nor essential, to reproduce and analyse the entire theoretical discussion involving the different aspects of the theory. As a result, I will provide a general overview of the theory and will place additional emphasis only on the aspects strictly related to its implementation at the ICC. Indeed, one of the main objectives of this study is to equip English speakers who do not have access to the original sources (which require knowledge of German or at least of Spanish) with the tools to fully understand the foundations and content of the

[804] ROXIN C., *Täterschaft*, p. 245.

[805] ROXIN C., *El dominio de organización*, pp. 11-22*,* p. 15; ROXIN C., *Crimes as Part*, p. 199.

[806] The most important modification made to the original version of Roxin's theory dates back to 2006, when the German scholar surprisingly added an additional and autonomous criterion to his theory: the disposition to the act ("*Tatbereitschaft*") identified by Schroeder in his main work: SCHROEDER F.C., *Der Täter*. The disposition to the act was, up until the moment of its addition, the object of discussion between the two scholars (ROXIN C., *El dominio de organización*, p. 16; ROXIN C., *Organisationsherrschaft*, pp. 298-299). Nevertheless, in the last version of the theory presented by Roxin, such a criterion lost its previous importance and is no longer considered an autonomous criterion, but simply a consequence resulting from the implementation of the other elements identified by the scholar: power of command, fungibility, detachedness of the apparatus from the law. As a consequence the last version of the theory approaches the original one: ROXIN C., *Täterschaft,* p. 739. (See infra in this Section, II., b), iv)).

[807] For the purpose of this analysis, the most important alternative is presented by Schroeder's "*Der Täter hinter dem Täter"*.

Organisationsherrschaftslehre. In fact, in spite of being today the dominant theory applied at the ICC, with a few exceptions, it is still not possible to find detailed analysis of the theory in English-language literature[808].

When Roxin developed the original version of the theory, he had in mind the National Socialist dictatorship and its leading figures such as *Hitler* and *Himmler*, as well as the magnitude of the crimes perpetrated in such contexts involving organised power structures[809]. In his first writing on this topic, the German scholar focused on the *Eichmann* case and on the *Stashynsky* case, using the facts they presented as examples for elaborating his theory[810].

As previously mentioned, *Adolf Eichmann* was one of the main organisers of the holocaust and coordinator of the deportation of Jews to the concentration camps. During *Eichmann*'s trial, the Jerusalem District Court relied on a sort of organisational responsibility and convicted the defendant as a "principal offender" for several crimes strictly related to the carrying out of the "Final Solution"[811]. The *Eichmann* judgment is particularly important[812] because the judges referred to the Nazi apparatus as the entity through which the crimes were committed[813]. The judges further highlighted that the macro-dimension of the crimes charged and the large number of individuals involved would have made it difficult to use the classical concepts normally employed to ascribe the criminal responsibility for

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[808] JAIN N., *Perpetrators and Accessories*, pp. 116-136. More in general on the *Tatherrschaftslehre*: FLETCHER G.P., *Rethinking*, pp. 649-657. The most important elaborations on the topic are in German and in Spanish. Nevertheless, one can find some works of German and Spanish scholars that touch upon the topic and that are in the English language, in particular when analysing the concrete application of this theory in macro-criminal contexts: WEIGEND T., *Perpetration through an Organization*, pp. 91-111; AMBOS K., *The Fujimori Judgment*, pp. 137-158; AMBOS K., *Command Responsibility*, pp. 127-157; JESSBERGER F., GENEUSS J., *On the Application*, pp. 853-869. See also: OLÁSOLO H., *The Criminal Responsibility*, pp. 116-134.

[809] ROXIN C., *Strafrecht Allgemeiner Teil*, p. 47.

[810] ROXIN C., *Täterschaft*, pp. 246-248; ROXIN C., *Crimes as Part*, pp. 193-205.

[811] *Eichmann* District Court Judgment; AMBOS K., *Algumas considerações*, p. 183 (for an English version: AMBOS K., *Some Considerations*, p. 131); AMBOS K., *Treatise, Vol. 1*, p. 114.

[812] On the importance of the *Eichmann* trial to international law: SCHABAS W., *The Contribution*, pp. 667-699.

[813] *Eichmann* District Court Judgment, para. 193.

ordinary crimes[814]. The Court did not apply the *Organisationsherrschaftslehre* that was developed by Roxin a few years after the trial[815]. Nevertheless, the *Eichmann* judgment seems to have developed the concept used in the *Justice* Trial relying on a form of domination of the criminal events by the individual in the background[816].

When studying the *Eichmann* case a few years later, Roxin underlined that the crimes with which the *Eichmann* was charged were committed as part of organised power structures[817]. Roxin further noted how in such contexts, relying on the traditional criteria of participation, the individual in the background (in this case *Eichmann*) would have been considered responsible as a "mere" instigator, aider or abettor[818]. Indeed, thanks to the "autonomy principle"[819] and to the full responsibility of the direct perpetrator operating on the ground, the individual in the background would have been considered a "mere" accessory. In other words, the responsibility of the direct perpetrator would have protected the man in the background from principal responsibility and eventually from the associated stricter punishment. Furthermore, in the specific case, it would have not been possible to establish that *Eichmann*'s subordinates (as well as *Eichmann*) acted under coercion or deception, because there was no evidence showing that during the Nazi regime the direct perpetrators were forced to commit the crimes[820]. Such direct perpetrators acted mainly out of a sense of duty and obligation towards their superiors. As a result, it would have not been possible to rely on the traditional categories of indirect perpetration.

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[814] *Ibid*., para. 197.

[815] *Eichmann*'s trial began on 11 April 1961 and ended on 12 December 1961 with *Eichmann*'s conviction, while Roxin first elaborated on the *Organisationsherrschaftslehre* in a publication issued in 1963.

[816] AMBOS K., *Treatise, Vol. 1*, p. 114 (according to Ambos, the Jerusalem District Court "argued for a type al responsibility, a form of domination of the criminal events and immediate perpetrators by the 'man at the desk', a further development of the concept used in the *Justice* Trial").

[817] ROXIN C., *Crimes as Part*, pp. 193-194.

[818] *Ibid.*, p. 198.

[819] On the "autonomy principle": SCHÜNEMANN B., *StGB § 25 Täterschaft*, pp. 1880-1882.

[820] ROXIN C., *Täterschaft*, pp. 243-244.

Roxin made a similar reasoning in relation to the *Stashynsky* case[821], in which KGB agent *Bogdan Stashynsky* was ordered by the Secret Service to assassinate two exiled Ukrainian politicians: *Lev Rebet* and *Stepan Bandera*. The *Bundesgerichtshof* (BGH) tried the case and applied a subjective approach – traditionally used by the case law of the time to distinguish principals from accessories – to convict those who ordered the commission of the crime as principals and *Stashynsky* as a mere abettor. Roxin acknowledged the ability of this approach to reflect the responsibility of the man in the background, but he highlighted that it offers only an apparent solution while in reality it presents a series of problems[822].

This approach would allow the direct agents to be considered as accessories, playing down their responsibility and failing to render justice to the case[823]. In his view, the one who meets the "*actus reus* and *mens rea* of the crime should always be held responsible for committing the crime, and thus as a principal, regardless of whether he or she acted only on behalf of the will of others (so-called "*animus socii"*)"[824]. Furthermore, the subjective approach would lead the participants to invoke their lack of interest in the commission of the criminal act or their mental fragility in order to be considered mere accessories and thereby shifting the responsibility to the individual in the background[825]. Last but not least, relying on the "*animus auctoris*", it would be difficult to distinguish between indirect perpetrators and instigators, because both figures are willing to commit the crime.

After rejecting the subjective approach in favour of the control over the act, Roxin claimed that according to the traditional *Tatherrschaftslehre*, it would have not been possible to attribute the responsibility as principal to the head of the KGB who ordered *Stashynsky* to assassinate the two politicians. Indeed, because *Stashynsky* acted fully autonomously, and not under coercion or deception, the traditional forms of indirect perpetration were not applicable[826].

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[821] BGH, Judgment of 19 October 1962*,* in *BGHSt,* 18 (1963), pp. 87 ff.

[822] ROXIN C., *Täterschaft*, p. 244.

[823] ROXIN C., *Crimes as Part*, p. 196.

[824] *Ibid*., p. 195.

[825] *Ibid.*, p. 196.

[826] *Ibid.*, p. 197.

The similarities identified by the German scholar in the two cases are the following: (i) the direct agents did not act under duress or mistake, as a consequence it would have not been possible to rely on the traditional forms of indirect perpetration to convict the individuals in the background[827]; (ii) independently from the number of victims, those in the background committed the crimes through an organised power structure composed of responsible individuals[828]; and (iii) the traditional forms of participation, such as instigation, aiding and abetting were not capable of adequately reflecting these types of dynamics, nor did they capture the responsibility of the individuals in the background[829].

On the basis of these observations, Roxin elaborated a new form of control over the will: "*Willensherrschaft kraft organisatorischer Machtapparate*". The new formulation of the doctrine appears to respond to the following problems: (i) the inability of the traditional concept of participation to properly capture the responsibility of the individual in the background for the crimes committed by his or her subordinates on the ground; and, at the same time, (ii) the impossibility of considering the individual in the background as a principal perpetrator along the lines of the traditional concepts of indirect perpetration (duress and mistake), since in both examples mentioned above the direct agents were fully responsible individuals.

II. The *Organisationsherrschaftslehre* as an autonomous form of indirect perpetration

a) Theoretical foundations

Before analysing the theoretical foundations of the *Organisationsherrschaftslehre* in detail, it is important to highlight that the theory is "intimately linked" to the differentiated model of participation to the crime

[827] *Ibid.*; ROXIN C., *Täterschaft*, pp. 243-244.

[828] ROXIN C., *Täterschaft*, pp. 247-248.; ROXIN C., *Crimes as Part*, p. 201.

[829] ROXIN C., *Crimes as Part*, p. 198.

based on the distinction between principal/primary and accessorial/secondary responsibility[830]. Moreover, this theory was mainly elaborated for reasons of criminal policy. The purpose was that of finding a criterion capable of linking the individual far removed from the scene of the crime to the offences committed by his or her subordinates and to adequately punish his or her criminal act. Indeed – as aforementioned – according to the German system (and many others) the individual in the background would have been punished "only" as accomplice or instigator.

Thanks to the *Organisationsherrschaftslehre* the individual in the background can be considered responsible as a principal for the crimes committed by fully responsible persons. This principle, which underpins the entire theory, has been strongly criticised in the doctrine[831]. In most cases, the dissenting views are based on the recognition of the "autonomy principle" and on the impossibility of applying the notion of indirect perpetration in cases where the direct agent is fully responsible[832]. In other words, for those criticising the theory, it would not be possible to consider a fully responsible indirect agent as a tool in the hands of the indirect perpetrator, as is the case with the traditional forms of indirect perpetration.

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[830] AMBOS K., *The Fujimori Judgment*, p. 147 (however, the author, regardless this peculiar connection, does not exclude the possibility of establishing an autonomous doctrine of *Organisationsherrschaft* for the needs of the ICC). For an overview of the German differentiated model: GENEUSS J., *German Report*, pp. 272-278; DUBBER M.D., HÖRNLE T., *Criminal Law*, pp. 323 ff.

[831] This aspect has been criticised in academic literature: JAKOBS G., *Sobre la autoría*, p. 108; JAKOBS G., *Derecho penal*, p. 784 (the author categorically refuses the possibility of considering the direct agent a perpetrator of the crime he committed and at the same time a tool in the hands of the man in the background. Rather, the author is in favour of applying the doctrine of co-perpetration in such cases), for the original version: JAKOBS G., *Strafrecht Allgemeiner Teil*, 1991; JESCHECK H.H., WEIGEND T., *Lehrbuch des Strafrechts*, p. 670. In the Italian literature: GRASSO G., *Art. 110*, p. 164 (the author shares the position previously proposed by Seminara); SEMINARA S., *Tecniche normative*, pp. 129-130.

[832] *Inter alia*, see also: RENZIKOWSKI J., *Restriktiver Täterbegriff*, pp. 88-90; OTTO H., *Täterschaft*, pp. 254-456.

The question is the following: on which premises may one consider the *Organisationsherrschaftslehre* an autonomous form of indirect perpetration?

In Roxin's view, the concept of "instrument" is not limited to the single individual agent used in traditional cases of indirect perpetration (coercion and deception): the person who kills the designated victim with his or her own hands[833]. This concept must be extended also to the apparatus through which the individual in the background commits the crimes and that allows him or her to exercise control over the commission of the crime[834]. In this case, the conduct of the single agent is irrelevant as such because if he or she does not act, another individual is able to immediately to take over. In other words, the organisation – composed by several individuals integrated in a pre-established structure – must be considered an instrument in the same way as the direct perpetrators in the traditional hypothesis of indirect perpetration[835]. In this context, the control over the act is grounded on the control exercised by the indirect perpetrator over the organisation and it is through the latter that he controls the direct agents[836].

In this perspective the naturalistic argument used to criticise the theory (that is the impossibility to control the will of a fully responsible direct agent) is overcome by relying on a normative criterion of attribution of the crimes committed on the ground.

According to the German scholar, the responsibility of the individual in the background and that of the direct perpetrator are based on different grounds reflecting different forms of control that are not mutually exclusive[837]. As a result, for the purpose of the application of the theory presented by the author it is irrelevant that the direct agent is an independent and criminally responsible individual.

On the basis of the previous considerations, Roxin inferred that it is possible that the *Organisationsherrschaftslehre* constitutes an autonomous form of indirect

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[833] ROXIN C., *El dominio de organización*, p. 14.

[834] *Ibid.* p. 15.

[835] *Ibid.*

[836] AMBOS K., *Zur „Organisation"*, p. 841.

[837] ROXIN C., *El dominio de organización,* p. 15.

perpetration. The German scholar went even further by stating that in such a case – compared to the traditional hypothesis of indirect perpetration – the individual in the background is even more certain that the crime he or she ordered will be committed[838].

b) The constitutive elements of the *Organisationsherrschaftslehre*

The main issue relating to the *Organisationsherrschaftslehre* is that of establishing the reasons for believing that the individual far removed from the scene of the crime exerts control over his or her subordinates operating on the ground[839]. It is only where this control is concretely verified[840] that one may adequately ascribe the responsibility of the crimes committed by the perpetrators to the *Hintermann* as if they were his own, and thereby consider him as an indirect perpetrator. The determination of the control in this context is particularly complex because – as mentioned above – in most cases those carrying out the crimes are also fully responsible persons. As a result, according to Roxin, in order to determine whether the individual in the background controls the direct perpetrators, the following elements must be met:

i) the existence of a hierarchical power apparatus ("*Machtapparate*") and the command power of the indirect perpetrator ("*Befehlsgewalt*");

ii) the apparatus of power's detachedness from the law ("*Rechtsgelöstheit*")

iii) the fungibility of the direct perpetrators ("*Fungibilität*");

iv) the direct perpetrator's disposition to commit the act ("*Tatbereitschaft*")[841].

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[838] *Ibid.*

[839] AMBOS K., *Treatise, Vol. 1*, p. 159.

[840] ROXIN C., *Strafrecht Allgemeiner Teil*, p. 51.

[841] Whether the direct perpetrator's disposition to commit the act constitutes an autonomous element of the theory is controversisial and will be analysed in this Section, II., b), iv)). ROXIN C., *Täterschaft*, pp. 739-740.

i) The existence of a hierarchical power apparatus and the command power of the indirect perpetrator

a. The existence of a hierarchical power apparatus

The existence of an organisation is at the basis of the theory elaborated by Roxin – it is therefore both an essential and constitutive element because it is the instrument through which the indirect perpetrator commits the crimes[842]. According to the German scholar the organisation must have certain features: it must consist of a hierarchically structured power apparatus and it must have a dimension capable of providing a sufficient number of interchangeable individuals[843]. In this perspective, the organisation is considered an autonomous entity working automatically and with a life independent from that of its components[844]. As a result, its existence does not have to be based on the personal relationship between its participants[845]. In fact, if it were so, its existence would depend on its members, where the substitution of one member could potentially compromise the existence of the entire organisation[846]. It is for this reason that the power apparatus must be able to provide a sufficient number of interchangeable individuals[847]. In Roxin's view, these features would secure the automatic functioning of the organisation and thus the commission of the crimes.

There are no doubts that when Roxin developed his theory he had in mind the

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[842] ROXIN C., *El dominio de organización*, pp. 14-15.

[843] ROXIN C., *Täterschaft*, p. 739; ROXIN C., *Zur neuesten*, pp. 407-409.

[844] ROXIN C., *Täterschaft,* pp. 245, 739; ROXIN C., *Crimes as Part*, p. 198.

[845] ROXIN C., *Täterschaft*, p. 739; ROXIN C., *Zur neuesten*, p. 409. This feature has been explicitly implemented also in the *Katanga* Trial Judgment, para. 1409.

[846] Roxin provides an example of half a dozen anti-social elements joining their forces in order to jointly commit crimes while choosing their own leader. According to the scholar it is insufficient to claim that this is a power structure ("*Machtapparat*"). ROXIN C., *Crimes as Part*, p. 204. This example has been used also in the *Katanga* Trial Judgment, para. 1409.

[847] ROXIN C., *Zur neuesten*, p. 409. In contrast, according to Rotsch the broad dimension of the organisation would weaken the power of control exerted by the individual in the background: ROTSCH T., *Tatherrschaft*, p. 557.

National Socialist state bureaucracy apparatus[848]. Nevertheless, since his first writing on the topic, he has also explicitly accepted the possibility of applying the theory to other types of organisations[849]. While he has recognised that the state apparatus often reflects the model of perfectly organised criminality, he has also claimed that the application of the theory does not have to be limited to such contexts, and can also involve non-state sponsored organisations, such as terrorist and mafia-like criminal organisations[850]. It is noteworthy that at the time when Roxin first elaborated on the *Organisationsherrschaftslehre* the German legal system lacked legislation specifically related to criminal organisations[851] and adequate mechanisms of attribution to the leaders of such organisations for the crimes committed by their subordinates in the implementation of an organisational policy.

Roxin did not define organisation. In his view, the qualification of the organisation is not necessary to apply the theory. What is important is that the power apparatus meets certain features: (1) it must have a hierarchical structure; (2) the direct executors must be interchangeable; and (3) it must operate outside of the legal order[852]. The lack of precision in the definition of this concept led to the broad application of the theory. In case law the use and application of the *Organisationsherrschaftslehre* has been extended to punish the leaders of

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[848] OSIEL M., *Ascribing Individual Liability*, pp. 110-114; OSIEL M., *Making Sense*, p. 100. Nevertheless, the author's statement according to which "Roxin's analysis assumes the existence of a rigidly formal bureaucracy of the sort contemplated by Max's Weber's famous ideal type" cannot be entirely accepted for at least two reasons: (1) Roxin never explicitly referred to Weber's model in his writings on the topic and, (2) since his first work, Roxin allowed for the possibility of extending the application of the theory to other organisational contexts. In this vein: AMBOS K., *Zur „Organisation"*, pp. 841-842.

[849] ROXIN C., *Crimes as Part*, pp. 203-204 (the author refers in particular to "organizations such as the Mafia, the Ku Klux Klan, the OAS and the FLN"). This approach has been confirmed in the most current version of his theory: ROXIN C., *Täterschaft*, p. 739.

[850] ROXIN C., *Problemas actuales*, pp. 224-225.

[851] ARNOLD J., *L'associazione criminale*, p. 231.

[852] *Ibid.*; FARALDO CABANA P., *Responsabilidad penal*, pp. 195-196.

business enterprises for the crimes committed by the companies they headed[853].

The model of organisation used by Roxin to develop his theory is one of the most problematic aspects related to the transposition and implementation of the doctrine in other contexts dealing with different criminal settings. The specific type of organisation used by the scholar in elaborating his theory has been criticised in academic literature because of its limited applicability in only certain cases. With specific regard to the hierarchical structure required for an organisation, some scholars have stated that this feature does not always characterise "the organizations through which many mass atrocities are conducted"[854]. This is one of the main criticisms that has been raised against the application of the theory at the ICC, mainly dealing with African groups and militias (such as the *Katanga* case)[855]. Moreover, in such a context, a perfect correspondence between the *de jure* command and the *de facto* power is not always easily identifiable and the chain of command within the organisation is not always as clear as it was in the National Socialism structure or as it is in military organisations. This is the reason for which particular attention must be paid to the analysis of the concrete case.

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[853] The possibility to extend the application of the theory beyond state organisations has been confirmed by the BGH in the first decision implementing the *Organisationsherrschaftslehre*. It did not only recognised the possibility to apply it to Mafia-like criminal organisations, but it further extended it to the business enterprises' leaders: BGH, Judgment of 26 July 1994, in *BGHSt*, 40 (1995), p. 237. Nevertheless, the possibility to apply this theory to the business enterprises' leaders has been strongly criticised in the doctrine, among the others, by Roxin, who recently confirmed his position: ROXIN C., *Täterschaft*, pp. 748-751 (for further reference see in particular footnote n. 776). The broad approach adopted by the BGH has been criticised mainly for the lack of elements justifying the application of the *Organisationsherrschaftslehre*, in particular the fungibility and the detachedness from the law. For a critical view see, *inter alia*: HEINRICH M., *Zur Frage*, pp. 147-167; AMBOS K., *Tatherrschaft*, pp. 226-245.

[854] OSIEL M., *Making Sense*, p. 99; OSIEL M., *The Banality of Good*, pp. 1833-1837.

[855] VAN SLIEDREGT E., *International Criminal Law*, p. 7; CRYER R., *An Introduction*, p. 368; JAIN N., *Individual Responsibility*, p. 865; JAIN N., *The Control Theory*, pp. 194-195; WEIGEND T., *Perpetration through an Organization*, p. 107; MANACORDA S., MELONI C., *Indirect Perpetration*, p. 171; OSIEL M., *Making Sense*, p. 100; OSIEL M., *The Banality of Good*, pp. 1833-1837.

The hierarchical element does not have to be interpreted in a strict manner, having in mind only the Nazi apparatus, but in a broader sense and considering that in all organisations it is possible to identify a certain degree of internal hierarchy. This is confirmed by the possibility – as recognised by Roxin himself – of also applying the theory to other organisational contexts[856].

The lack of a tight hierarchy, typical of non-state sponsored organisations, could be compensated by other factors, such as, for example, the affiliation of origin, the ethnicity, the spiritual beliefs, or the social-familiar bonds of members ("soft or weak factors"), as well as the use of drugs, and the recruitment and training of children[857]. Nevertheless, the existence of these factors does not substitute the requirement of the hierarchical structure of the organisation[858]. They would only compensate for the absence of a tightly hierarchical structure[859].

This is the approach that the ICC appears to have adopted. It is noteworthy to recall that several factors have been invoked at the ICC in order to establish a leader's control over his subordinates. In the *Katanga and Ngudjolo* case, the judges relied on the leader's "capacity to hire, train, impose discipline, and provide resources to his subordinates"[860]. In the *Katanga* judgment, the Chamber further highlighted how "the modalities of control over persons can be increasingly varied and sophisticated and that it is particularly difficult to conceive and grasp the nature and internal dynamics of contemporary criminal organisations"[861]. The mentioned factors would contribute – jointly with the

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[856] As a result, one cannot agree with Osiel where he claims that the German theory was limited to be applied only to the Weberian organisations.

[857] AMBOS K., *Zur „Organisation"*, pp. 850-851. More in general, in this vein also OSIEL M., *Making Sense*, p. 114 (the author stated that a "sufficient control over immediate, physical perpetrators may arise by means other than a highly formal, rigidly hierarchical organization").

[858] In academic literature there are those who question whether the strictly hierarchical structure is a prerequisite for the application of the *Organisationsherrschaftslehre* in all cases: MEINI I., *El dominio de la organización*, pp. 217-218 (according to the author, the existence of a hierarchical structure apparatus reflects the typical scenario that justifies the application of the theory, but it is possible that the automatic functioning of the organisation also depends on other factors).

[859] AMBOS K., *Zur „Organisation"*, p. 849.

[860] *Katanga and Ngudjolo* Confirmation of Charges, para. 513.

[861] *Katanga* Trial Judgment, para. 1410.

hierarchical factor – to secure the automatic compliance with a leader's orders[862]. Therefore, in light of the aforementioned, the tight hierarchical structure that an organisation must have is not required to be interpreted in an overly strict manner.

b. The command power of the indirect perpetrator

The organisation must be at disposal of the individual in the background. It is the means by which individuals such as *Hitler*, *Himmler*, *Stalin* and also *Fujimori* were able to commit the crimes[863]. For the purpose of the application of the theory, the indirect perpetrator must exercise power of command ("*Befehlsgewalt*") over the organisation[864].

Nevertheless, the critical question is the following: at which level of the hierarchy is it possible to consider that an individual exerts a sufficient control over the organisation to be considered indirect perpetrator? This question has been raised in particular with regards to the individuals who are placed at the middle of the hierarchical organisational structure.

According to Roxin, to be considered indirect perpetrator it is sufficient that the individual in the background controls part of the organisation, regardless of his or her level in the hierarchy and of the fact that behind him or her there may have been someone in a higher position[865]. In his view, there can be a chain of indirect perpetrators[866]. What is required is for the *Hintermann* to be in a position that enables him to exercise control over a part of the organisation ("*Anordnungsgewalt*"), through which he can be sure that the crimes he orders will be committed without having to rely on the action of the individual

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[862] *Katanga and Ngudjolo* Confirmation of Charges, para. 517 (the elements identified by the judges are particularly important also in the cases where it is not possible to establish that members of the organisation are fungible individuals. It is noteworthy that the replaceability of the direct agents is strictly related to the hierarchical structure of the organisation).

[863] ROXIN C., *Zur neuesten*, p. 400.

[864] ROXIN C., *Täterschaft*, p. 739.

[865] ROXIN C., *Crimes as Part*, p. 201.

[866] *Ibid.*, p. 202; ROXIN C., *Probleme von Täterschaft,* p. 556.

executor[867]. Otherwise, he has to be considered a participant ("*Gehilfe*")[868].

Eichmann represents a good example of the potential application of the theory to those who do not occupy the highest positions. In fact, he was not a mere executor of the orders given from the top, but was also at the same time in a position to plan, organise and give orders to his subordinates. As a consequence, in Roxin's view, *Eichmann* could be considered an indirect perpetrator along the line of the theory under examination, in spite of his position at the middle of the hierarchy[869].

Relevant case law has followed this approach by also applying the theory to mid-ranking individuals[870]. However, in academic literature, this circumstance has been criticised by those who believe that the theory "can only convincingly be applied" to those who are at the leadership level[871]. Such individuals are the only

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[867] ROXIN C., *El dominio de organización*, p. 16.

[868] *Ibid*.; ROXIN C., *Crimes as Part*, p. 202.

[869] ROXIN C., *Täterschaft*, pp. 246-247.; ROXIN C., *Crimes as Part*, p. 200. In this vein also: URBAN C., *Mittelbare Täterschaft*, p. 169 (however, according to the author, those subordinate to *Eichmann*, despite not being the direct executors of the extermination, could not be considered indirect perpetrators along the lines of the *Organisationsherrschaftslehre* because they did not have the decision-making power of their superior); FARALDO CABANA P., *Responsabilidad penal*, p. 205; LANGNEFF K., *Die Beteiligtenstrafbarkeit*, pp. 97-99.

[870] The possibility to apply the theory also to the mid-ranking commanders along the lines of Roxin's proposal is dominant in both the domestic and international case law. In Germany, *inter alia*: BGH, Judgment of 4 March 1996, in *BGHSt*, 42 (1997), pp. 65 ff. For a critical analysis of the *Bundesgerichtshof*'s case law and for further references: AMBOS K., *La parte general*, p. 230; AMBOS K., *Der Allgemeine Teil*, pp. 602-603. This dominant approach has also been recognised by the Peruvian Supreme Court: *Corte Suprema de Justicia de la República, Sala Penal Especial*, Judgment of 7 April 2009 against *Alberto Fujimori*, Exp. N° A.V. 19/2001, para. 731. Nevertheless, in certain cases in Peru and in Colombia, judges have relied on co-perpetration in order to convict mid-level commanders (see infra in Section B.). At the ICC, indirect perpetration has been used to reflect the responsibility of mid-level commanders in the *Gaddafi* case. Additionally, this possibility has been explicitly recognised in the *Katanga* Trial Judgment (para. 1412).

[871] AMBOS K., *The Fujimori Judgment*, pp. 151-152; AMBOS K., *Command Responsibility*, p. 154; AMBOS K., *Der Allgemeine Teil*, pp. 602-606; AMBOS K., *La parte general*, pp. 230-234. Nevertheless, in the most updated version of his reasoning on the topic, Ambos recognised the possibility to apply the theory also to the leaders of sub-organisations that, despite being part of a

ones in the position of exerting "absolute control through and over the organisation" because they do not receive orders from anyone[872]. This is particularly evident, for example, in the case of state violence. It is only from the highest position of the hierarchy that the individual can be sure to act undisturbed and without interference from others, especially those above[873].

It is on the basis of these observations that some have stated that with regard to mid-level commanders it would be more appropriate to rely on co-perpetration[874]. From this perspective, individuals in mid-level positions and the direct perpetrators of the crimes should be considered co-perpetrators according to the functional division of tasks that exists between them.

Those who consider it more appropriate to apply co-perpetration to mid-level commanders base their reasoning on a broad interpretation of both common plan and functional division of tasks between co-perpetrators. First of all, in order to share a common plan, in this perspective it would not be necessary that the mid-ranking commanders and the direct agents know each other or that they make the decisions jointly. In fact, "an informal consensus or agreement of the persons involved" would suffice and could be manifest in the direct perpetrators' acceptance of the organisation's policy imposed by the leaders[875]. Furthermore, the conduct of the superior planning and ordering the commission of the crime and that of the direct executors – in spite of operating at a different stage – are both functional and essential to the implementation of the crime[876]. Last but not least, it has been highlighted that the distinction between the vertical and

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broader context, work independently. Therefore, he extended the possibility to apply – under certain conditions – the theory also to mid-ranking commanders: AMBOS K., *Zur „Organisation"*, pp. 850-851; AMBOS K., *The Fujimori Judgment*, pp. 151-153.

[872] AMBOS K., *The Fujimori Judgment*, p. 151; AMBOS K., *Zur „Organisation"*, p. 851; AMBOS K., *Command Responsibility*, p. 153.

[873] *Ibid.*

[874] AMBOS K., *Treatise, Vol. 1*, p. 160; AMBOS K., *The Fujimori Judgment*, pp. 152-153; AMBOS K., *Zur „Organisation"*, p. 851; AMBOS K., *La parte general*, pp. 229-234; AMBOS K., *Der Allgemeine Teil*, pp. 603-606.

[875] AMBOS K., *The Fujimori Judgment*, p. 152.

[876] *Ibid.,* pp. 152-153 (according to the author "functional control over the acts means nothing else than a division of labour between the persons involved").

horizontal relationship among the perpetrators is not always clear in macro-criminal contexts. It would be evident only in cases where between the leadership level and the execution level it is not possible to identify the further figure of the mid-level perpetrators[877]. Nevertheless, this scenario is very unlikely in macro-criminal contexts. As a consequence, this restrictive interpretation of the theory would notably limit its application only to the leadership level[878] and to the individuals at the top of sub-organisations that, in spite of being part of a broader criminal context, work independently from one another[879].

The perspective analysed above prefers to accept "an unequal ranking of the co-perpetrators" instead of "a deficiency of leadership on the part of the indirect perpetrator"[880]. In other words, these two aspects complement each other[881]. As will be seen during the course of this analysis, most of these arguments, where accepted, could be used in order to prioritise co-perpetration when also dealing with those at the top of the hierarchy[882].

This approach has been rejected by Roxin[883]. In his view, the fact that the power of individuals – as *Eichmann* – derives from the senior leadership does not prevent considering those in the middle of the hierarchy as indirect perpetrators, insofar as they exercise the power over the part of the organisation they control in the same way as superiors do over the entire organisation[884]. Moreover, the minority approach could also be criticised on the basis of the following principled arguments used to reject co-perpetration in this kind of scenario: the absence of a common plan between the individuals involved in the crimes (in most cases the

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[877] *Ibid*., p. 153.

[878] For a critical view: FARALDO CABANA P., *Responsabilidad penal*, p. 204 (according to the author the interpretation of Ambos is too restrictive, nevertheless the Spanish scholar refers to a dated writing, where the German scholar recognised that the theory was convincingly applicable only to the top leaders: AMBOS K., *Der Allgemeine Teil*, p. 604).

[879] AMBOS K., *Zur „Organisation"*, p. 851

[880] AMBOS K., *The Fujimori Judgment*, p. 153; AMBOS K., *La parte general*, pp. 229-234; AMBOS K., *Der Allgemeine Teil*, pp. 603-606.

[881] AMBOS K., *Zur „Organisation"*, p. 851.

[882] In this vein also ROXIN C., *Zur neuesten*, p. 414.

[883] *Ibid*., pp. 413-414.

[884] ROXIN C., *Täterschaft*, p. 743; ROXIN C., *Zur neuesten*, pp. 413-414.

superior does not even know who the direct agents are) and the existence of a hierarchical relation between the superior and the direct perpetrators, allowing the former to unilaterally give orders on the latter, thus preventing the functional division of tasks.

ii) The apparatus of power's detachedness from the law

Under Roxin's theory, the power apparatus must operate outside of the legal order ("*Rechtsgelöstheit*")[885]. Only in such cases may the individual in the background be certain that the crime he or she orders will be committed. Indeed, if the direct perpetrators were bound by legal norms, the commission of the crimes would no longer be guaranteed: the perpetrators of the crime, being subject to such a law, could refuse to carry out the illegal order[886]. As a result, the individual in the background would not have the power to activate the entire organisation at his or her disposal and would therefore fail to exert control over it[887]. If the entire apparatus operates according to the law and the individual in the background orders the commission of the crime, and no other applicable forms of indirect perpetration exist, the only available mode of liability would be that of instigation[888]. In such a system, the direct members are certain that with their action they are respecting the rules of the group and that as a consequence they will be protected by the group.

In the perspective adopted by Roxin, the concept of "law" is not limited to "positive law", but it appears to be more related to "natural law", including the protection of human rights[889] and thus also of international law[890]. This broad interpretation has been invoked in particular to address the criticism raised in the contexts where the crimes were committed according to the law in force (for

[885] ROXIN C., *Täterschaft*, pp. 249-251.

[886] *Ibid.*

[887] *Ibid.*, p. 249.

[888] *Ibid.*; ROXIN C., *Crimes as Part*, p. 203.

[889] *Ibid.*

[890] In this vein also FARALDO CABANA P., *Responsabilidad penal*, p. 208 (the author refers to the concept of "*derecho suprapositivo*" at which bases are the principles of international law) .

example, during the Nazism). In fact, the state may operate in violation of "natural law" despite respecting the positive law (this is for example the case of the Nazi Regime or the Border Regime).

The German scholar claimed that this form of indirect perpetration can be manifest mainly in the following situations: in a state apparatus where the legal guarantees do not operate or do not operate anymore and the individual in the background uses the organisation at his or her disposal to commit the crime; or in underground movements and secret associations operating as organisations within the state and against the established legal order[891]. One of the typical examples of the second group is the Mafia. Moreover, it is important that the direct perpetrators do not act "on their own initiative and contrary to the goals of their group but as organs of leadership whose authority they recognize"[892].

In the writings following the first elaboration of the theory, the German scholar further specified the features of this element. Roxin stated that it is not necessary for the entire apparatus to operate outside of the legal order[893]. Rather, it is enough for it to operate detached from the law in the area where the crimes were committed. Roxin referred in particular to the National Socialist dictatorship and to the Border Regime established by the German Democratic Republic (GDR), highlighting how in many areas they have been functioning according to the existing law[894]. With regard to the "Final Solution" and to the killings of the GDR citizens trying to cross the border and flee to West Germany, Roxin underlined that both actions were against the legal order. Nevertheless, it is peculiar that in his view this condition need not be evaluated according to the law in force at the time of the facts, but rather on the basis of the current law[895]. Despite this additional clarification, it seems that Roxin continues to refer to a concept of law

[891] ROXIN C., *Täterschaft*, pp. 249-250; ROXIN C., *Crimes as Part*, p. 203.

[892] *Ibid*., p. 204

[893] ROXIN C., *El dominio de organización*, p. 16.

[894] *Ibid.*

[895] For a critical view: JAIN N., *Perpetrators and Accessories*, p. 133 (the author specifies that "it is difficult to see why the law currently in force should be the guiding feature for assessing the organization's previous activities, and even if it is, whether that should be limited to the domestic law of the State where the crimes are committed or if it also includes international law").

closely related to "natural law"[896].

The power apparatus' detachedness from the law, as a constitutive element of the theory, is very controversial[897]. Nevertheless, because the ICC has neither adopted nor applied it in its case law (and correctly so), it does not appear necessary to analyse the discussion involving it.

iii) The fungibility of the direct perpetrators

The fungibility of direct perpetrators is a decisive factor of Roxin's theory[898]. According to him, the members of the organisation must be fungible and replaceable. As a result, if an individual does not act, another one must be immediately ready to take over and carry out the order. The direct agent is considered an anonymous and interchangeable entity within the organisation, a cog in the machinery that can be substituted at any time[899]. This is the reason for which the organisation must have a certain amount of members, i.e. a number sufficient enough to allow for its components (soldiers, combatants, etc.) to be replaced if necessary. This circumstance enables the head of the organisation to be sure that the acts he or she orders will be carried out. As a result, in this

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[896] *Ibid.*

[897] For a critical view, *inter alia*: HERZBERG R. D., *La Sentencia-Fujimori*, p. 132; HERZBERG R. D., *Mittelbare Täterschaft*, p. 39; ROTSCH T., *Thaterrschaft*, p. 534; AMBOS K., *Tatherrschaft*, pp. 241-245 (according to the author this element is not necessary in order to apply the theory under examination). Of a different vein: JAIN N., *Perpetrators and Accessories*, p. 133 (in spite the author criticises Roxin's approach, she states that such an element "may in fact be one of the major strengths rather than weakness of Roxin's theory […] 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 crimes are committed; at the same time, it would provide a moral compass for the behavior expected of the executor when surrounded by a climate that sanctions horrific acts of brutality"). See also: MUNÕZ CONDE F., *Willensherrschaft kraft organisatorischer,* p. 624; MUNÕZ CONDE F., *¿Dominio de la voluntad*, pp. 104-114.

[898] ROXIN C., *Täterschaft*, p. 245, p. 739; ROXIN C., *El dominio de organización*, p. 17; ROXIN C., *Crimes as Part*, p. 198.

[899] *Ibid.*

perspective it is irrelevant who carries out the act or how the crime is committed; what is important is the crime's execution[900].

In Roxin's view, the fungibility criterion is an objective one. It contributes to compensate the lack of factual control exerted by the indirect perpetrators over the single agent. In other words, the indirect perpetrator does not control the single component of the organisation, rather "the collective of direct perpetrators part of the criminal organization"[901].

The full responsibility of the executor is irrelevant in order to establish the control exerted by the individual in the background, since it is determined on a normative basis[902]. The criterion under examination further enables the organisation to become an autonomous entity with a life independent from that of its single members.

Roxin – most likely because of the criticisms raised against this element in the course of the years – recently recognised that if, for example, a secret service engages a specialist to commit a specific crime requiring specific skills and the executor is in the position to implement the crime alone, the individual in the background will be responsible as an instigator and not as an indirect perpetrator[903]. As a consequence, according to Roxin, not all of the crimes committed by the organisation can be charged to its leaders under the indirect perpetration model[904]. Despite attributing a fundamental role to the aspect of fungibility, the German scholar acknowledged that indirect perpetration could not be grounded exclusively in this criterion, but rather must be considered jointly with the other elements required for the implementation of the theory[905].

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[900] AMBOS K., *Command Responsibility*, p. 145.

[901] AMBOS K., *The Fujimori Judgment*, p. 155.

[902] *Ibid;* AMBOS K., *Command Responsibility*, p. 144.

[903] ROXIN C., *Zur neuesten*, p. 460; ROXIN C., *Sobre la más reciente*, p. 15; ROXIN C., *Organisationsherrschaft*, p. 297; ROXIN C., *El dominio de organización*, p. 18 (the scholar refers to the example of a criminal organisation instructing a specialised shop – external to the organisation – to produce falsified passports; for this crime the leaders of the organisation would be charged with instigating the commission of falsified passports).

[904] ROXIN C., *El dominio de organización*, p. 18.

[905] *Ibid*., p. 19.

Since its initial formulation, Roxin recognised that the executor of the crime may refuse to carry out the order. However, in his view, this circumstance would be exceptional and would not weaken the capacity of this criterion to lay the foundations of the control over the act by means of the organisation[906]. Indeed, in the typical situations analysed by Roxin (i.e., concentration camp), the direct agent is subjected to several factors such as the context in which the criminal acts take place, leaving the agent a small margin of choice and keeping him or her under the surveillance of "colleagues" [907]. As a result, these elements would notably reduce the executor's freedom to act[908]. It is noteworthy that in his analysis Roxin considers the direct agent as part of the organisation to which he or she belongs.

The fungibility, as a criterion grounding the theory under examination, has been strongly criticised in the literature since its inception[909]. As mentioned above, according to this criterion, the organisation's members are considered mere cogs in the machinery. It has been noted that this circumstance would be scarcely compatible with the *status* of the direct agents, namely their full criminal responsibility. In other words, the expectation of the automatic compliance with the superiors' orders by a fully responsible individual would be in contrast with this *status*[910]. One should not undervalue the fact that direct agents are human beings and thus there is always room for a certain degree of unpredictability on their side. For example, it is not possible to exclude the possibility that a would-be direct perpetrator on the ground refuses to carry out the order, thereby frustrating

[906] ROXIN C., *Täterschaft*, pp. 742-743.

[907] *Ibid.*

[908] Nevertheless these elements recall the individual predisposition to commit the crime.

[909] SCHROEDER F.C., *Der Täter*, p. 168; JAKOBS G., *Derecho penal*, pp. 783-784 and related footnotes (in particular footnote n. 190); PLASENCIA H., *La autoría mediata*, p. 275; RENZIKOWSKI J., *Restriktiver Täterbegriff*, p. 89 (according to the author it is not possible to base the control of the individual in the background on the hypothetical actions of third and responsible individuals). For an overview: URBAN C., *Mittelbare Täterschaft*, pp. 136-143. More recently: MEINI I., *El dominio de la organización*, p. 226.

[910] OTTO H., *Täterschaft*, p. 755.

the commission of the crime[911], since it is not certain that another individual would be immediately ready to take over. Furthermore, on an empirical basis it is not easy to prove that the direct perpetrators of the crimes are indeed interchangeable individuals[912]. This aspect must be concretely evaluated and cannot be taken for granted[913]. In many cases, the direct agents are highly specialised and not easily replaceable[914]. This is particularly evident also with regards to the individuals at the mid-level of the organisation[915]. As a consequence, it is not rare that the refusal of an individual to commit a crime could frustrate a crime's commission, in particular in small organisations[916]. It has been further highlighted that only a limited number of potentially interchangeable individuals can be involved in the execution of a certain act, therefore it is difficult to refer to an unlimited number of interchangeable individuals[917].

In academic literature, alternatives approaches, based on normative considerations, have been presented in order to address the limits of naturalistic

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[911] HERZBERG R. D., *Mittelbare Täterschaft*, p. 39.

[912] Referring to the crimes committed during the Border Regime, Ambos noted that if a body guard at the border would have refused to shoot a refuge trying to flee from East Germany, there would have not been another individual ready to take over: AMBOS K., *The Fujimori Judgment*, p. 155; for additional examples AMBOS K., *Command Responsibility*, pp. 146-147.

[913] In the doctrine there are those who consider the fungibility at the moment in which the order is given and not at the moment of the execution of the crimes, in this vein: LANGNEFF K., *Die Beteiligtenstrafbarkeit*, pp. 87-91.

[914] SCHROEDER F.C., *Der Täter*, p. 168. More recently: AMBOS K., *Command Responsibility*, p. 147; MEINI I., *El dominio de la organización*, p. 226 (the author refers in particular to the members of the Colina group in the *Fujimori* case; in his view the fungibility of the executors consists only of "a statistic data that expresses a greater or lesser probability of success in the commission of the crime").

[915] AMBOS K., *Command Responsibility*, p. 147 (the author highlights that "on the one hand the interchangeability of these persons is necessary too in order to justify their actual control by the organisation's top level by virtue of the doctrine of *Organisationsherrschaft*; on the other hand, this assumption of their interchangeability would contradict the possibility of their organisational control over the immediate perpetrators and therefore their indirect responsibility on the basis of perpetration by means".

[916] OSIEL M., *Making Sense*, p. 101.

[917] MURMANN U., *Tatherrschaft*, pp. 273-274.

explanations of the theory[918]. Some scholars, for example, have relied on the notion and structure of the *Pflichtdelikte* (duty-offences) to explain the duties of the civilian leaders towards their citizens[919]. In this perspective, for example, the head of a state is the individual who is in a position to protect his citizens and if he orders the commission of certain crimes against other citizens (victims) he violates such a duty of protection[920]. The dependence of the citizens on the state is at the basis of the control exerted by the head of the state over the act[921]. This normative explanation, however, could be used only when dealing with state apparatuses and the leadership level, since the duty of protection is lacking in other organisational settings[922]. Nevertheless, as highlighted in the literature, "with this approach the *Organisationsherrschaft* is not abandoned, but reinforced by normative, value-based considerations"; indeed, "the normative explanation does not substitute, but complement the naturalistic, empirical perspective"[923].

In the light of the aforementioned, it does not appear possible to rely exclusively on fungibility as a naturalistic or factual criterion. In contrast, when necessary, it has to be corroborated by other factors. The position adopted by the ICC on this aspect appears to follow this approach and to be in line with the opinion of the scholars who do not consider fungibility an essential criterion for the theory to be properly applied[924]. In fact, in the ICC case law, the

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[918] AMBOS K., *The Fujimori Judgment*, p. 156.

[919] MURMANN U., *Tatherrschaft*, pp. 275 ff. For a summary in English: AMBOS K., *Command Responsibility*, p. 149.

[920] In this perspective – besides the legal relationship between the leader and the citizens – another legal relationship among the citizens exists: it concerns the freedom of each individual, that is violated by the criminal action of the direct perpetrator and that is at the basis of the attribution of the crime to the executor.

[921] AMBOS K., *Command Responsibility*, p. 149.

[922] AMBOS K., *The Fujimori Judgment*, p. 156.

[923] *Ibid.*

[924] PARIONA ARANA R., *La autoría mediata*, p. 245. In this vein also: MEINI I., *El dominio de la organización*, pp. 225-226. RENZIKOWSKI J., *Restriktiver Täterbegriff*, pp. 88-90. According to Ambos the fungibility, in its naturalistic or factual meaning, cannot ground the theory under examination: AMBOS K., *The Fujimori Judgment*, p. 155; AMBOS K., *Command Responsibility*, p. 148.

fungibility/interchangeability of the direct executors has been considered among the possible factors securing the automatic compliance with the leader's orders[925].

iv) The direct perpetrator's disposition to commit the act

In the original version of his theory Roxin did not mention the direct perpetrators' disposition to the act ("*Tatbereitschaft*")[926]. This concept was introduced by another German scholar, Friedrich-Christian Schroeder, in his seminal work, "*Der Täter hinter dem Täter*" (the perpetrator behind the perpetrator), published a couple of years after the first appearance of the *Organisationsherrschaftslehre* in 1963[927]. In his writings, Schroeder proposed a different version of the perpetrator behind the perpetrator. Although it is not possible to delve into a comprehensive analysis of Schroeder's formulation of the theory, its importance can nonetheless not be underestimated.

As will be seen during the course of the present analysis, Schroeder's take has been adopted jointly with Roxin's *Organisationshershaftslehre* in fundamental judgments on this topic, such as the case against the civil and military leaders of the GDR[928]. Schroeder criticised fungibility as a constitutive element of the *Organisationsherrschaftslehre* and introduced a new element based on the pre-existing disposition to commit the crime of the direct agent ("*Tatentschlossenheit*")[929].

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[925] This is particularly clear in the *Katanga and Ngudjolo* Confirmation of Charges Decision (para. 518); while in the *Katanga* Trial Judgment it appears to be implicit (para. 1410). The automatic compliance with the leader's order plays a key role in the interpretation of art. 25(3)(a), third alternative, ICCSt.

[926] ROXIN C., *Straftaten*, pp. 193-207.

[927] SCHROEDER F.C., *Der Täter*, p. 168. In 2002 one of Roxin's scholars, Heinrich Manfred, recognised and developed this concept: HEINRICH M., *Rechtsgutszugriff*, pp. 273-274 (nevertheless, the author refers to the disposition to the act typical of the organisation "*organisationstypische Tatgeneigtheit*", focusing more on the collective dimension of the organisation of which the member is part, rather than on the individual dimension).

[928] BGH, Judgment of 26 July 1994, in *BGHSt*, 40 (1995), pp. 233-234, pp. 236-237.

[929] SCHROEDER F.C., *Der Täter*, p. 168. More recently SCHROEDER F.C., *Disposición al hecho*, p. 118. In a similar vein: MEINI I., *Problemas de autoría*, pp. 235-265.

According to the scholar this is the only element securing the indirect perpetrator the realisation of the crime[930]. In his view, the automatic compliance with the orders given by the individual in the background would be guaranteed by the conditional readiness of the direct agents to commit the offence ("*bedingter Tatentschluss*")[931]. In this perspective, the term "conditional" refers to the readiness of the direct perpetrator – determined by his disposition to commit the act – who stands by to be activated by the indirect perpetrator's orders[932].

Schroeder further criticised the notion of fungibility also on the basis of naturalistic considerations. In particular, he highlighted how long it takes to an individual who is part of an organisation to improve and form his or her skills and how such specific skills can hardly make such an individual perpetrator replaceable[933]. In his view, fungibility can be only a mean for achieving the control, but it is not necessary not for establishing an individual's criminalresponsibility as an indirect perpetrator[934].

The predisposition to commit the act introduced by Schroeder has been criticised by Roxin among others[935]. Nevertheless, in 2006, in an additional version of his theory, Roxin surprisingly added this aspect to the requirements described in the previous sections (i)-(iii) of this analysis. In doing so, he stated that it was an autonomous component which helped to determine whether the

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[930] SCHROEDER F.C., *Disposición al hecho*, p. 118 (moreover, according to the author, this element would differentiate indirect perpetration from instigation, in which the result is not sure, p. 119); of a different vein ROTSCH T., *Tatherrschaft*, pp. 525-526.

[931] SCHROEDER F.C., *Der Sprung des Täter*, pp. 178-179.

[932] *Ibid.*, p. 179.

[933] SCHROEDER F.C., *Disposición al hecho*, p. 118.

[934] *Ibid.;* SCHROEDER F.C., *Der Täter*, p. 168.

[935] ROXIN C., *Strafrecht Allgemeiner Teil*, p. 57; ROXIN C., *Anmerkung*, p. 51 (according to the author, the direct agents' implementation of the orders does not depend entirely on their disposition to commit the crime because they often implement the given orders for other reasons, such as, for example, to avoid unpleasant consequences resulting from their refusal to carry out the act). See also: SCHLÖSSER J., *Soziale Tatherrschaft*, p. 161; ROTSCH T., *Tatherrschaft*, pp. 525-526; OTTO H., *Täterschaft*, pp. 757-758; AMBOS K., *Tatherrschaft*, p. 230; BLOY R., *Die Beteiligungsform*, p. 362; HERZBERG R.D., *Täterschaft*, p. 49. For an overview of the main criticism: PARIONA ARANA R., *Autoría mediata*, pp. 62-71.

individual in the background exerts control over the organisation[936]. Roxin's interpretation slightly differs from Schroeder's[937]. The latter, as mentioned above, refers to the pre-existing and conditional disposition of the members of the organisation to commit the act, while the former refers to the disposition of the individuals conditional to the organisation[938]. In his view, the members of the organisation are influenced by several factors deriving from their involvement in the organisation. While such factors may not relieve said members of criminal responsibility, they nonetheless influence their behaviour, thereby making them more disposed to implement the leaders' orders[939]. He refers to a sort of tendency of the single member to adapt to the organisation and to its mechanisms deriving from belonging to it[940]. This is the version of the Roxin's theory that the Peruvian Supreme Court adopted in the *Fujimori* case[941].

Over the years, this approach to the disposition to commit the act notably changed. In the last version of the Roxin's theory it is no longer considered an autonomous condition laying the foundations of the control of the indirect perpetrator, but is the result of the other elements previously examined, contributing to strengthen the control exercised by the individual in the background[942].

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[936] ROXIN C., *El dominio de organización*, p. 15, pp. 19-20; ROXIN C., *Organisationsherrschaft*, pp. 298-299 (in this article the author refers to the "*Tatbereitschaft als dritten Kriterium der Organisationsherrschaft*").

[937] ROTSCH T., *De Eichmann hasta Fujimori*, p. 40. According to Rotsch, Roxin did not implement Schroeder's "*Tatentschlossenheit*", but rather the "*organisationstypischen Tatgeneigtheit*" developed by his disciple Heinrich: ROTSCH T., *„Einheitstäterschaft" statt Tatherrschaft*, p. 331.

[938] ROXIN C., *El dominio de organización*, p. 20.

[939] *Ibid.*

[940] *Ibid.*

[941] ROXIN C., *Apuntes*, p. 94. Nevertheless, as we will see analysing the *Fujimori* judgment, the Court referred also to other German scholars, in particular to Schroeder (see infra Section B., IV., b)).

[942] ROXIN C., *Täterschaft*, p. 740; ROXIN C., *Zur neuesten*, p. 396, p. 412. Roxin expressed this change of view already in 2010: ROXIN C., *Organisationssteuerung*, pp. 462-464; ROXIN C., *Apuntes*, pp. 100-101. Of a similar vein: PARIONA ARANA R., *La autoría mediata*, p. 248

According to the German scholar, the hierarchical structure of the organisation intensifies the level of adaptability of the members to the organisation[943]. The power of command exercised by the individual in the background further increases the direct perpetrators' disposition to commit the act, since the direct agents could be more willing to implement the order, for example, for fear of losing the place within the organisation or for fear of being marginalised by other members in case of refusal to act[944].

Furthermore, in Roxin's view, both the notion of detachedness of the organisation from the law and fungibility increase the direct agents' disposition to commit the act. In fact, the direct agents operating according to the rules of the organisation – that is functioning outside of the legal order – can elevate their disposition to commit the act in the extent that they can increase, *inter alia*, their needs of recognition, their professional aspirations, in the belief that they will be protected by the organisation and thus they will not respond for their criminal acts[945].

Last but not least, the notion of fungibilty increases the disposition to commit the crime because an individual, who by himself or herself would never commit such an act, carries it out knowing that if he or she does not commit the crime there is immediately another one ready to take over[946].

Roxin's refusal of the disposition to the act as an autonomous condition of the *Organisationsherrshaftslehre* is most likely based also on the criticism raised against this element. The disposition to the act has been criticised mainly because it would be difficult to distinguish between an instigator and an indirect perpetrator[947]. Moreover, because it involves the individual's psychic sphere it is

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(according to the author, the disposition of the direct agent to commit the crime – as well as the fungibility – are only characteristics of this form of control, but do not necessarily form part of its primary foundation).

[943] ROXIN C., *Apuntes*, at p. 100.

[944] *Ibid.*, at p. 100.

[945] *Ibid.*, at pp. 100-101.

[946] *Ibid.*, at p. 101.

[947] ROTSCH T., *Tatherrschaft*, pp. 525-526.

also not easy to prove[948]. On a theoretical level, it has also been noted that such an interpretation would contrast with the idea at the basis of the theory, transferring the attention from the organisation – considered as an instrument to obtain the result – to its single members[949].

In ICC case law, there is no reference to such an element intended as a constitutive element that would establish the responsibility of the individual in the background as an indirect perpetrator. Nevertheless, this element seems to be implicitly provided among the "soft or weak factors". The disposition to commit the crime of the direct agent cannot be underestimated, in particular when dealing with non-state sponsored organisations.

c) A definition of the *Organisationsherrschaftslehre* according to Roxin

In light of the aforementioned, according to the most recent version of Roxin's *Organisationsherrschaftslehre*, an individual – regardless of his or her position within the hierarchy – can be considered an indirect perpetrator where it is proved that he or she exerted power over a hierarchical and organised apparatus of power, operating outside of the legal order, and composed by a certain number of interchangeable individuals. If these elements are fulfilled it is possible to establish that the individual in the background exerted control over the organisation and is therefore responsible for the crimes committed by its members. In this case, the absence from the scene of the crime, and thus the lack of direct and factual control exercised over the act, would be compensated by the individual's control over the organisation[950]. As a consequence, according to the model developed by Roxin, it would be possible to consider as principal to a crime also the individual in the background, that remaining behind his or her desk

[948] HERZBERG R.D., *Täterschaft und Teilnahme*, p. 49.

[949] AMBOS K., *Zur „Organisation"*,pp. 839-841. More recently this critisism has been embraced also by ROXIN C., *Zur neuesten*, p. 412. Highlighting that according to the *Organisationsherrschaftslehre* the indirect perpetrator exerts control over the organisation and not over the direct perpetrator see also: SCHLÖSSER J., *Soziale Tatherrschaft*, p. 164; LANGNEFF K., *Die Beteiligtenstrafbarkeit*, p. 92; BLOY R., *Grenzen der Täterschaft*, pp. 424-425.

[950] ROXIN C., *Täterschaft*, p. 247; ROXIN C., *Crimes as Part*, p. 200.

and without having the blood of the victims on his or her hands, nevertheless bears great responsibility.

Because this model has been strongly criticised both in the doctrine and in the case law several alternative solutions have been proposed.

III. Alternative solutions to the *Organisationsherrschaftslehre*

In Germany, the possible alternatives to the *Organisationsherrschaftslehre* invoked by the opponents of this theory are co-perpetration and instigation[951]. The two alternatives are based on several factors, the most common of which relates to the fact that according to some scholars it is not possible to consider the individual in the background responsible – as an indirect perpetrator – for the crimes committed by a direct and fully responsible agent, that, as such, is personally called upon to respond for his or her criminal conduct.

a) Co-perpetration

One of the modes of liability used by the opponents of the *Organisationsherrschaftslehre* to reflect the responsibility of the individual in the background for the crimes committed by their subordinates is co-perpetration ("*Mittäterschaft"*)[952]. This mode of liability, provided by § 25(2) StGB, is based on the functional division of tasks between at least two perpetrators[953]. They have

[951] Other countries based on a differentiated model of participation in a crime, such as for example Spain, Peru, Argentina, rely also on the figure of the "*cooperador necesario*".

[952] In this vein: JAKOBS G., *Sobre la autoría*, p. 108; JAKOBS G., *Derecho penal*, p. 784; JAKOBS G., *Strafrecht Allgemeiner Teil*, p. 649; JESCHECK H.H., WEIGEND T., *Lehrbuch des Strafrechts*, p. 670. For an overview on co-perpetration: JOECKS W., *StGB § 25 Täterschaft*, pp. 1277-1302; MURMANN U., *StGB § 25 Täterschaft*, pp. 249-254; MURMANN U., *Grundkurs Strafrecht*, pp. 350-357; WESSELS J., BEULKE W., SATZGER H., *Strafrecht Allgemeiner Teil*, pp. 266-272; FRISTER H., *Strafrecht*, pp. 419-420; KÜPPER G., *Zur Abgrenzung*, p. 525. For Roxin's interpretation of co-perpetration, most recently: ROXIN C., *Täterschaft*, pp. 275-305, pp. 752-772. In English: AMBOS K., BOCK S., *Germany*, pp. 330-332.

[953] For an overview on this mode of liability: HEINE G., WEIßER B., *StGB § 25 Täterschaft*, pp. 530-538; FORNASARI G., *I principi*, pp. 433-436.

to share a common plan. It is on the basis of the common plan that it is possible to attribute the entire offence to all of them in spite each individual carried out only part of the offence. Nevertheless, the contribution of each individual to the crime must be substantial. In other words, if one of the co-perpetrators does not act, the realisation of the crime is no more possible. This is fundamental in order to distinguish principals form accessories to the crime, in particular from aiders.

According to this view, the scenario reflected by the *Organisationsherrschaftslehre* would be covered by co-perpetration and it would not be necessary to rely on such a complex theory. As for instigation, also in this case, at the basis of the reasoning there is the acknowledgment that it would be not possible to consider a full and culpable individual as a tool in the hands of the indirect perpetrator[954]. In this perspective, the fact that the individual in the background – compared to the direct agent – operates at a different stage does not constitute an obstacle considering the two individuals co-perpetrators[955]. This differentiation results from the division of tasks and labour between individuals[956]. Consequently, the individual far removed from the scene of the crime would act at the preparation stage of the crime, planning its execution, while the individual on the ground would physically execute it. Nevertheless, this notable difference among the roles played does not prevent them from being labelled as co-perpetrators. In this perspective, there would only be a differentiation in the "quantity" of the individual participation[957].

According to supporters of the *Organisationsherrschaftslehre*, there are many differences between indirect perpetration and co-perpetration. They reflect different scenarios: the first is characterised by a vertical relationship between the individual in the background and the direct perpetrator, while the second is characterised by a horizontal relationship between the individuals involved, who

[954] FRISTER H., *Strafrecht*, pp. 419-420; JAKOBS G., *Sobre la autoría*, p. 108; JAKOBS G., *Mittelbare Täterschaft*, pp. 26 ss.; OTTO H., *Täterschaft*, pp. 758-759;

[955] *Contra*: ROXIN C., *Täterschaft*, p. 745; BLOY R., *Grenzen der Täterschaft*, p. 440.

[956] JAKOBS G., *Sobre la autoría*, p. 109 (the author referring in particular to the *Fujimori* case established that "los grandes son grandes no sin los pequeños").

[957] *Ibid.*

work at the same level[958]. As a result, in the first case, the orders are given by top level individuals and carried out by those on the ground, and, in the second case, there is a common plan and the commission of the crimes is the result of the plan's overall execution. In fact, the common plan is one of the constitutive elements of co-perpetration, while it is lacking in the indirect perpetration[959]. In indirect perpetration, the individual in the background organises, plans and gives instructions to his or her subordinates about how they must commit the crime despite not being involved in its physical execution. In most cases, the individual in the background does not even know the executors of the crimes.

Relying on co-perpetration would likely entail going beyond certain problems presented by the *Organisationsherrschaftslehre*. For instance, considering the individual in the background a co-perpetrator would allow to go beyond the problem above mentioned related to up which level of the hierarchy an individual can be considered an indirect perpetrator for the purpose of the *Organisationsherrschaftslehre*' s application. Nevertheless, the most feeble point of this mode of liability is the concept of common plan, that would become vague when considered between the direct agent and the individual in the background. This mode of liability has been favoured and applied, in particular by certain jurisdictions (i.e., the Colombian one) in order to deal with the responsibility of the individual at a leadership level. Moreover, according to some scholars it should be preferred when dealing with mid-level commanders[960]. As a result, this mode of liability could eventually be considered a possible alternative to the *Organisationsherrschaftslehre*. Last but not least, such an alternative would allow for the individual in the background, as well as the direct agent, responsible as principals[961].

[958] ROXIN C., *Täterschaft*, p. 745.

[959] ROXIN C., *El dominio de organización*, p. 13.

[960] (See supra footnote n. 874).

[961] Nevertheless, the same result can be obtained relying on the *Organisationsherrschaftslehre.*

b) Instigation

The other mode of liability used by the opponents of the *Organisationsherrschaftslehre* to characterise the responsibility of the individual in the background for the crimes committed by their subordinates is instigation ("*Anstiftung*")[962]. Instigation is one form of accessory responsibility provided by § 26 StGB[963].

It is not possible to ignore the fact that a certain similarity exists between indirect perpetration by means of an organisation and instigation: in both cases the individual in the background causes other persons to commit the crime[964].

Nevertheless, between the two figures there are notable differences. Usually, the instigator – in contrast to the indirect perpetrator – has a personal relationship with the direct perpetrator of the crime. Instigation is common with regards to ordinary crimes, involving two or few individuals. For example, A may instigate B to kill C. Indirect perpetration by means of an organisation mainly deals with macro-criminal contexts. The indirect perpetrator commits the crime through the apparatus at his or her disposal, composed by interchangeable individuals who are, in most cases, unknown to the individual in the background. In fact, as mentioned above, the organisation as such is considered an autonomous entity working automatically and its members are nothing more than cogs in the machine. As a result, the personal relationship between the individual in the background and the direct perpetrator is not required by the *Organisationsherrschaftslehre*.

Furthermore, with regard to instigation, the final decision is up to the direct agent[965]. It is the perpetrator who decides whether and how the crime will be

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[962] HERZBERG R. D., *La Sentencia-Fujimori*, pp. 125-140.

HERZBERG R. D., *Mittelbare Täterschaft*, pp. 33-53; ROTSCH T., *Neues zur*, p. 16; ROTSCH T., *Tatherrschaft*, pp. 518-562; RENZIKOWSKI J., *Restriktiver Täterbegriff*, pp. 88-90.

[963] For an overiview: W., *StGB § 26 Anstiftung*, pp. 1308 ff.; MURMANN U., *StGB § 26 Anstiftung*, pp. 254 ff.; MURMANN U., *Grundkurs Strafrecht*, pp. 363-374; WESSELS J., BEULKE W., SATZGER H., *Strafrecht Allgemeiner Teil*, pp. 266-272. In English: AMBOS K., BOCK S., *Germany*, pp. 332-334.

[964] ROXIN C., *El dominio de organización*, p. 13.

[965] ROXIN C., *Täterschaft*, p. 746.

committed[966]. As a result, the instigator cannot be sure as to whether or how the crime instigated will be committed[967]. In contrast the indirect perpetrator is sure about the result, and thus that his or her orders will be implemented. The indirect perpetrator is the one who takes the final decision. In such cases, the direct agent cannot alter the course of event because the commission of the crime does not depend on the individual perpetrator. Indeed, if he or she refuses to commit the crime, the organisation will provide another individual who is immediately ready to take over and the order will be carried out. The indirect perpetrator does not need to order a single individual to carry out the act, but must simply give the order to the apparatus.

In light of the aforementioned, it is manifest that the position of the individual who orders the commission of the crimes through the organisation at his or her disposal notably changes compared to the position of the instigator[968]. The indirect perpetrator, in contrast to the instigator, plays a central role in the commission of the crime[969].

For these reasons, it is not possible to share the opinion of those who believe that in the scenarios reflected by the *Organisationsherrschaftslehre* it is, instead, possible to charge the individual in the background as an instigator. Moreover, when dealing with macro-criminality and with complex and hierarchically structured power apparatuses, instigation is not capable of adequately reflecting the chain of command characterising those scenarios and resulting in the commission of the crime. In fact, this mode of liability seems to adequately reflect ordinary crimes, involving a limited amount of determined individuals.

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[966] *Ibid.*

[967] ROXIN C., *Organisationsherrschaft*, p. 296; ROXIN C., *Strafrecht Allgemeiner Teil*, p. 47 (in Roxin's view, in instigation, the uncertainty regarding the result, namely the execution of the order, is much higher compared to indirect perpetration by means of an organisation). Of a different view: MURMANN U., *Tatherrschaft*, p. 274; ROTSCH T., *Neues zur*, p. 14.

[968] ROXIN C., *Täterschaft*, p. 244-245.

[969] In this vein also AMBOS K., GRAMMER C., *Dominio del hecho*, pp. 29-30 (according to the authors "*le hombre de atrás es más que el estigador del hecho*"); AMBOS K., *Der Allgemeine Teil*, p. 513.

In legal systems based on a differentiated participation model (e.g., Germany), the same penalty is often available for both instigators and perpetrators. However, instigation is a mode of secondary liability, and, as such, does not always adequately capture the degree of responsibility of those who are at the leadership level and who commit the crimes through the power apparatus at their disposal. As a result, it appears that the *Organisationsherrschaftslehre* would better reflect the responsibility of those individuals and their central role in the execution of said crimes.

B. The application of the *Organisationsherrschaftslehre* in macro-criminal contexts

The *Organisationsherrschaftslehre* has been implemented in the case law many years after its first appearance in academic literature in 1963. This theory gained recognition not only in Germany, but also in Spain[970] and in many Latin American jurisdictions, in particular in Argentina, Chile, Peru, Colombia[971] and Brazil[972].

[970] Spain offers a curious scenario. As highlighted by Olásolo, while many Spanish scholars focus on the *Organisationsherrschaftslehre* and several decisions refer to it (*inter alia*, the decision to proceed against *Pinochet* of 10 December 1998), the doctrine has yet to be applied in practice. For further references and details: OLÁSOLO H., *Tratado de autoría*, pp. 293-298; GIL GIL A., *La autoría mediata*, pp. 53-87. The most common modes of liability used by the Spanish judges to deal with those at the top of the hierarchy are: instigation ("*inducción*") and necessary cooperation ("*cooperación"*). Moreover, according to art. 28 of the Spanish Penal Code those modes of liability are treated as perpetration and co-perpetration, therefore are punished with the same penalty. For the solutions adopted in Spain to deal with the responsibility of those in a leadership position: GIL GIL A., *El Caso Español*, pp. 93-137.

[971] For an overview: AMBOS K., *Treatise, Vol. 1*, pp. 114-118; MUNÕZ CONDE F., *Die mittelbare Täterschaft*, pp. 1415-1445; MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 113-135; AMBOS K. (ed.), *Imputación de crímenes* (the papers contained in this book will be quoted many times in the course of this part of the analysis).

[972] In Brazil the doctrine under examination was applied – although in a wrong and very confused way – in the *Mensalão* case, an important case dealing with a corruption scandal revealed in 2005 involving the Federal Government. For further details: GRECO L., LEITE A., *A "recepção"*, pp. 386-393; AMBOS K., ROMERO DE VASCONCELOS E., *Introduction*, pp. 259-260; ALFEN

Latin America has offered several scenarios that reflect the problems that international criminal justice currently faces. Among them is the identification of the proper mode of criminal liability that should be applied to those in leadership positions and who, despite their distance from the scene of the crime, are responsible for the worst atrocities[973]. It is in order to face this problem that the theory under examination has played an important role in several jurisdictions and progressively gained ground[974]. Nevertheless, as will be seen throughout the course of this analysis, the theory has not been applied in the same way in all cases. Its implementation notably varies from one judgment to another and it may result in a version of the theory slightly diverging from the original version presented by Roxin.

The *Organisationsherrschaftslehre* was applied for the first time ever during the Argentinean *Junta* trials to punish the military commanders for the crimes committed by their subordinates during the military dictatorship. From that moment on, the theory progressively gained ground and recognition, and has been applied, *inter alia*, in Germany, Chile, Peru and Colombia, as well as, as described in the first part of this study, at the ICC[975]. For reasons of time and space, it is not possible for the present study to analyse all judgments implementing the theory. Therefore, I will focus only on the most important cases concerning Germany, Argentina, Peru, Chile and Colombia.

P.R., *Domínio do fato*, pp. 274-284.

[973] In this continent, several national jurisdictions had to deal with the prosecution and punishment of gross human rights violations committed during military dictatorships and armed conflicts. For an overview and further references: FORNASARI G., FRONZA E. (eds.), *Percorsi giurisprudenziali*.

[974] AMBOS K., *Treatise, Vol. 1*, p. 118.

[975] In this analysis I will only focus on the most important cases dealing with macro-criminal contexts.

I. Germany

In Germany, the Roxin's theory remained almost unknown in the country's jurisprudence[976] until its application in the persecution and punishment of the crimes committed during the GDR Border Regime. The concept of indirect perpetration by means of an organisation was applied by the *Bundesgerichtshof* for ascribing to the civil and military leaders of the GDR – respectively the members of the National Defence Council and the generals of the National People's Army – the killings of the GDR citizens trying to cross the border and fleeing to West Germany[977].

With this judgment the *Bundesgerichtshof* reversed the decision of the Berlin District Court re-characterising the modes of liability charged to the former members of the GDR National Defence Council (*Kessler*, *Streletz* and *Albrecht*)

[976] Nevertheless the concept of indirect perpetrator behind the direct perpetrator ("*Der Täter hinter dem Täter*") previously appeared in the "*Katzenkönig* case": BGH, Judgment of 15 September 1988, in *BGHSt*, 35 (1989), pp. 347 ff. As stated by Roxin, already in this judgment, the BGH demonstrated its sympathy for this concept (ROXIN C., *Organisationsherrschaft*, p. 293). In short, in the aforementioned case, H and P convinced R that a creature had been threatening the world for a long time and that to save the mankind it was necessary to fight against it. They further persuaded R (who was psychologically dependent on them), that he had been chosen to fight against such a terrible creature and that, in order to save the lives of one million persons he had to kill N. While R stabbed N several times, the latter survived. According to the Court, R's mistake was avoidable, and as a result, R was convicted of attempted murder as a perpetrator. The problem that the Court had to face concerned the qualification of the title of responsibility used to ascribe the responsibility of the killing to H and P. Were they principals or accessories to the crime? The Court labelled them as principals and convicted the two individuals as indirect perpetrators for attempted murder of N. Indeed, in the judges' view, H and P were in a position of dominance over R and controlled his will. For a summary in German of the case: SCHÜNEMANN B., *StGB § 25 Täterschaft*, pp. 1895-1896. In English: AMBOS K., BOCK S., *Germany*, p. 328.

[977] BGH, Judgment of 26 July 1994, in *BGHSt*, 40 (1995), pp. 218 ff. For a partial English translation: WERLE G., BURGHARDT B., *The German Federal*, pp. 207-226. For a commentary on the case, see K. AMBOS, *El Caso Alemán*, pp. 25-44. See also DUBBER M.D., HÖRNLE T., *Criminal Law*, pp. 314-318.

to fall under indirect perpetration[978]. Indeed, initially, the first two defendants were convicted for instigating manslaughter ("*Anstifter*"), while the third was convicted for abetting manslaughter ("*Gehilfe*")[979]. During the GDR Border Regime, the National Defence Council's decisions were at the basis of the orders given by the Minister for National Defence to the guards operating at the inner-German border[980]. It is in the implementation of the measures adopted according to these decisions that a large amount of refugees was killed[981]. The border guards were responsible individuals acting in accordance with the instructions given by their superiors. The Court claimed that because the defendants – as part of the National Defence Council – were in the position to know that the decisions they delivered were at the basis of the orders issued to control the border and that their implementation resulted in the killings of refugees, it was possible to convict them as indirect perpetrators[982]. To ascribe responsibility for the killings to the defendants, the Court relied in particular on Roxin, although it referred also to the concept of the indirect perpetrator behind the direct perpetrator ("*Der Täter hinter dem Täter*") presented by Schroeder[983].

Some scholars have highlighted that the *Bundesgerichtshof*'s decision did not adequately consider the relationship between the defendants, implicitly suggesting that in the specific case, a combined mode of responsibility – resulting from the

[978] This judgment was cited in the confirmation of charges decision against *Katanga and Ngudjolo* to support the theory's application at the ICC (*Katanga and Ngudjolo* Confirmation of Charges, footnote n. 666).

[979] BGH, Judgment of 26 July 1994, in *BGHSt*, 40 (1995), p. 230 (the District Court excluded the possibility to apply indirect perpetration by means of an organisation on the basis of the defendant's lack of control over the act and of the different structure of the GDR compared to the Nazi regime).

[980] *Ibid.*, p. 223.

[981] *Ibid.*, p. 227.

[982] *Ibid*., pp. 237-238.

[983] *Ibid.*, pp. 233-234, 237. In this decision the judges dedicated particular attention to this concept: they reported both positions of those who recognised the possibility to consider principals to a crime – as indirect perpetrators – the individuals in the background for the crimes committed thorough fully responsible individuals and those who did not recognise such a possibility.

combination of indirect perpetration and co-perpetration – would have likely better captured the responsibility of those individuals[984].

This judgment is particularly important because it applied the *Organisationsherrschaftslehre*, acknowledged the applicability of the theory in other contexts (such as the Mafia-like organised crime and the business enterprises crimes)[985], and opened the door to a series of judgments of the *Bundesgerichtshof* adopted along the lines of this decision[986].

II. Argentina

The most important Argentinian case that I will analyse is the *Juntas* case. Nevertheless, the *Organisationsherrschaftslehre* has been applied also in other cases dealing with the attribution of the responsibility to those at the top of the hierarchy during the military dictatorship that ruled Argentina between 1976 and 1983[987], and it has been extensively recognised in the country[988].

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[984] WERLE G., BURGHARDT B., *The German Federal*, p. 210. Highlighting this aspect also GENEUSS J., *German Report*, p. 279.

[985] BGH, Judgment of 26 July 1994, in *BGHSt*, 40 (1995), p. 237. The theory was applied to business corporations, *inter alia*, in the following cases: BGH, Judgment of 13 May 2004, in *BGHSt* 49 (2005), pp. 147 ff.; BGH, Judgment of 26 August 2003, in *BGHSt* (2004), pp. 331 ff.

[986] BGH, Judgment of 6 November 2002, in *BGHSt*, 48 (2003), pp. 77 ff. (in this case – known as *Politbüro* case – the *Bundesgerichtshof* established that the teory can be applied also in cases of ommission). For further references: JOECKS W., *StGB § 25 Täterschaft*, pp. 1265-1267.

[987] An exception is represented, for instance, by the case against *Santiago Omar Riveros*, *Osvaldo Jorge García*, *Exequiel Verplaetsen and others*, where the San Martín Federal Oral Tribunal, on 12 August 2009, convicted the defendants on the basis of their joint control exerted over the act and thus on co-perpetration based on the functional division of tasks. For an overview: OLÁSOLO H., *Tratado de autoría*, pp. 238-241; MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 118-120.

[988] MALARINO E., *El Caso Argentino*, pp. 68, 74; AMBOS K., GRAMMER C., *Dominio del hecho*, pp. 27-42.

a) The *Juntas* case

The 9 December 1985 decision of the Federal Criminal and Correctional Court of Appeals, Federal District, Buenos Aires[989] convicting the former military leaders for the crimes committed during their dictatorship (also known as "*Juntas trial"*) should be considered a milestone for several reasons. It is the first time in the history of Latin America that former military leaders were prosecuted and convicted during a subsequent democratic government for the gross human rights violations committed at the time of their regimes. It is the first time that the *Organisationsherrschaftslehre* was applied since first appearing in Roxin's writings in 1963. The German doctrine was also adopted in subsequent decisions and thus it has been consolidated in the Argentinian case law[990]. Last but not least, this judgment has been used as a model by other Latin American countries, such as Chile, Peru and Colombia for prosecuting and punishing the gross human rights violation perpetrated during dictatorships and armed conflicts[991].

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[989] Cámara Federal Nacional de Apelaciones en lo Criminal y Correccional de la Capital Buenos Aires, No. 13/84 "Causa originariamente instruida por el Consejo Supremo des las Fuerzas Armadas en cumplimiento del Decreto 158/83 del Poder Ejecutivo Nacional", 9 December 1985, available at http://idehpucp.pucp.edu.pe/images/boletin_ddhh/CASOS/cccf%20-%20causa%2013-9-12-85.pdf ('*Juntas* Federal Court Judgment). For an English version: National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders, (introductory note and translation of Henry Dahl and Alejandro M. Garro), in *ILM*, 26 (1987), pp. 317-372; Argentina, Conviction of former Military Commanders, (translation of Henry Dahl and Alejandro M. Garro), in *HRLJ*, 8 (1987), pp. 368-430. For a commentary: MALARINO E., *El Caso Argentino*, pp. 45-77.

[990] It has been applied in other following cases in order to punish the military commanders that were part of the higher level of the Argentine military in the period between 1976 and 1983, such as in the *Etchecolatz* case in 18 May 2007. For further details: MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 118-120; MALARINO E., *El Caso Argentino*, p. 63. On the prosecution of international crimes in Argentina: PARENTI P. F., *The Prosecution*, pp. 491-507.

[991] AMBOS K., *Treatise, Vol. 1*, p. 114. Nevertheless, it is important to note that the Generals were convicted with low penalties and subsequently were pardoned, as a result the effectiveness of the judgment, although being highly symbolic, is doubtful. For an overview of the cases against the heads of states for gross human rights violations in Latin America: ROHT ARRIAZA N., *Prosecutions of Heads*, pp. 46-76.

The present case deals with the kidnapping, torture, homicide and disappearance of thousands of civilians perpetrated during the military dictatorship in Argentina, in the period between 1976 and 1993[992], as part of the complex strategy and campaign set up by the leaders to fight the dissidents and military guerrillas by all means necessary[993]. In particular, the Court – after recognising indirect perpetration by means of an organised apparatus of power proposed by Roxin as a form of indirect perpetration[994] – relied on the German theory in order to hold nine commanders of the *Juntas* criminally responsible for the crimes committed by their subordinates over which they exerted control[995]. The judges – noting that the commanders did not personally commit any of the crimes with which they were charged – verified whether it was possible to punish them as indirect perpetrators. In analysing the situation, the Court focused on the following elements: (i) the existence of the military commanders' control over the organisation; (ii) the existence of a hierarchical organised power apparatus; (iii) the detachment of the organisation from the law; and (iv) the fungibility of the direct perpetrators.

According to the Court, all of the abovementioned elements were met in the case[996]. The military commanders exerted absolute control over the apparatus. They controlled both the military personnel and the forces of police. They also established a system designed to deny and conceal the crimes, and to ensure the impunity of those who directly committed the crimes. The irregular and criminal operations were brought about in secrecy and clandestine detention centres – where the detained were tortured and questioned – were built as part of this

[992] For an overview of the crimes committed during the period between 1976 and 1993: SANCINETTI M.A., FERRANTE M., *El derecho penal*, pp. 104 ff.

[993] For a summary of the factual background: *National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders*, in *ILM,* 26 (1987), pp. 317-319.

[994] *Juntas* Federal Court Judgment, point 5 "Indirect responsibility" (original version: punto 5 "La autoría mediata").

[995] *Ibid*, point 6 "Analysis of the defendants' criminal responsibility" (original version: punto 6 "El camino a seguir").

[996] *Ibid.*

strategy and campaign. Moreover, the control exerted by the commanders was manifest in the fact that when they decided to put an end to the fight against the subversion, all criminal conduct and irregular operations were interrupted.

The apparatus operated outside of the legal order. It consisted of an additional and secondary legal system, that coexisted with the established legal system. Both systems operated at the same time and when the given (illegal) order and the applicable legislation conflicted, the first had to prevail.

The criminal acts were carried out by interchangeable individuals as part of the overall strategy put in place by the military commanders. Such crimes were committed pursuant to a regular chain of command. Who carried out the orders or how the high-level orders were executed were irrelevant considerations. What mattered was that subversion and dissidence were defeated by any and all means necessary. As a result, the direct agents had a certain freedom in the implementation of such a strategy. The autonomy enjoyed by the direct executors has been invoked in the academic literature to highlight the difficulty to prove that the indirect perpetrators exerted control over the crimes[997]. The judges further claimed that the lack of knowledge of the commanders of each criminal act and of the identity of victims was irrelevant in order to establish their criminal responsibility.

On the basis of these observations, the Court stated that the military commanders had to be considered indirect perpetrators. Nevertheless, it is noteworthy that in the analysis of the commanders' individual responsibility, the judges referred many times to the strategy put in place, as well as the alleged plan shared by those at the top level. This is a typical element of co-perpetration. In fact, the existence of a common plan is not required for indirect perpetration. Regarding this aspect, it is important to note that the judges did not exclude the possibility to apply co-perpetration based on the division of functions in the specific case. However, since this categorisation would have not led to different results, the judges did not analyse it further and applied indirect perpetration[998].

[997] In this vein: OSIEL M., *Making Sense*, pp. 102-103.

[998] *Juntas* Judgment, point 6 "Analysis of the defendants' criminal responsibility" (original version: punto 6 "El camino a seguir").

On 30 December 1986 the Supreme Court of Argentina[999] overturned the decision of the Buenos Aires Federal Court of Appeals. According to the majority, because the commanders did not physically take part in the commission of the crime, it was not possible to consider them principals, but they had to rely on a secondary mode of liability[1000]. As a consequence, the judges invoked the traditional objective approach and established that the generals had to be charged as necessary contributors ("*cooperadores necesarios*"), and thus as accomplices[1001]. The majority rejected the German doctrine because of its vagueness and the absence of precedent relating to its application[1002].

III. Chile

The Chilean Supreme Court applied the concept of *Organisationsherrschaft* for the first time on 12 November 1993 in the case against high-level individuals in the General Augusto Pinochet's brutal regime[1003]. The individuals were General *José Manuel Contreras*, former chief of the Chilean secret service – *Dirección de*

[999] Corte Suprema de Justicia de la Nación, No. 13/84, Judgment, 30 December 1986 ('*Juntas* Supreme Court Judgment'). A translation in English is available in *ILM*, 26 (1987), pp. 317 ff. and in *HRLJ*, 8 (1987), pp. 430 ff. (the following quotations refer to the latter).

[1000] *Juntas* Supreme Court Judgment, pp. 435-436.

[1001] In contrast, Judges Petracchi and Bacqué, in their dissenting opinion attached to the judgment, favoured the application of the concept of indirect perpetration by means of an organisation in the present case.

[1002] *Juntas* Supreme Court Judgment, pp. 435-436. The modification of the title of responsibility applied to the defendants did not influence the penalty and thus the length of the conviction sentences remained the same. According to the Argentinean Penal Code direct perpetrators, indirect perpetrators, instigators and necessary contributors are punished with the same penalty. Indeed, art. 45 of the Argentinean Penal Code reads that "Los que tomasen parte en la ejecución del hecho o prestasen al autor o autores un auxilio o cooperación sin los cuales no habría podido cometerse, tendrán la pena establecida para el delito. En la misma pena incurrirán los que hubiesen determinado directamente a otro a cometerlo". For further details and doctrinal references: MALARINO E., *El Caso Argentino*, pp. 70-72; AMBOS K., *Impunidad y Derecho*, pp. 270 ff.

[1003] Corte Suprema, Juez de Instrucción Bañados Cuadra, 12 November 1993, in *Fallos del Mes*, año XXXV, noviembre 1993, edición suplementaria Corte Suprema de Justicia (30 May/6 June 1995).

Inteligencia Nacional (DINA) – and *Coronel Espinoza* (the operational chief)[1004]. The two defendants were convicted as indirect co-perpetrators for the murder of Orlando Letelier ("Letelier") and his secretary Ronnie Moffitt. Letelier was the former foreign affairs minister of former Chilean President Salvador Allende's administration[1005]. At that time, Letelier was living in exile in Washington D.C., where he was working at the Institute for Political Studies and had a key role in the international campaign against Pinochet's regime. According to the Court, *Contreras* made the decision to kill Letelier and *Espinoza* organised and made the murder possible. Additionally, *Michael Townley*, a DINA agent, carried out the crime on 21 September 1976.

Although art. 15 of the Chilean Penal Code[1006] permitted the application of indirect perpetration only in the form of duress, the judges relied on Roxin's concept of *Organisationsherrschaft* in order to convict the two defendants[1007]. In particular, the Court emphasised the peculiar position of the direct agent. After excluding that *Townley* had been instigated by the defendants or acted as a result of a common plan shared between them, the judges stated that, on the basis of his condition (i.e., he was a member of DINA, the latter was protecting his family, he was subordinate to the defendants and somehow psychologically dependent), *Townley* was not in the position to refuse to carry out the orders he received, and thus he could be considered an instrument in the hands of the defendants[1008].

[1004] GUZMÁN J.L., *El Caso Chileno*, p. 80.

[1005] *Ibid.,* p. 82.

[1006] According to art. 15 of the Chilean Penal Code perpetrators (principals to the crime) are: "*1.° Los que toman parte en la ejecución del hecho, sea de una manera inmediata y directa; sea impidiendo o procurando impedir que se evite. 2.° Los que fuerzan o inducen directamente a otro a ejecutarlo. 3.° Los que, concertados para su ejecución, facilitan los medios con que se lleva a efecto el hecho o lo presencian sin tomar parte inmediata en él*".

[1007] GUZMÁN J.L., *El Caso Chileno*, pp. 80-81.

[1008] *Ibid.* (Nevertheless, Guzmán highlighted that the responsibility of *Contreras* and *Espinoza* could have been adequately reflected also relying on instigation for the first and on necessary contribution for the second. The penalty provided for all those modes of liability was the same, p. 89).

The possibility of applying this concept was also recognised later in the decision of the Chilean Supreme Court granting the extradition of President *Fujimori* to Peru on 21 September 2007[1009].

IV. Peru

In Peru, the *Organisationsherrschaftslehre* has played a leading role in the punishment of those at the top level of the hierarchy[1010]. Additionally, its implementation in Peruvian case law (in particular at the time of the *Fujimori* judgment) has been at the centre of the national and international academic discourse[1011]. Peruvian judges have offered a very detailed analysis and a peculiar interpretation of the doctrine under examination. For this reason, the most important cases will be examined with particular attention and detail[1012].

[1009] The decision is available at the following link: http://www.politicacriminal.cl/n_04/d_5_4.anexo.pdf

[1010] With regard to the mid-level commanders the Peruvian judges relied on co-perpetration (this is in line with the approach proposed by Ambos). As an example: Corte Superior de Justicia de Lima, Primera Sala Penal Especial, N° 03-2003-1°, Judgment, 8 April 2008.

[1011] *Inter alia*: AMBOS K., MEINI I. (eds.), *La autoría mediata. El Caso Fujimori*, 2010 (this is a translation of the collection of contributions published online, on www.zis-online.com, in 2009, entitled "*Aus Wissenschaft und Praxis – Das Urteil gegen Alberto Fujimori*"); PARIONA ARANA R., *Autoría mediata*, 2009; MEINI I., *Imputación y responsabilidad*, pp. 139-183; MEINI I., *El dominio de la organización*, 2008.

[1012] The *Organisationsherrschaftslehre* has been recently applied also in the "*Los Cabitos* case". It has been used to ascribe to the military leaders the gross human rights violations (i.e., torture, disappearance, and killings) perpetrated in *Los Cabitos*, an headquarter in Huamanga, the capital of Ayacucho Department, in 1983: Sala Penal Nacional (Peruvian National Penal Chamber), N° 35-2006, Judgment, 18 August 2017, pp. 298-304. This decision heavily relies on the *Fujimori* judgment and on the Roxin's version adopted in it. It does not add anything to the discussion, as a consequence it will not be analysed in further details.

a) The *Abimael Guzmán Reynoso et al.* case

On 13 October 2006, the Peruvian National Penal Chamber applied the *Organisationsherrschaftslehre* in the *Abimael Guzmán Reynoso et al.* case[1013]. This decision marks the first time that the German doctrine was applied in Peru[1014]. In applying the theory, the judges explicitly referred to Roxin and invoked the constitutive elements identified by him: (i) the existence of a tightly hierarchical and structured organisation at disposal of the indirect perpetrator; (ii) the fungibility of the direct agents; and (iii) the detachedness of the organisation from the law[1015]. After determining whether it was possible to recognise these

[1013] Sala Penal Nacional, Expediente Acumulado, N° 560-03, Judgment, 13 October 2006, ('*Guzmán* Judgment of the National Penal Chamber') available at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Peru/GuzmanReinoso_Decision_13-10-2006.pdf (last accessed on 28 November 2017). This decision was later confirmed: Corte Suprema de Justicia de la República, Segunda Sala Penal Transitoria (Second Transitory Penal Chamber of the Peruvian Supreme Court), N° 5385-2006, Judgment, 14 December 2007 ('*Guzmán* Judgment of the Second Transitory Penal Chamber'), available at https://www.pj.gob.pe/wps/wcm/connect/ce077a0040753cca90cdd099ab657107/7.+R.N.+5385-2006-Caso+Cúpula+de+Sendero.pdf?MOD=AJPERES&CACHEID=ce077a0040753cca90cdd099ab657107 (last accessed on 29 November 2017). This Chamber is somewhat similar, and can be compared, to an Appeals Chamber – Court of Second Instance). For a commentary on the first decision: MEINI I., *Comentario a la Sentencia*, pp. 49-58. For a commentary on both decisions: MEINI I., *El Caso Peruano*, pp. 139-171. For a summary in English: MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, at pp. 127-130. On this case also: CARO CORIA D.C., *Sulla persecuzione*, pp. 117-165 (according to the author in the specific case it would have been preferable to rely on co-perpetration, p. 159); CARO CORIA D.C., *Perú*, pp. 271-306.

[1014] The defence of the accused challenged this approach on the basis the following elements: (i) the lack of the doctrine general recognition; (ii) the impossibility to apply it because indirect perpetration was introduced in art. 23 of the Peruvian Criminal Code only in 1991; (iii) the absence of precedents in the Peruvian case law; (iv) the lack of control over the will of the individual perpetrators; and (v) the lack of interchangeability between the direct agents, based on the lack of equal expertise (*Guzmán* Judgment of the National Penal Chamber, p. 158). For the Chamber's reply and for the grounds adopted by the judges for implementing the theory: *Guzmán* Judgment of the National Penal Chamber, pp. 159-167.

[1015] *Guzmán* Judgment of the National Penal Chamber, p. 161.

elements in the facts, the Chamber held *Abimael Guzmán Reynoso* – known also as *"Presidente Gonzalo"* ("*Guzmán*") – responsible as an indirect perpetrator. This decision is particularly important, not only because it marks the first time that the theory was applied in Peru, but also because of how it was applied with regard to the aspect of fungibility[1016].

Before delving into the legal analysis of the doctrine's application, it is helpful to focus on the factual background. *Guzmán* was the leader ("*jefe máximo y dirigente"*) of the *Sendero Luminoso*[1017], a Maoist guerrilla organisation fighting against the Peruvian Government since 1980[1018]. The *Sendero Luminoso* controlled part of the Peruvian territory and increased its power over the course of its existence, becoming a huge problem for the Government. The case under examination deals with the Lacanamarca massacre perpetrated by the *Sendero Luminoso* fighters on 3 April 1983[1019].

According to the judges, there were no doubts that the *Sendero Luminoso* was a hierarchically structured organisation operating outside of the legal order and composed of a large number of individuals[1020]. The sense of cohesion among the members of the organisation was particularly strong thanks to their political beliefs. Moreover, the distribution of functions among the members, as well as the different internal subdivision (leadership – intermediate committees – field units), was clearly established. At the top of the hierarchy was *Guzmán*, who was also the President of all leading organisms of the apparatus: the Permanent Direction Committee, the Central Committee and the Political Bureau[1021]. According to the judges, *Guzmán* planned and determined where, how and when violent operations had to be performed (and who was to be targeted) and ordered their

[1016] This aspect is particularly important also because it is on it that the Peruvian Supreme Court decision notably changes.

[1017] *Guzmán* Judgment of the National Penal Chamber, p. 168.

[1018] For further details on the factual background: MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, p. 127.

[1019] *Ibid.*

[1020] *Guzmán* Judgment of the National Penal Chamber, pp. 162-163, p. 166.

[1021] *Ibid*., p. 168.

commission[1022]. The Lacanamarca massacre was a tangible example of the organisational policy implementation. In order to exert the control over the organisation, *Guzmán* "centralised" the power and predisposed a mechanism of disciplinary measures to be applied to the members in case of disobedience[1023]. Despite the Chamber recognised that the *Sendero Luminoso* was a non-state sponsored organisation, it reminded that the possibility to rely on the *Organisationsherrschaftslehre* also in those cases was explicitly provided by Roxin himself[1024].

With regards to the fungibility criterion, the Chamber, in an apparent attempt to fend off criticism from the defence[1025], claimed that such a feature (interpreted according to a naturalistic meaning) could increase the likelihood that the crime would have been executed, but it could not ground the control of the individual in the background[1026].

The judges further highlighted the importance of the disposition of the members to implement the leader's order, deriving from their free belonging to the organisation, provided of a certain policy and ideology. In the judges' view, if a direct agent refused to carry out the order there would have been another agent ready to take over[1027]. As a result, according to the Chamber, this was a key element that guaranteed the automatic functioning of the organisation and consequently the defendant's control over the organisation[1028].

[1022] *Ibid*., p. 170.

[1023] *Ibid*.

[1024] *Ibid*., 162.

[1025] The defence of *Guzmán* claimed that in the present case it was not possible to establish that the members of the organisation were fungible individuals because of their high specialisation and expertise. As a result in the defence's view it was not possible to invoke indirect perpetration.

[1026] *Guzmán* Judgment of the National Penal Chamber, p. 167 (according to the Chamber "La posibilidad de sustituir a los ejecutores representa únicamente la existencia de mayores probabilidades de que el hecho se realice, pero no fundamenta dominio alguno").

[1027] With particular regard to the individuals at the middle of the hierarchy (the so called "*cuadros*") exerting control over part of the organisation, the Chamber provided the possibility to consider them indirect perpetrators or co-perpetrators (*Guzmán* Judgment of the National Penal Chamber, p. 166).

[1028] *Ibid.*, p. 167.

It is in light of the aforementioned that the Chamber convicted *Guzmán* as an indirect perpetrator along the lines of the *Organisationsherrschaftslehre*. This judgment was subsequently affirmed by the Supreme Court[1029]. The main difference between the two decisions concerns the fungibility of direct perpetrators. According to the Supreme Court, the agents' fungibility played a fundamental role in the determination of individual criminal responsibility as an indirect perpetrator. The judges initially related the fungibility of the direct perpetrators of the crimes to the hierarchical structure of the organisation and to the predisposition of the direct agents to carry out orders[1030]. In the course of the analysis, however, they referred to the *successive* – and not simultaneous – interchangeability of the direct perpetrators[1031]. Nevertheless – as correctly highlighted in academic literature – this criterion would not allow one to determine whether the indirect perpetrator exerts control over an organisation[1032]. Such an interpretation would also conflict with the concept of fungibility presented by Roxin. Moreover, the possibility of substituting an individual who refuses to implement an order within a certain amount of time is a general characteristic of all organisations[1033]. However, such a trait is not sufficient to secure the automatic functioning of the organisation, and thus to establish that the leader of the organisation exerts control over it.

[1029] *Guzmán* Judgment of the Second Transitory Penal Chamber, pp. 31-33 (Judge Villa Stein, dissenting from his colleagues, stated that *Guzmán* had to be considered a co-perpetrator). The position of Judge Villa Stein is mainly based on the rejection of the fungibility criterion and on the impossibility to consider the direct agents (fully responsible individuals) instruments in the hands of the man in the background. For a summary of Judge Villa Stein's dissenting opinion: MEINI I., *El Caso Peruano*, at pp. 155-157.

[1030] *Guzmán* Judgment of the Second Transitory Penal Chamber, pp. 30, 32-33 (the judges referred in particular to the "cartas de sujección al Presidente Gonzalo", that the members of the organisation had to sign at their entrance in the apparatus and that determined their submission to it, to its president and to the ideology).

[1031] *Guzmán* Judgment of the Second Transitory Penal Chamber, p. 33.

[1032] OLÁSOLO H., *Tratado de autoría*, p. 251; MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, p. 130; MEINI I., *El Caso Peruano*, pp. 154-155.

[1033] OLÁSOLO H., *Tratado de autoría*, p. 251; MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, p. 130.

b) The *Fujimori* case

One of the most – if not the most[1034] – important decisions on the application of the German theory is the 2009 judgment of the Special Criminal Chamber of the Peruvian Supreme Court convicting the former president of Peru – *Alberto Fujimori* – to 25 years' imprisonment for various crimes perpetrated in 1991 and 1992 during his presidency[1035]. All crimes with which *Fujimori* was charged were provided for in the Peruvian Penal Code[1036]. Nevertheless, the judges qualified the offences carried out by the Colina group in the *Barrios Altos/La Cantuta* case[1037] and the *Sótanos SIE* case[1038] as crimes against humanity[1039]. In order to attribute the responsibility of the crimes committed by the Colina group[1040] to *Fujimori* and

[1034] In this vein: ROXIN C., *Täterschaft*, pp. 737-738; ROTSCH T., *De Eichmann hasta Fujimori*, p. 40; PARIONA ARANA R., *El posicionamiento de la teoría*, p. 292.

[1035] Corte Suprema de Justicia de la República, Sala Penal Especial, Exp. N° A.V. 19-2001, Judgment, 7 April 2009 ('*Fujimori* Judgment of the Special Criminal Chamber'). It is possible to find a German translation of Part III of the judgment in the Annex attached to the "*Aus Wissenschaft und Praxis – Das Urteil gegen Alberto Fujimori"*. For an English translation of the judgment: SULLIVAN A., *The Judgment*, pp. 657-842. This decision was subsequently confirmed: Corte Suprema de Justicia de la República, Primera Sala Penal Transitoria (First Transitory Criminal Chamber of the Supreme Court), Exp. N° 19-2001-09A.V., Judgment, 30 December 2009. For an overview of the historical and political background: AMBOS K., *The Fujimori Judgment*, pp. 137-143; MACULAN E., *La Responsabilità*, pp. 1-10.

[1036] In particular *Fujimori* was convicted of aggravated homicide in 25 cases and serious bodily injury in 4 cases related to the *Barrios Altos* and *La Cantuta* cases, and aggravated kidnapping in the 2 arbitrary detentions in the *Sótanos SIE* case.

[1037] This case refers to two operations conducted by the group Colina: the first took place in the Barrios Altos district of Lima, in November 1991, and caused the killing of 15 individuals, erroneously suspected to be part of the *Sendero Luminoso* (SL) group; the second, regards the kidnapping and execution of 9 students and 1 professor of La Cantuta National University of Lima and took place in 1991, following the *Sendero Luminoso*'s bomb attack.

[1038] This case refers to arbitrary detentions.

[1039] *Fujimori* Judgment of the Special Criminal Chamber, paras. 710-717. The qualification of such crimes as crimes against humanity was meant to have only a symbolic value. For a further analysis on this aspect: MACULAN E., *La Responsabilità*, pp. 12-16.

[1040] The Colina group was a special unit, integrated in the State apparatus structure as part of the intelligence of the national armed forces. It was composed of very high specialised individuals and

to interpret art. 23 of the Peruvian Penal Code[1041], the Chamber invoked Roxin's *Organisationsherrschaftslehre*[1042].

Before focusing on the concrete application of this theory in the present case it is important to highlight that the judgment under examination is exemplary for political and legal reasons[1043]. Regarding its political importance, the judgment marked the first time that a former President was convicted and severely punished for gross human rights violations perpetrated during his dictatorship during a subsequent democratic government (and that the sentence was actually imposed)[1044]. The judgment constitutes a landmark in the fight against the impunity of those who are in a leadership position and was followed by other convictions against former Presidents in neighbouring counties[1045]. For what concerns the second aspect – that is more closely related to this study – the decision contains an in-depth analysis of the theory under examination[1046]. Furthermore, on the evidentiary level, the judgment is particularly relevant

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it was in charge of secrete operations aimed to discover those who belonged to insurgent groups and to repress the political dissent.

[1041] According to art. 23 of the Peruvian Penal Code "*El que realiza por sí o por medio de otro el hecho punible y los que lo cometan conjuntamente serán reprimidos con la pena establecida para esta infracción*".

[1042] *Fujimori* Judgment of the Special Criminal Chamber, paras. 718-748.

[1043] ROXIN C., *Apuntes*, p. 102.

[1044] In contrast to the Argentinian trials against the leaders of the military dictatorship, in this case the penalty was adequate and *Fujimori* served the sentence. Nevertheless, on 24 December 2017, *Pedro Pablo Kuczynski*, the current Peruvian President, pardoned *Alberto Fujimori* with Resolutión Suprema n. 281-2017-JUS. For some critical observations: AMBOS K., URQUIZO G., *Pardons for Crimes.*

[1045] For instance the former President of Uruguay *Juan Maria Bordaberry Arocena* was convicted on 9 February 2010 (in this case the former President was convicted as a direct perpetrator for the crime of attack against the Constitution and as a co-perpetrator for the nice crimes of forced disappearance and two murders). For an analysis: FORNASARI G., *Dittatori alla Sbarra*, pp. 2281-2305.

[1046] Thirty pages of the judgment focus on the theoretical analysis of the doctrine and on the national and international literature developed on this topic. Highlighting the importance of this judgment: MUNÕZ CONDE F., *Die mittelbare Täterschaft*, p. 1434; ROXIN C., *Apuntes*, p. 93.

because the judges relied only on indirect and circumstantial evidence to establish *Fujimori*'s responsibility[1047].

Before directing the attention to the elements of the theory, the judges retraced the origin and evolution of the *Organisationsherrschaftslehre* and referred to its main judicial applications[1048].

In order to convict *Fujimori*, the Chamber identified the following elements: (i) the prior existence of a structured and hierarchical organisation; (ii) the command authority of the indirect perpetrator; (iii) the organisation detachment from the law; (iv) the direct perpetrators' fungibility; and (v) the disposition to the crimes of the direct agents[1049].

In the judges' view, the first element constitutes the general assumption for the application of the theory. The others are specific elements that must be further classified in two categories: the indirect perpetrator's command authority and the detachment from the law are included in the first category (objective elements); the direct perpetrators' fungibility and the predisposition to the crime in the second (subjective elements).

According to the Chamber, the organisation must be tightly hierarchically structured and the attribution of different roles and tasks to its components must be clear[1050]. The organisation must have an autonomous life that would secure the almost automatic implementation of the leaders' orders. The orders are given by the superiors following the vertical line of the hierarchy, from the top to the bottom level, passing through those who are at the middle[1051].

The Chamber further specified that to be considered indirect perpetrator it is not necessary that the individual in the background directly orders the commission of the crimes. What is important is that the criminal acts are carried out by the

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[1047] *Fujimori* Judgment of the Special Criminal Chamber, paras. 658-664.

[1048] *Ibid*, paras. 723-725.

[1049] *Ibid.*, paras. 726-727. The elements identified by the Court to a large extent correspond to the elements of the doctrine identified by Roxin in the version of the theory adopted in 2006. ROXIN C., *Apuntes*, p. 94.

[1050] *Fujimori* Judgment of the Special Criminal Chamber, para. 726.

[1051] *Ibid*., para. 730.

direct agents and that those acts are in line with the purpose followed by the organisation and established by the leader[1052].

The first specific and objective element required by the Chamber to be charged as an indirect perpetrator along the line of the doctrine under examination is command authority[1053]. This feature is strictly related to the position of the individual and to his or her capacity to issue orders and assign tasks to his or her subordinates[1054]. Such a capacity can either be conferred by the specific position of the individual, or derive from other circumstances of, for example, political, social, religious, ideological nature[1055].

The judges further specified that there are different forms of command authority, depending on whether the individual exerting power is at the top or middle level of the hierarchy[1056]. As a result, the individuals at the top of the hierarchy exert control over the entire apparatus, while those at the middle of the hierarchy control only a specific part or sector of it[1057]. Furthermore, since in the judges' view the degree of blameworthiness of the individuals involved in the commission of the crime decreases as one goes down the hierarchy, the former would bear a greater responsibility compared to the latter [1058].

According to the Chamber, the order can be implicit or explicit. It does not need to be written, but it can be oral or consist of signs and gestures[1059]. The Chamber further identified two levels of orders: (i) formal orders ("*órdenes formales*"), which acquire such a status from directives, dispositions and

[1052] *Ibid.*, para. 726.

[1053] *Ibid.*, paras. 729-732.

[1054] *Ibid.*, para. 729.

[1055] *Ibid.*

[1056] *Ibid.*, para. 730.

[1057] *Ibid*. The Chamber – along the lines of Roxin – recognised the possibility to apply the theory also to the individuals at the middle of the hierarchy, the mid rank officials exerting control over a part of the organisation (para. 731).

[1058] *Ibid.*, para. 731.

[1059] *Ibid.*, para. 732.

mandates; and (ii) orders characterised by their substantial effectiveness, such as, *inter alia*, signals, concrete actions and codified gestures[1060].

The second objective element identified by the Chamber is the detachedness of the organisation from the law[1061]. Also with regard to this aspect the judges shared the opinion presented by Roxin and stated that the law is not limited to the national established legal system, but it includes also international law. As a result, the systematic violation of human rights by a state apparatus would consist of conduct carried out outside of the legal order.

In the judgment it is possible to distinguish between cases where the organisation operates outside of the legal order since its very origin (i.e., terrorist groups, secret movements) and cases where such a feature comes into existence after the inception of the organisation (more typical of state criminality)[1062]. Within the second group, the Chamber further identified the cases where the higher-level management decides to create a normative system neither recognised, nor accepted by international law and cases where the leadership level progressively detaches itself from the order by creating a parallel and alternative order and benefits from the legal structure to commit the crimes[1063].

The first subjective criterion identified by the Chamber is that of fungibility[1064]. The judges' analysis of this criterion is particularly interesting not only because they labelled it as a subjective criterion, but also because they distinguished between negative and positive fungibility[1065]. In their view, negative fungibility is strictly related to the fact that the direct agent is not considered a free individual person but as an anonymous and interchangeable figure[1066]. As a result, if the direct perpetrator refuses to carry out the criminal act, there is another one immediately ready to take over. Instead, positive fungibility relates to the plurality

[1060] *Ibid.*

[1061] *Ibid.*, paras. 733-736.

[1062] *Ibid.*, paras. 734-735.

[1063] *Ibid.*, para. 735.

[1064] *Ibid.*, paras. 737-739.

[1065] *Ibid.*, paras. 738.

[1066] *Ibid.*

of potential perpetrators at disposal of the individual in the background and contributes to increase the probability of the crimes' execution[1067].

According to the Chamber, positive fungibility would allow the leader to select the best combatants among the individuals at his or her disposal for the commission of a certain operation[1068]. The judges adopted an approach according to which the fungibility of actors must be evaluated at the moment the act is carried out and the moment in which the orders are given, regardless of whether the crime is committed by a limited amount of individuals[1069]. In the light of this interpretation, this criterion was applicable to the Colina group which was composed of a limited and very specialised number of individuals.

The last (subjective) criterion identified by the Chamber in order for an individual to be considered an indirect perpetrator along the lines of the doctrine under examination is the disposition of the direct perpetrator to the crime. This criterion, introduced by Schroeder, was also adopted – although with slight differences – for a certain period by Roxin[1070]. The Chamber referred to this version of Roxin's theory in its decision[1071]. According to the judges, this criterion alludes to the psychological disposition of the direct agent to carry out the order, which implies the commission of the wrongful act[1072]. In their view, this factor ensures that the order will be executed. The psychological disposition of the individual derives from his or her belonging to the organisation. In fact, in a vertically-organised power apparatus, the individual is no longer considered an individual entity as such, but a part of a whole, with its own ideology, strategy, and operational functioning, that when merged together leads to the constitution of the organisation[1073]. The Chamber further referred to a sort of "collective psychology" ("*psícologia colectiva*") of the organisation[1074]. The direct

[1067] *Ibid.*

[1068] *Ibid.*

[1069] *Ibid.*

[1070] *Ibid.*, para. 740 (see supra, Section A., II., b), iv)).

[1071] *Ibid.*, para. 739 (the Court refers to the version "integradora" of Roxin) .

[1072] *Ibid.*, para. 741.

[1073] *Ibid.*

[1074] *Ibid.*

perpetrator identifies with the purpose, ideology and the objective pursued by the organisation, which in turn increases his or her belief that the action is part of the organisation and thus his or her disposition to implement the leader's orders[1075].

The Chamber further verified whether the elements mentioned above were met in the present case[1076]. The defendant was at the highest position of the hierarchy. He was not only the President of Peru, but also the head of the national defence system and thus of the armed national police[1077]. As a result, because of his position, *Fujimori* was able to establish a government policy and strategy to be adopted in the fight against the terrorist group. The crimes committed in the *Barrios Altos*, *La Cantuta* and in the *SIE* basement were the result of the implementation of such a strategy. *Fujimori* was able to control the operations that were part of the fight against the dissenting and terrorist groups, and thus of the Colina group[1078]. Moreover the Chamber established that the crimes, with which *Fujimori* was charged, were carried out by fungible individuals disposed to commit the crime and who had no horizontal or direct connection to *Fujimori*[1079]. As a result, these circumstances guaranteed the automatism of the organisation. The judges further stated that the fight put in place by Peruvian President against dissidents was the expression of state criminality and implied a gross violation of human rights in contrast with national and international law[1080].

In light of the aforementioned, the Chamber established that it was possible to convict *Fujimori* as an indirect perpetrator for the *Barrios Altos* and *La Cantuta* murders, and for the *SIE* basement kidnappings[1081].

[1075] *Ibid*.

[1076] *Ibid.*, paras. 745-748.

[1077] *Ibid.*, para. 745.

[1078] *Ibid.*

[1079] *Ibid*.

[1080] *Ibid.*, para. 746.

[1081] *Ibid.*, para. 748. For a critical view on the application of the theory in the present case: CAVERO G., *La autoría mediata*, pp. 187-209 (the author criticised the Chamber in particular because it did not focus adequately on the fungibility and predisposition of the direct agent to commit the crimes in the specific case); JAKOBS G., *Sobre la autoría*, p. 111 (according to the author the right solution would have been that of considering *Fujimori* co-perpetration jointly with the direct perpetrators).

V. Colombia

The first appearance of the concept of *Organisationsherrschaft* in Colombian case law dates back to 2007. The Colombian Supreme Court invoked it in the following cases[1082]: the *Machuca* case[1083], the *Yamid Amat* case[1084] and the *Gabarra* case[1085]. Nevertheless, in the end, in all mentioned cases the judges relied on co-perpetration. This conclusion is somewhat unsurprising as it was in line with the traditional approach adopted by the Supreme Court[1086]. It is noteworthy that before it was applied by the Supreme Court in the *García Romero* case, the concept of *Organisationsherrschaft* was used by the Human Rights Unit of the Federal Prosecutor in the prosecution of the rebel group of the *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia – FARC)[1087].

On 23 February 2010, the Supreme Court curiously applied, for the first time, the German doctrine in the case against the former national senator *García Romero*, one of the founders of the *Frente Héroes de los Montes de María*, a

[1082] For further details: OLÁSOLO H., *Tratado de autoría*, pp. 265-271; MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, at p. 122; LÓPEZ DÍAZ C., *El Caso Colombiano*, pp. 173-204.

[1083] Corte Suprema de Justicia, Sala de Casación Penal, No. 23825, Judgment, 7 March 2007.

[1084] Corte Suprema de Justicia, Sala de Casación Penal, No. 25974, Judgment, 8 August 2007.

[1085] Corte Suprema de Justicia, Sala de Casación Penal, No. 24448, Judgment, 12 September 2007.

[1086] Indirect perpetration was codified for the first time in Colombia in art. 29 of Law 599 of 2000 (Colombian Penal Code in force). According to art. 29 "*es autor quien realice la conducta punible por sí mismo o utilizando a otro como instrumento; son coautores los que, mediando un acuerdo común, actúan con división del trabajo criminal atendiendo la importancia del aporte*". Before such a codification, indirect perpetration was recognised only in doctrine and in case law, where, however, it was applied to deal with the traditional forms where the individual in the background commits the crime through a no culpable individual, that is used as a tool. On the dominant approach favouring the application of co-perpetration: CADAVID LONDOÑO P., *Coautoría en aparatos organizados*. See also: VELÁSQUEZ VELÁSQUEZ F., *Paramilitärische Führer*, pp. 1119-1131. For a general overview of indirect perpetration and direct perpetration in Colombian criminal law: VELÁSQUEZ VELÁSQUEZ F., *Manual de derecho penal*, pp. 578-588.

[1087] AMBOS K., *Treatise, Vol. 1*, p. 116, APONTE CARDONA A., *Colombia*, pp. 200-203.

paramilitary group operating in northern Colombia, in the department of Sucre[1088]. The Court adopted the doctrine to convict *García Romero* for an operation (also known as "Macayepo massacre") that took place between 9 and 16 October 2000, and envisaged the killings and massive displacement of the population of several villages in the Carmen de Bolivar area[1089]. At the time of the commission of the crimes, *García Romero* was far removed from the place where the crimes were committed.

The Court decided to attribute to *García Romero* the crimes committed during the Macayepo massacre as an indirect perpetrator[1090] on the basis of the following elements: (i) the paramilitary group was an organised hierarchical apparatus of power; (ii) it was composed by a certain number of individuals, ready to implement the decisions taken at the leadership level, and with limited discretionary power; (iii) the control (shared with other commanders) exerted over the paramilitary group; (iii) the operation was carried out as part of the activities performed by the group; (iv) he contributed to avoid possible interferences with the success of the operation (i.e, he prevented the intervention of the Colombian military) [1091]. This judgement is important because it was the first time that the Colombian Supreme Court applied the theory under examination in order to attribute responsibility as indirect perpetrator[1092].

[1088] Corte Suprema de Justicia, Sala de Casación Penal, No. 32805, 23 February 2010 ('*Romero* Judgment of the Supreme Court'); for a summary of the case: MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 124-127.

[1089] MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 125.

[1090] *Romero* Judgment of the Supreme Court, pp. 84-85. It is noteworthy that in the same judgment the Court convicted *García Romero* as an instigator for the killing of Georgina Narváez, perpetrated on 27 October 1997 by the paramilitary group (*Romero* Judgment of the Supreme Court, p. 144). For a critical view MUÑOZ CONDE F., OLÁSOLO H., *The Application*, p. 126.

[1091] *Romero* Judgment of the Supreme Court, pp. 76-86. For a deeper analysis and a critical view: MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, pp. 126-127 (according to the authors in the present case it would have been more appropriate to apply indirect co-perpetration or co-perpetration).

[1092] More recently, the Colombian Supreme Court further confirmed the application of the German theory in the case against *Luis Alfonso Plazas Vega*: Corte Suprema de Justicia, Sala de Casación Penal, No. 38957, Judgment, 16 December 2015.

The approach adopted in *Romero* judgment was followed by the *Tribunal Superior Bogotá, Sala de Justicia y Paz*, in several cases[1093]. Nevertheless, the implementation of this concept of *Organisationsherrschaft* in the Supreme Court judgment appears quite confused and reflects the judges' attempt to introduce this theory in a legal system based and deeply rooted on the traditional application of co-perpetration and instigation[1094].

[1093] For example, it was adopted in the case against the paramilitary commander of the *Frente Fronteras del Bloque Catatumbo Lorge*, *Iván Laverde Zapata ("El Iguano* case"): Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, No. 110016000253200680281, Judgment, 2 December 2010. In this judgment the Court recharacterised the title of responsibility of the defendant from co-perpetration to indirect perpetration and, to adopt the "new" mode of liability, relied on the following elements: (i) the command power; (ii) the detachedness of the organisation from the law; (iii) the fungibility of the direct executors; and (iv) the disposition of the direct executors to the commission of the crimes. This wording is similar to the wording adopted in the *Fujimori* case, in particular with regard to the last element identified by the judges. The Sala de Justicia y Paz of the *Tribunal Superior del Distrito Judicial de Bogotá* further applied this concept in the case against *Fredy Rendón Herrera* ("*El Alemán* case"), No. 110016000253200782701, 16 December 2011 (This decision was later confirmed by the Colombian Supreme Court on 12 December 2012, available at https://www.ictj.org/sites/default/files/subsites/ictj/docs/Sentencias_Justicia-y-Paz/2012.SegundaInstancia.FredyRendonHerrera.pdf). In this case the judges established that in order to be charged as an indirect perpetrator it was not necessary that the individual gave a specific order (i.e., identifying in particular the victims or the specific acts to be carried out), but it was sufficient that he or she gave the general lines of how the campaign had to be performed. The *Sala de Justicia y Paz* of the *Tribunal Superior del Distrito Judicial de Bogotá* relied on indirect perpetration also in the case against the commander of the *Fronte José Pablo Díaz del Bloque Norte*, *Edgar Ignacio Fierro Flores* ("*Don Antonio* case"), No. 110016000253-200681366, 7 December 2011, availble at https://www.ictj.org/sites/default/files/subsites/ictj/docs/Sentencias_Justicia-y-Paz/2011.PrimeraInstancia.EdgarFierro-y-AndresTorres.pdf (in this case the judges referred to both co-perpetration and indirect perpetration). For an analysis of mentioned cases: OLÁSOLO H., *Tratado de autoría*, pp. 280-285.

[1094] In this vein: OLÁSOLO H., *Tratado de autoría*, p. 280.

VI. Concluding observations relating to the application of the *Organisationsherrschaftslehre*

a) General observations

The *Organisationsherrschaftslehre* has been playing an important role in Latin America, in particular in the prosecution and punishment of senior civil and military leaders. In most cases the doctrine has been used in order to reflect the responsibility of those at the top of the hierarchy, such as the military commanders of the Argentinian dictatorship, the leader of the *Sendero Luminoso* (*Guzmán*), the former President of Peru (*Fujimori*), and the co-founder of the *Frente Héroes de los Montes de María* (*Romero*). Nevertheless, it has been applied also to convict individuals at the mid-level of the hierarchy, such as the former head of the DINA (*Contreras*) and the operational chief (*Espinoza*) – who were convicted as indirect co-perpetrators – and the FARC mid-level commanders[1095]. This approach is in line with Roxin's theory. In fact, Roxin himself explicitly provided the possibility of applying the theory to intermediate-level individuals when they exert control over a part of the organisation[1096].

In the cases analysed above, the courts have applied the theory in order to deal with state apparatuses, with the only exceptions being the *Guzmán* case which dealt with the terrorist organisation *Sendero Luminoso*, as well as the Colombian cases dealing with the FARC. While the doctrine has been applied in situations involving both state and non-state sponsored organisations[1097], the cases analysed involve complex and hierarchically structured apparatuses, essentially developed on three levels: (i) the leadership level; (ii) the intermediate level (composed by

[1095] This approach has also been followed by the ICC in the *Gaddafi* case, where the Pre-Trial Chamber applied the control over the organisation to *Al-Senussi*.

[1096] Examples of mid-level commanders convicted as co-perpetrators may be found in Peruvian case law (see supra footnote n. 1011).

[1097] According to Roxin, for the application of the *Organisationsherrschaftslehre* the qualification of the organisation is not relevant, what matters is that the peculiar features of the organisation are met. The case law refers to functional hierarchies (*Fujimori* Judgment of the Special Criminal Chamber, para. 730).

mid-level commanders); and (iii) the execution level (composed by direct agents operating on the field). Moreover, in certain cases, as in *Fujimori*, there were several organisational apparatuses gravitating around the state.

The judgments analysed demonstrate how the German doctrine has often been applied in a very modified way compared to its original version. In certain cases some of the elements of the theory have not been applied, whereas in others they have been implemented with a slightly different meaning in order to reflect and to adapt to different scenarios.

For example, the *Bundesgerichtschof* (like the ICC) did not apply the element of the detachedness from the law ("*Rechtsgelöstheit*") in the case against the former members of the GDR National Defence Council. Furthermore, in the GDR case, the Court also heavily relied on Schroeder's version of the theory. This is noteworthy because in 1994 Roxin's theory did not include the predisposition to commit a crime. It appeared in his writings for the first time only in 2006. This is the version of Roxin's theory that was adopted in the *Fujimori* case, where the direct agent's predisposition to the crime was considered a constitutive element.

The Peruvian case law shows also how the elements of the doctrine were applied in a different way. This is particularly manifest with regard to the application of the fungibility criterion in both the *Guzmán* and *Fujimori* cases. While the Chamber of Second Instance in the *Guzmán* case re-established the importance of the fungibility (although subsequent) as an element grounding the theory under examination, the Chamber of first instance claimed that the interchangeability of the direct agents could only be evaluated in order to establish the probability of the crimes' commission. The approach to fungibility is peculiar also in the *Fujimori* case, where the Peruvian Supreme Court referred to it as a subjective criterion[1098], and further distinguished between negative and positive fungibility, relying on the latter.

Last but not least, it is worth noting that all cases analysed were tried in legal systems based on a differentiated model of responsibility, with the only exception

[1098] Critic on this aspect: PARIONA ARANA R., *La autoría mediata*, p. 245 (according to the author this criterion is only objective).

of Brazil[1099]. In some cases, as an alternative to indirect perpetration, one proposition has included the possibility of relying on instigation or, where foreseen, on necessary contribution. Nevertheless, despite the fact that the penalty provided for these figures is the same of that provided for perpetrators, it has been highlighted that such modes of liability would not adequately reflect the responsibility of the individuals in leadership positions, since they would be merely considered secondary participants to the crime[1100].

b) Evidentiary issues

It is very important to observe that the *Organisationsherrschaftslehre* was developed for specific purposes and intended to be applied in unique contexts. In other words, although Roxin himself established the possibility of extending this theory to different scenarios, it is noteworthy that he mainly had in mind the Nazi crimes and the context in which said crimes were committed. In this scenario, the criteria he set would have rendered the prosecutor's life very easy as he would have given the prosecutor a tool to punish as principals, individuals who, otherwise, would have been punished as instigators or accomplices. The same cannot be said for other scenarios, which are not so clearly structured and where it is not so easy to find the evidence necessary to prove that the leaders exerted control over the crime. In such cases, the job of a prosecution office would be made much more difficult by the application of the theory and its constitutive elements. In other words, the doctrine under examination can be a very powerful instrument in the hands of the prosecutor, but at the same time it can pose serious evidentiary problems depending on the context in question. Indeed, proving that the individual in the background exerted control over the crimes committed by his

[1099] Art. 29 of the Brazilian Penal Code reads: "*Quem, de qualquer modo, concorre para o crime incide nas penas a este cominadas, na medida de sua culpabilidade*". This prvovision recalls the wording of art. 110 of the Italian Penal Code: "Quando più persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilita, salve le disposizioni degli articoli seguenti". This is not surprising. The unitarian model was introduced in the Brazilian system in 1940 and it was strongly influenced by the 1930 Italian Penal Code.

[1100] MUÑOZ CONDE F., OLÁSOLO H., *The Application of the Notion*, p. 134.

subordinates is not an easy task[1101]. Such an issue is one of the greatest difficulties that a prosecutor faces when prosecuting senior leaders far removed from the scene of the crime. Nevertheless, the evidentiary situation can notably change according to context. For example, during Nazism and the Border Regime established by the GDR, a great number of documents showing the existence of orders, instructions and decisions was produced and thus was available and easily accessible. During the trial against military and civil leaders of the GDR, a great amount of written documents were introduced as documentary evidence in order to prove the responsibility and the orders given by those in the leadership position[1102].

In contrast, during the Argentinian military dictatorship, the criminal operations conducted in furtherance of the campaign against the subversion were carried out in secrecy and many mechanisms were established in order to conceal the crimes. As a result, during the *Juntas* trials, it was particularly difficult to prove that the indirect perpetrators exerted control over the direct agents[1103]. No direct evidence was presented in order to establish that the leaders ordered the commission of the crimes[1104]. The same holds true with regard to the *Fujimori* case where the judges relied on "indirect or circumstantial evidence" as if it had the same value as direct evidence[1105].

[1101] WEIGEND T., *Perpetration through an Organization*, at p. 109.

[1102] AMBOS K., GRAMMER C., *Dominio del hecho*, p. 32.

[1103] On this aspect Moreno Ocampo, Prosecutor at the time of the Juntas trial, stated the following: "El segundo problema al que nos enfrentamos era cómo probar la responsabilidad de los ex comandantes cuando no había constancias de órdenes escritas u otras pruebas que los vincularan con algún delito. Cómo juzgarlos si en la mayoría de los casos se desconocía la identidad de los autores materiales y, por lo tanto, también la de quienes pudieron haber ordenado los hechos". This statement was quoted by AMBOS K., GRAMMER C., *Dominio del hecho*, p. 32.

[1104] OSIEL M., *Making Sense*, p. 114. This is the reason why the academic literature highlighted the importance of the oral evidence in those trials, in this vein: AMBOS K., GRAMMER C., *Dominio del hecho*, p. 32.

[1105] AMBOS K., *The Fujimori Judgment*, pp. 144-145. Ambos – quoting the *Fujimori* judgment – recalled that circumstantial evidence "requires a multiplicity of circumstances which – based on criteria of experience, logic and rationally and the absence of conditions or possible differing conclusions – allow to consider a certain fact as existing, even if no direct evidence pointing to

In many cases, the main (if not exclusive) element used by the judges to prove that the individual in the background exerts control over the organisation is the position that he or she holds in the organisation[1106]. This would compensate for the lack of evidence of the involvement in the commission of the crimes of the individuals far removed from the scene of the crime. Nevertheless, the risk is that of creating a form of responsibility based only on one's position in the hierarchy, regardless of the concrete role played by the individual, and thus in contrast with the principle of culpability.

VII. Conclusion

In light of the aforementioned, it is possible to note that the control over the organisation theory, as implemented at the ICC, differs notably from the original version presented by Roxin. This is somewhat unsurprising as Latin American judges applied the *Organisationsherrschaftslehre* in a modified way and the interpretation of its constitutive elements differs significantly from their original version.

Judges at the ICC have not paid much attention to the concept of organisation. In certain cases, such as the *Kenya* cases, the judges have referred to the concept of organisation used for crimes against humanity. There are no doubts that the theory under examination can be applied both to state sponsored and non-state sponsored organisations and the ICC case law offers an important example of this varying application of the theory. According to the judges, the formal qualification of the organisation is irrelevant for the purpose of the theory's application. What is important is that the organisation contains specific features that enable its functional automatism. Among these features is the "interchangeability of the potential executors". In the *Katanga* judgment, the

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that fact can be established. In other words, the fact to be proven must be the only possible conclusion to be drawn on the basis of the existing circumstantial evidence". It is worth noting that in this case there was no direct evidence showing "Fujimori's role in the establishment and supervision of the military operations of the Colina group".

[1106] MALARINO E., *El Caso Argentino*, p. 68.

fungibility of the potential executors is considered a "key feature of the organisation", securing the functional automatism of the organisation and thus the almost automatic execution of the leader's orders. Nevertheless, the interchangeability of the direct agents does not appear to be essential for the purpose of the theory's application. In this regard, it is worth nothing that in the *Ruto, Kosgey and Sang* confirmation of charges decision no reference is made to this element. In a likely attempt to limit the "pure/plain" transposition of the German theory at the international level (and therefore, also the fungibility criterion), the judges relied on other factors in order to establish whether the indirect perpetrator exerts control over the crime. Such factors are, *inter alia*, the payment and punishment mechanisms activated to secure the crimes' commission, the oath of loyalty to the group and its rules, the initiation ceremonies, the establishment of an internal judicial system ensuring the rules' enforcement and the intensive, strict, and violent training regimes. In addition to these factors, the ICC judges also referred to the hierarchical structure and to the organised character of the organisation, as features that further contribute to secure its functional automatism. Nonetheless, the hierarchical structure and the organised character of the organisation cannot be interpreted too strictly, in particular when dealing with different organisational settings. At the ICC, the scenario may change significantly from one case to another and the organisations involved in the commission of the crimes can present different characteristics. This is the case, for example, of a state apparatus compared to a group of rebels without a clear structure or hierarchy. For this purpose, the identification of other factors, such as those mentioned above and identified in case law, play a particularly important role. They do so by compensating for the lack of a tight hierarchy, as well as the lack of interchangeability of the direct executors of the crimes. This is especially true in cases involving non-state sponsored organisations and organisations that do not have a strict hierarchical structure, which is typical in the scenarios investigated by the ICC. Nevertheless, it is not possible to establish an exhaustive and predetermined list of factors because they can vary significantly from case to case.

The factors mentioned above can be included among the elements identified by academic literature as "soft or weak factors". They include also the affiliation of origin, the ethnicity, the spiritual believing and the social-familiar bonds of the members. These elements, when analysed together, play a fundamental role because they increase the disposition of the direct agents belonging to the organisation to commit the crimes and also ensure the almost automatic compliance with leaders' orders. As a result, they strengthen the control exerted by the indirect perpetrator over the crimes. The disposition to commit the crime does not have to be considered as a pre-existing condition of the direct agent, essential for the purpose of the application of the doctrine along the lines of Schroeder's theory. At most there could be a pre-existing disposition of the individual to take part in the constituting or constituted organisation and to share its purpose. This is particularly clear for organisations based on political beliefs, such as the Italian "Brigate Rosse". It is the belonging to the organisation that increases the individual's direct disposition to commit the crime.

The idea of a sort of "collective psychology" ("*psícologia colectiva*") of the organisation presented in the *Fujimori* judgment is particularly interesting. It is true that the individual's predisposition to commit a crime focuses more on the subject as an individual and on his or her psychic sphere, and not on the subject as part of the organisation as a whole. However, this is true only at a first glance, because these aspects have objective implications and contribute to determine the unity of the organisation and its automatic functioning as a unique entity. On one hand, the direct perpetrator identifies with the purpose, ideology and the objective pursued by the organisation, which in turn heightens his or her belief that the action is part of the organisational strategy, and thus it increases his or her disposition to implement the leader's orders. On the other hand, this provides the organisation with stability, allowing it to be considered as a unitary entity pursuing a common goal. As a result, the importance of this aspect should be emphasised.

At the ICC, an organisation's detachedness from the law – considered by the German scholar as a constitutive element of the doctrine – has not been applied thus far. Additionally, it is possible to agree with those who believe that it is in

fact not a constitutive element of the theory. Moreover, relying on a very broad concept of law in all of the analysed cases, it would appear that the organisations – at least with regard to the area entailing the commission of the crimes – operated outside the legal order.

It is also important to note that ICC case law requires that the indirect perpetrator fulfils the subjective elements of the crimes, including any required additional intent (such as *dolus specialis*) and that he or she is aware of the factual circumstances enabling him or her to exercise control over the crime through the organisation as constitutive elements. The first of the subjective elements places a very high burden of proof on the prosecutor and it is unrealistic that in macro-criminal contexts the indirect perpetrator is able to fulfil all mental elements required for all of the specific crimes committed on the ground by the direct executors.

Sharing the view of the majority, who believe that art. 25 ICCSt provides for a differentiated model of responsibility and that paragraph a) lists the principal modes of liability, it is possible to interpret indirect perpetration through a responsible person along the line of a theory notably inspired by the *Organisationsherrschaftslehre*, but not on its original version. It is not necessary for the German doctrine to be automatically applied at the ICC, but it can serve as a point of departure for the development and elaboration of an international theory with respect to indirect perpetration, capable of challenging international crimes. The approach adopted by the majority of the judges is consonant with the wording adopted by the drafters of the Rome Statute, which explicitly provides for the possibility of committing a crime through a responsible person. Since the possibility to commit the crime through a responsible person was explicitly provided in the text of art. 25 ICCSt, an interpretation of the provision along the lines of a theory inspired by the *Organisationsherrschaftslehre* should not be excluded or ignored.

The importance of the *Organisationsherrschaftslehre* cannot be underestimated, in particular when dealing with macro-criminal contexts as it is the case of the ICC. The theory has proven to be capable of facing large-scale criminality and adequately capturing the senior leaders' responsibility. Thanks to this theory it is

possible to punish as principals individuals who would otherwise be convicted only as instigators or accomplices. Furthermore, the theory captures the double dimension of international crimes, which encompasses a first aspect relating to the collective dimension of this type of criminality, and another aspect involving the individual attribution of the crimes.

Nevertheless, it is important to note that the reliance on the *Organisationsherrschaftslehre* at the ICC is strictly related to the interpretation of art. 25 ICCSt as a differentiated model of responsibility and also because the adoption of the control theory is the favoured criterion for distinguishing between principals and accessories. This approach, in spite of being the prevailing approach to the disposition, is not uncontroversial. For this reason, Italy is referred for verifying which are the mechanisms developed and adopted in a legal system based on a unitarian model of participation to ascribe to the individuals in the background the crimes committed by their subordinates. The approach adopted by the Italian case law to solve this problem can prove useful, not only because the Italian system is based on an unitarian system of attribution of criminal responsibility, but also because the country had to face – more than any others – the problematic related to the attribution to the leaders of criminal organisation the responsibility of the crimes committed by the participants to the organisation. This is particularly manifest, *inter alia*, in the maxi-trials for Mafia and in the trials related to the crimes committed during the so-called "*years of lead"* ("*anni di piombo*") afflicting the country with terrorist attacks. Departing from the idea that art. 25 ICCSt provides for a differentiated model of responsibility, do we still need to rely on the *Organisationsherrschaftslehre*?

PART III

AN ITALIAN APPROACH TO ART. 25(3)(a), THIRD ALTERNATIVE, ICCST

A. The prosecution and punishment of the leaders of criminal organisations for the crimes committed by their subordinates in the Italian legal system

The objective of this part of the study is to verify how scenarios reflected by the *Organisationsherrschaftslehre* would be solved under the Italian legal system, which is based on a unitararian model of participation in a crime. For this purpose, the criteria adopted by the Italian system and case law in order to attribute to the leaders of criminal organisations the responsibility for the crimes committed by their subordinates in the implementation of the purpose of the organisation[1107] (the so-called "*reati-fine*" and "*reati-mezzo*"[1108]) will be examined in detail. Such an examination allows us to better understand how the *Katanga and Ngudjolo* case – used here as a case model and analysed in depth in the first part of this study – would be solved on the basis of a unitarian model. It also helps determine whether it would be possible to adopt it through the interpretation of art. 25(3) ICCSt.

In order to truly understand the mechanisms that exist in Italian case law we must first look at the model of responsibility adopted by the Italian legal system. The Italian unitarian model is used here as a "source of ideas and concepts" that may be able, if analysed properly, to address and overcome criticisms of the dominant approach and in particular of the *Organisationsherrschaftslehre*. Indeed, in order to establish whether it really is necessary and/or useful to rely on the

[1107] It is not possible here to focus on both legal and illegal organisations. As a consequence, I will limit the analysis only to criminal organisations. For an overview of the problems related to the attribution of the crimes to those at the highest level of lawful organisations or business enterprises, and for further references: SERENI A., *Istigazione al reato*, pp. 48 ff.

[1108] The term "*reato-fine*" is used to indicate the crime constituting the *raison d'être* of the organisation (i.e., drug trafficking), while "*reato-mezzo*" is used to refer to the crime that is instrumental to the organisation (i.e., theft).

Organisationsherrschaftslehre for the purpose of interpreting art. 25(3)(a), third alternative, ICCSt, one must depart from the presumption that art. 25(3) ICCSt provides for a differentiated model of participation in a crime and from the consequent adoption of the control theory as a criterion used to distinguish between principals and accessories.

I. The Italian unitarian model of participation in a crime: origin and normative context

The Italian legal system is based on a pure unitarian model of participation in a crime. Art. 110 c.p. states that "*when a plurality of persons participate in the crime, each of them is subject to the penalty established for such crime, unless the following articles provide otherwise*"[1109]. The Italian Penal Code in force was adopted in 1930 and is known as "Rocco Code", being named after Alfredo Rocco who was the Minister of Justice at the time of its adoption. The "new" Penal Code explicitly abandoned the differentiated model previously endorsed in arts. 63 and 64 of the Zanardelli Code[1110], in favour of a model based on the equivalence of all causal contributions to the crime[1111].

[1109] According to art. 110 c.p. ("*Pena per coloro che concorrono nel reato*") "*Quando più persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilita, salve le disposizioni degli articoli seguenti*".

[1110] The Zanardelli Penal Code was adopted in 1889 and entered into force on 1 January 1890. It was the first penal code of the Kingdom of Italy. In particular, on one hand art. 63 (on co-perpetration, correità) stated that: "*1. Quando più persone concorrono nella esecuzione di un reato, ciascuno degli esecutori e dei cooperatori immediati soggiace alla pena stabilita per il reato commesso. 2. Alla stessa pena soggiace colui che ha determinato altri a commettere il reato; ma all'ergastolo è sostituita la reclusione da venticinque a trenta anni, e le altre pene sono diminuite di un sesto, se l'esecutore del reato lo abbia commesso anche per motivi propri*". On the other hand, art. 64 (on complicity, complicità) stated that: "*1. È punito con la reclusione per un tempo non minore dei dodici anni, ove la pena stabilita per il reato commesso sia l'ergastolo, e negli altri casi con la pena stabilita per il reato medesimo diminuita della metà, colui che è concorso nel reato: 1) con l'eccitare o rafforzare la risoluzione di commetterlo, o col promettere assistenza od aiuto da prestarsi dopo il reato; 2) col dare istruzioni o col somministrare mezzi per eseguirlo; 3) col facilitarne l'esecuzione, prestando assistenza od aiuto prima o durante il fatto. 2. La*

The Rocco Code was adopted during the fascist period and is the expression of the political ideology typical of that period[1112]. It is a known fact that criminal law is a very powerful instrument in the hands of the state and it is used as a tool in order to implement a certain policy. This holds true in particular with regard to the provisions on criminal liability. Art. 110 c.p. is particularly reflective of the fascist regime's need to equally repress and punish all individuals who contributed to the commission of a crime[1113]. The defence of the state and the fight against criminality were the cornerstone of the fascist ideology, and the crimes committed by a plurality of individuals were considered especially alarming[1114].

There are also other reasons that led to the adoption of a unitarian model, such as: (i) the need to overcome the difficulties presented by the previous model in the identification of criteria capable of clearly delineating the different forms of participation in a crime; (ii) the causal equivalence introduced in arts. 40 ff. c.p., according to which all conditions contributing to determine the event (on which the crime's execution depends) must be considered causes of the event[1115].

In the model adopted by the Rocco Code the differentiation between principal and secondary responsibility loses importance. All individuals participating in the crime must be treated as perpetrators and as a result all are equally subjected to the same range of penalty provided by the Code for the crime committed.

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diminuzione di pena per il colpevole di alcuno dei fatti preveduti nel presente articolo non è applicata, se il reato senza il suo concorso non si sarebbe commesso". For an overview of the discipline adopted in the Zanardelli Penal Code: HELFER M., *Concorso di più ersone nel reato. Problemi aperti del sistema unitario italiano*, Giappichelli, Torino, 2013, pp. 47-53. More in general: VINCIGUERRA S., *Dal Codice Zanardelli al Codice Rocco. Una panoramica sulle ragioni, il metodo e gli esiti della sostituzione*, in S. Vinciguerra (ed.), *Il Codice penale per il Regno d'Italia*, Cedam, Padova, 2010, pp. 11-39.

[1111] ROCCO A., *Relazione sul Libro I*, p. 165.

[1112] For an overview of the fascist reform: BATTAGLINI G., *The Fascist Reform*, pp. 278-289; MAGGIORE G., *Diritto penale*, pp. 140-161.

[1113] DONINI M., *La partecipazione al reato*, pp. 184-185.

[1114] *Ibid.*

[1115] ROCCO A., *Relazione sul Libro I*, p. 165. See also: FIANDACA G., MUSCO E., *Diritto penale*, pp. 513-514; GRASSO G., *Art. 110*, pp. 140-141.

According to this model, the responsibility of each individual participating in the crime is not determined on the basis of the role played in the commission of the crime, as is the case of the differentiated model[1116]. Art. 110 c.p. does not set a list of modes of liability used to categorise the conduct of individuals. The determination of individual criminal responsibility is based on causation, or better yet on the criterion of the "causal efficiency" ("*efficienza causale*") of each participant's conduct and on the principle of equal contributions to the commission of a crime[1117]. In other words, in order to be punished it is necessary that the individual's conduct somehow contributed to cause the criminal event. Such a causal contribution can be both of a material or psychological nature, determining respectively a material participation ("*concorso materiale*") or a moral participation ("*concorso morale*") in the crime. Because this study focuses on the mechanisms of attribution of criminal responsibility for the offences committed on the ground to the individual in the background, I will only focus on the individual's moral contribution.

The specific role concretely played by each individual and the corresponding degrees of relevance of an individual's contribution to the crime are only considered at the sentencing stage. It is at this stage that a distinction between individual contributions to the crime is made on the basis of a detailed mechanism of aggravating and mitigating circumstances provided respectively at arts. 112 and 114 c.p.[1118]. In light of the topic of this study, the aggravating circumstance provided by art. 112(1) n. 2 c.p. for those who have promoted, organised the cooperation in the crime or directed the activity of the individuals participating in the crime is particularly relevant[1119]. The influence of the positivist criminology is

[1116] GRASSO G., *Art. 110*, p. 137.

[1117] FIANDACA G., MUSCO E., *Diritto penale*, p. 513.

[1118] The mechanism provided by arts. 112 and 114 c.p., along with art. 133 c.p. (on the general factors that have to be evaluated by the judges in the determination of the penalty to inflict), allows the judges to adapt the penalty to the role concretely played by each individual in the crime.

[1119] According to art. 112(1) n. 2 c.p. the penalty is increased "*per chi, anche fuori dei casi preveduti dai due numeri seguenti, ha promosso od organizzato la cooperazione nel reato, ovvero diretto l'attività delle persone che sono concorse nel reato medesimo*". Particular attention must be paid also to the aggravating circumstance provided by art. 112(1) n. 3 c.p., according to which

especially manifest in this part of the Code and in particular in these provisions[1120]. They contain a list of factors to which – according to the legislator – a different degree of danger corresponds[1121].

It has been highlighted that the unitarian model presents practical advantages[1122]. One such advantage is that it better responds to the needs of social defence and simplifies the probative assessment during the trial[1123]. Moreover, along the lines of this model, it would be possible to punish all criminal acts that do not fit in the categories previously determined by the Zanardelli Code[1124]. One of the most problematic aspects regarding the model adopted by the Zanardelli Code related to the identification of criteria capable of clearly delineating the categories identified by arts. 63 and 64[1125]. This aspect had a strong impact on the judges' activity[1126]. Therefore, the adoption of a unitarian approach significantly simplified the life of prosecutors and judges[1127].

Nevertheless, the determination of the "minimum contribution" required to the participant to be considered criminally liable, as well as the determination of the mental element required in order to be punished according to art. 110 c.p. are both particularly problematic. As a result, they have drawn the attention of both practitioners and scholars.

Another aspect at the centre of the Italian academic debate concerns the nature of the institute provided by art. 110 c.p. and the grounds over which establishing

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the penalty is increased "*per chi, nell'esercizio della sua autorità, direzione o vigilanza, ha determinato a commettere il reato persone ad esso soggette*".

[1120] RINALDINI F., *Art. 110*, p. 1723; FIANDACA G., MUSCO E., *Diritto penale*, p. 514; MONACO L., *La riforma*, pp. 122-123.

[1121] ROCCO A., *Relazione sul Libro I*, p. 166.

[1122] MANTOVANI F., *Diritto penale*, p. 505; MONACO L., *La riforma*, pp. 120-121, p. 123 (the author recalls the reasons used to support the implementation of a unitarian model, nevertheless he is in favour of the reintroduction of a participation differentiated model).

[1123] MANTOVANI F., *Diritto penale*, p. 505.

[1124] *Ibid.*

[1125] This aspect is particularly problematic in legal systems that have adopted a differentiated model of participation in a crime.

[1126] MONACO L., *La riforma*, p. 123.

[1127] MANTOVANI F., *Diritto penale*, p. 505; MONACO L., *La riforma*, p. 120.

the criminal responsibility of "atypical" conducts. Since it is not possible here to analyse all different theories developed for this purpose over the course of several years, they are only mentioned. They are: (i) the theory based on causation ("*teoria causale*"); (ii) the theory based on the accessory nature of the conduct of participants compared to the conduct of principals ("*teoria dell'accessorietà*"); and (iii) the theory pursuant to which a new offence originates as a result of the combination of art. 110 c.p. and the provisions contained in the special part of the Penal Code ("*teoria della fattispecie plurisoggettiva eventuale*")[1128].

The introduction of the unitarian model in the Rocco Code was undisputed for a long time[1129]. However, since the 1980s, the model has been at the centre of the academic debate between its supporters and those calling for the reintroduction of a differentiated model. The main criticism raised against art. 110 c.p. can be summarised as follows: (i) it attributes an overly broad discretionary power to the judges; (ii) it lacks specificity and therefore violates the principle of legality[1130]; and (iii) it would risk violating the principle of personal criminal liability[1131]. In other words, according to those who criticise art. 110 c.p., the differentiated model would offer more guarantees to the defendants[1132].

In the last years, several projects involving the reform of the penal code touched upon this criticism, offering different alternatives to the existing

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[1128] For an overview of the different theories: RINALDINI F., *Art. 110*, pp. 1728-1731; GRASSO G., *Art. 110*, pp. 144 ss.; DE FRANCESCO G., *Il concorso di persone*, pp. 328 ff.; PELLISSERO M., *Il contributo concorsuale*, pp. 1627 ff.

[1129] MONACO L., *La riforma*, p. 120.

[1130] RINALDINI F., *Art. 110*, p. 1723; FIANDACA G., MUSCO E., *Diritto penale*, p. 513; INSOLERA G., *Profili di tipicità*, p. 440; SEMINARA S., *Tecniche normative*, pp. 1-3; DE MAGLIE C., *Teoria e prassi*, p. 969. On the presumed unconstitutionality of art. 110 c.p. see in particular: VASSALLI G., *Riforma del codice*, p. 34. For further references on this aspect: VASSALLI G., *Note in margine*, p. 128 and related footnotes (in particular footnote n. 5). See also VIGNALE L., *Ai confini*, pp. 1358-1413; BRICOLA F., *Commento all'art. 25*, p. 263. For a critical view on the use of the discretionary power of the judges: G. GRASSO, *Disciplina normativa*, pp. 143 ff.

[1131] DONINI M., *Il concorso di persone*, pp. 140-141; INSOLERA G., *voce Concorso*, Agg., p. 67.

[1132] VASSALLI G., *Note in margine*, p. 152.

discipline[1133]. Nevertheless, thus far, the Italian legal system continues to be based on the unitarian model and it is within this model that the case law and doctrine elaborated different mechanisms in order to attribute to the leaders of the organisations the crimes committed by other participants in the implementation of the organisational strategy.

II. Indirect perpetration in the Italian legal system

The Italian Penal Code explicitly refers to the possibility of committing the crime through another person. In certain cases, regulated by the Penal Code, the commission of the crime can be determined: by duress (art. 46 c.p.); by mistake caused by deception of another individual (art. 48 c.p.); by the superior's order (art. 51(2)(4) c.p.); by state of necessity determined by threat (art. 54(3) c.p.); by incapacity to appreciate the unlawfulness of the conduct, provoked by another individual for the purpose of committing the crime (art. 86 c.p.); and by a non-imputable or non-punishable individual determined to commit the act by a responsible individual (art. 111 c.p.)[1134].

Some of these provisions are similar to the innocent agency doctrine. In academic literature, the dominant approach is that of excluding those cases from the category of indirect perpetration ("*autoria mediata*") and instead considering them as special forms of participation in a crime committed by a plurality of persons[1135]. In the Italian legal system – based on a unitarian model – there is no

[1133] RINALDINI F., *Art. 110*, pp. 1724-1726.

[1134] Art. 112 c.p. further establishes the possibility to aggravate the penalty for those who in exercising their authority, direction or supervision have determined the person subjected to them to commit the crime (n. 3), and for those who determined to commit the crime a person under 18 years, in state of infirmity or mental deficiency, or committee the crime through the same or with them (n. 4).

[1135] In this vein: PADOVANI T., *La concezione finalistica*, p. 403; PADOVANI T., *Le ipotesi speciali*, p. 193; INSOLERA G., *voce Concorso*, p. 452. *Contra*: MORSELLI E., *Note critiche*, p. 418 (according to the author arts. 46, 48, 51(2)(4), 54(3) c.p. are referable to the category of the indirect perpetration, while arts. 86 and 111 can be considered forms of complicity); LATAGLIATA A.R., *I principi del concorso*, p. 73 (according to the author only arts. 46 and 48 would be referable to the category of indirect perpetration).

room for the figure of indirect perpetration ("*autoria mediata*") as known in the German legal system[1136].

Such a figure was originally introduced in the German system in order to punish conduct that otherwise would have remained unpunished[1137]. This is due to the fact that in this system, the responsibility of principals and accessories to the crime is based on the principle according to which the conduct of the latter is accessory to the conduct of the former[1138]. As a consequence, where the direct agent was either innocent or not culpable, it would have not been possible to punish the conduct of the individual in the background (who used such an agent to commit the crime) by using the provisions on participation and therefore considering him or her a participant in the crime[1139]. At the same time, it would have been impossible to punish the individual in the background for the crime committed by the direct agent as a direct perpetrator because he or she did not fulfill all of the offence's constitutive elements[1140]. As a result, the concept of indirect perpetration made it possible to overcome the limits presented by the German model. In the cases mentioned above, the German doctrine considers the direct agent a mere instrument in the hands of the indirect perpetrator.

[1136] GRASSO G., *Art. 110*, p. 162 (the author highlights that the introduction of the figure of the "indirect perpetrator" in the German system is strictly related to its needs and to the necessity to fill in gaps of such a system); DI MARTINO A., *La disciplina del concorso*, pp. 202-203; PADOVANI T., *La concezione finalistica*, pp. 395-409 (the author highlights in particular the incompatibility of the concept of control over the act as a criterion to determine whether an individual is indeed principal to a crime, nevertheless he claims that such a concept can be used in order to concretely determine the involvement of the individual in the crime, pp. 401-402).

[1137] On the origin of indirect perpetration and for a critical view: PADOVANI T., *La concezione finalistica*, pp. 398-400; GALLO M., *Lineamenti di una teoria*, pp. 70-78; DELL'ANDRO R., *La fattispecie plurisoggettiva*, p. 123; PEDRAZZI C., *Il concorso di persone*, pp. 35-38. More in general on indirect perpetration in Italian criminal law: SINISCALCO M., *voce Autore mediato*, pp. 443-451.

[1138] GRASSO G., *Art. 110*, p. 162; FORNASARI G., *I principi*, p. 423.

[1139] GALLO M., *Lineamenti di una teoria*, p. 71. The reference here is to the "*teoria dell'accessorietà estrema*", which provides that in order for the conduct of the participant to be criminally relevant, it must be accessory to an unlawful, culpable and "typical" conduct carried out by the perpetrator.

[1140] *Ibid.*

In contrast, according to the Italian Penal Code, non-imputable or non-culpable individuals can be considered participants in a crime under art. 110 c.p., even if they are not punished[1141]. The responsibility of the individual in the background in the aforementioned cases would be adequately captured by the application of the aggravating circumstances provided by arts. 111 and 112 c.p. As a consequence, there is no need to rely on the category of indirect perpetration[1142]. Moreover, if it were possible to include these cases in such a category and exclude them from the application of the discipline contained in art. 110 c.p., the individual in the background would receive a lower punishment due to the impossibility of applying the aggravating circumstances provided for in arts. 111 and 112 c.p.[1143]. Therefore, the characteristics justifying the adoption of indirect perpetration in the German legal system are not present in the Italian legal system[1144].

As analysed in the second part of this study, the category of indirect perpetration was further extended to the cases where the direct perpetrator is a fully responsible individual[1145]. This is due to the need – typical of the differentiated approach – to adequately capture the responsibility of the individuals in the background, who would risk being considered "mere" accessories and consequently punished with a lower sanction.

In Italy, not much attention has been paid to the indirect perpetrator behind the direct perpetrator scenarios, and thus to the *Organisationsherrschaftslehre*, with the exception of a few authors[1146]. This is due to the fact that the conduct captured

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[1141] This possibility is explicitly recognised by arts. 111, 112(4) and 119 c.p. On this aspect: DI MARTINO A., *Concorso di persone*, p. 161.

[1142] FORNASARI G., *I principi*, p. 432.

[1143] DI MARTINO A., *La disciplina del concorso*, p. 202.

[1144] MAUGERI A.M., *La responsabilità dei leader*, p. 353 (in particular footnote n. 482); FORNASARI G., *I principi*, pp. 432-433.

[1145] The *Organisationsherrschaftslehre* perfectly reflects this need of the German system.

[1146] MAUGERI A.M., *La Responsabilità dei leader*, pp. 353-357 (the author analyses the theory on an Italian perspective); MOCCIA S., *Autoria*, pp. 388-391 (this is the only article available in Italian, entirely dealing with the *Organisationsherrschaftslehre*; according to the author the German doctrine would be compatible with the Italian legal system); RAPISARDA C., *Nota ad Ass. Torino, 26 luglio 1983, Acella e altri; Ass. Genova, 26 febbraio 1983, Azzolini e altri; Ass. Roma 24 gennaio 1983, Andriani e altri*, p. 189; SAMMARCO G., *Le condotte di partecipazione*,

by such a figure would be endorsed in art. 110 c.p. and subjected to the provisions regulating the participation in a crime committed by a plurality of persons[1147].

According to the Italian legal system, the individual in the background (who does not take part in the physical commission of the offence) can be considered a moral participant if his or her conduct causally contributes to the commission of the offence perpetrated by his or her subordinates. It would also be possible to charge the leaders of the organisation with the aggravating circumstance provided by art. 112(1) n. 2 c.p. Consequently, before analysing the mechanisms adopted by case law to attribute responsibility to the leaders of the organisations (for the crimes committed by their subordinates) and for a better comprehension of the same, it is important to focus on moral participation.

III. Moral participation

Moral participation ("*concorso morale*") is a broad category used to cover conduct that does not consist of a material contribution to the offence, but that, nevertheless, contributes to its commission, such as determining, strengthening, mandate, ordering, agreement to commit a crime, and also providing technical advice [1148]. The term instigation is traditionally synonymous with moral participation[1149]. Such a term is employed in the Italian Penal Code in a broad sense, inclusive of all of the different forms of moral participation in a crime committed by a plurality of individuals[1150]. This approach is confirmed by the way the legislator used the term in the Penal Code, and in particular in art. 115

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pp. 127-128. For a critical view of the theory in the Italian academic literature: SEMINARA S., *Tecniche normative*, pp. 129-130; PADOVANI T., *Le ipotesi speciali*, p. 168.

[1147] In this vein: DI MARTINO A., *La disciplina del concorso,* pp. 202-203.

[1148] DI MARTINO A., *Concorso di persone*, pp. 181-182 (the author further stated that in reality it is possible that the different manifestations of moral participation to a crime overlap, p. 184).

[1149] GRASSO G., *Art. 110*, p. 180; DI MARTINO A., *Concorso di persone*, p. 184.

[1150] RINALDINI F., *Art. 110*, p. 1738; FIANDACA G., MUSCO E., *Diritto penale*, p. 529; VIOLANTE L., *voce Istigazione*, p. 988.

c.p., which is the only provision in the general part of the Code that explicitly refers to instigation as a mode of liability[1151].

According to the dominant academic literature, instigation includes acts that strengthen the criminal purpose, already existing in the direct agent (instigation "*stricto sensu*"), and acts that determine or otherwise encourage such criminal purpose in the direct agent (instigation "*lato sensu*")[1152]. This reading of the provision is further confirmed by the use of instigation made in art. 580 c.p.[1153]. As a consequence, in the following paragraphs the term instigator will be used in a broad sense.

With particular regards to criminal organisations – despite the fact that the conduct of the leaders may manifest itself in several ways[1154] – it is very likely that the leader is the same individual who gives the final impulse to the commission of the crime[1155]. In fact, it is also likely that the members of the organisation are already disposed to the commission of the crime, and that such individuals are simply waiting to be "activated" to commit the crime[1156]. The moral participation of the leaders in the offences carried out in pursuance of the organisation's purpose is normally reflected by implicit instigation, agreement or instigation and agreement[1157].

In any case, regardless of the type of contribution, to be held responsible as a

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[1151] Instigation can constitute a crime *per se* in the following cases: arts. 266, 302, 322, 414, 414-*bis*, 415, 580 c.p. With regard to the special legislation, *inter alia*: art. 3 law 654/1975 (as subsequently modified); art. 8 law 962/1967.

[1152] MARINUCCI G., DOLCINI E., *Manuale di diritto penale*, p. 491; RINALDINI F., *Art. 110*, p. 1737. *Contra*: RISICATO L., *La causalità psichica*, pp. 10-13. On the relationship between instigation "*stricto sensu*" and determination, and on the different theories developed on this point: ARGIRÒ F., *Le fattispecie*, pp. 243-252.

[1153] In art. 580 c.p. "*instigation or help to suicide*" ("*istigazione o aiuto al suicidio*") instigation is explicitly used to refer to conduct that further determines and strengthens the criminal purpose of the victim.

[1154] The leaders generally give orders, directives, instructions: CORVI A., *Regole di esperienza*, p. 783.

[1155] DE MAGLIE C., *Teoria e prassi*, pp. 947-948.

[1156] *Ibid.*

[1157] SPAGNOLO G., *Il problema dei limiti*, pp. 42-43.

moral participant it is necessary to prove that the leader causally contributed to the crime and fulfilled the required mental element.

a) The causal contribution to the crime

As mentioned above, in order for the moral participant's conduct to be punishable, it must be causally linked to the crime committed by the direct agent[1158]. The existence of such a link has to be verified on the basis of an *ex post* evaluation, intended to establish whether it is concretely possible to determine that the direct perpetrator's act originated from the influence exercised over him or her by the individual in the background[1159]. With particular regards to instigation, academic literature has highlighted that a "double passage" ("*doppio passaggio*") is required: first, the conduct of the instigator must determine or strengthen the criminal purpose of the subject who is instigated; and, second, the execution of the crime must be the result also of the instigated individual's conduct[1160].

Proving the existence of a psychological causal link is much more complicated than demonstrating a naturalistic causal link because we move in the field of the interpersonal relationships[1161]. Different theories were developed in order to ascertain the existence of a causal link[1162]. Moreover, the larger an organisation, the more difficult it is to identify the concrete contributions made by the leader to

[1158] MILITELLO V., *Italian Report*, p. 302; RONCO M., *Le interazioni psichiche*, pp. 829 ff.; SEMINARA S., *Riflessioni sulla condotta*, p. 1123.

[1159] MANTOVANI F., *Diritto penale*, pp. 514-515; FIANDACA G., MUSCO E., *Diritto penale*, p. 530; GRASSO G., *Art. 110*, p. 184.

[1160] MARINUCCI G., DOLCINI E., *Manuale di diritto penale*, p. 491; SEMINARA S., *Riflessioni sulla condotta*, p. 1127.

[1161] DI MARTINO A., *Concorso di persone*, pp. 180-181; RISICATO L., *La causalità psichica*, p. 6; STELLA F., *Leggi scientifiche*, pp. 102 ff.; DE MAGLIE C., *Teoria e prassi*, p. 927; TARUFFO M., *La prova del nesso*, pp. 77 ff. Highlighting the peculiarities of the psychic causality: CASTRONUOVO D., *Fatti psichici e concorso*, pp. 190 ff.; CORNACCHIA L., *Il problema della c.d. causalità,* pp. 200-203.

[1162] For an overview: SERENI A., *Istigazione al reato*.

the crimes committed by the direct agents in furtherance of the organisational strategy[1163].

In order to limit the judges' discretion, the Joint Chambers of the Court of Cassation claimed that to determine whether an individual morally participated in a crime, a judge must establish the following: (1) that the individual participated in the conception of the crime or in its preparatory stage; and (2) the manner in which such conduct manifested itself with respect to the conduct of the other participants in the crime. Lastly, these two aforementioned factors must be clearly expressed in the reasoning of the judgment[1164]. The statement of the Joint Chambers is particularly important because it was intended to compensate for art. 110 c.p.'s lack of specificity, and was later confirmed in subsequent case law[1165].

b) The mental element

The existence of a causal contribution to the offence is not sufficient in order for a moral participant to be convicted of a crime. The individual must also fulfil the subjective elements of the crime carried out by the direct perpetrator and must have the requisite mental intent to cooperate with others in the commission of the crime[1166]. With particular regard to crimes that require specific intent[1167], it is not necessary that all individuals fulfil this additional intent. Rather, it is sufficient that only one of them fulfils it[1168]. Nevertheless, those who do not act with such intent must be aware that a participant is acting with specific intent[1169]. This

[1163] CORVI A., *Regole di esperienza*, p. 783.

[1164] Cass. pen., Sez. un., 30 ottobre 2003, *Andreotti ed altro*, con nota di D. Carcano, in *Cass. pen.*, 3 (2004), pp. 811 ff.

[1165] For further references to the case law: RINALDINI F., *Art. 110*, pp. 1740-1741.

[1166] *Ibid.*, pp. 1747-1748.

[1167] The term "specific intent" here is used as synonym of *dolus specialis* as defined in the first part of this study (see supra footnote n. 574).

[1168] FIANDACA G., MUSCO E., *Diritto penale*, p. 534; GRASSO G., *Art. 110*, p. 194. For a more in-depth analysis of participation in crimes requiring a special intent in a comparative perspective with the German system: PICOTTI L., *Il dolo specifico*, pp. 611-624.

[1169] GRASSO G., *Art. 110*, p. 194; INSOLERA G., *voce Concorso di persone*, p. 476; GALLO M., *Lineamenti di una teoria*, pp. 99-10; PEDRAZZI C., *Il concorso di persone*, p. 17.

aspect is strictly related to the idea that a new and unitary offence results from the combination of art. 110 c.p. with the provision contained in the special part of the Penal Code.

As to the mental element of the instigator, it is not sufficient that the instigator simply has the intent to generally strengthen or determine the criminal purpose of direct perpetrator. Rather, he or she must intend to provoke a specific criminal act. In other words, the object of instigation and related mental element must be specific. Otherwise the conduct of the instigator would not constitute a form of moral participation, but would instead fall under the crime of criminal solicitation endorsed in art. 414 c.p. ("*istigazione a delinquere*")[1170].

In order to be punished as an instigator, the object of the instigation and and the crime committed do not have to be perfectly identical[1171]. This means, for example, that the instigated individual has enough freedom as to the modalities he or she employs to carry out the criminal conduct. Nevertheless, if the crime carried out by the direct perpetrator differs from the crime provoked by the instigator, it is eventually possible to ascribe such an offence to the latter according to art. 116 c.p.[1172]. This provision states that when several individuals agree to commit a crime, but one of them carries out a different offence, such an offence will be attributed also to the other participants if it is the consequence of their actions or omissions. Moreover, with regard to the mental element, such an offence must have been foreseeable at the moment the crime was carried out also by those individuals who did not intend to commit such crime[1173].

[1170] DE MAGLIE C., *Teoria e prassi*, p. 949.

[1171] DI MARTINO A., *Concorso di persone*, p. 184.

[1172] Art. 116 c.p. ("*Reato diverso da quello voluto da taluno dei concorrenti*") reads that "*Qualora il reato commesso sia diverso da quello voluto da taluno dei concorrenti, anche questi ne risponde, se l'evento è conseguenza della sua azione od omissione. Se il reato commesso è più grave di quello voluto, la pena è diminuita riguardo a chi volle il reato meno grave*".

[1173] On 31 May 1965 the Italian Constitutional Court – with judgment n. 42 – claimed that the existence of a causal link between the action or omission of the individual who did not intend to commit the crime and the crime perpetrated was not sufficient in order to be punished under art. 116 c.p. It established that a certain degree of culpability was also required. The Court of Cassation is constant in requiring to the individual, who did not intend to commit the crime, at

Lastly, the individual who is instigated must be determined, or at least determinable[1174]. This is particularly relevant with regards to crimes that are committed through criminal organisations, where in most cases those in the leadership position do not know who the direct perpetrators are[1175].

c) Evidentiary and substantive issues

One of the most problematic aspects related to moral participation concerns the applicable evidentiary standards. As mentioned above, demonstrating the existence of a causal link between the individual in the background and the direct agent is not an easy task, the risk being that of presuming the existence of such a connection[1176]. This issue is particularly manifest in the prosecution and punishment of leaders for crimes committed by other participants in furtherance of the organisation's objectives.

In most cases, the responsibility of such individuals is not based on direct evidence, but on indirect evidence or circumstantial evidence, from which it is possible to make inferences related to the *factum probandum*[1177]. Consequently, as will be discussed in the following paragraphs, judges in Italy often rely on the so-called "*massime d'esperienza*": "principles" inferred from common experiences (obtained from the empirical observations of phenomena) but lacking a scientific nature, which allow one to reconnect to certain premises determined consequences[1178].

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least the foreseeability of the criminal offence carried out by another person. Moreover, according to the dominant approach such a foreseeability has to be evaluated in concrete.

[1174] DI MARTINO A., *Concorso di persone*, p. 183; MAGLIE C., *Teoria e prassi*, p. 951.

[1175] CORVI A., *Regole di esperienza*, p. 784; DE MAGLIE C., *Teoria e prassi*, p. 950.

[1176] DE MAGLIE C., *Teoria e prassi*, p. 967.

[1177] CORVI A., *Regole di esperienza*, p. 785. Moreover, particular reference must be made to art. 192 c.p.p. on the criteria for evaluating the evidence. The reliance on indirect or circumstancial evidence to prove the leaders' responsibility is common also in the trials related to international crimes and to the serious violation of human rights. This approach is manifest, for example, in the *Junta* trials, in *Fujimori*, as well as in the ICC proceedings.

[1178] CORVI A., *Regole di esperienza*, pp. 785-786.

As correctly highlighted in the academic literature, the prosecution and punishment of those in a leadership position pose problems both on evidentiary and substantial levels[1179], which are often closely related[1180]. The difficulties faced in finding the evidence of the leaders' involvement in the commission of said crimes[1181] and in clearly identifying the internal dynamics of the organisations may induce the judges to attribute the responsibility of such individuals based on their position within the organisation. This approach would simplify the life of prosecutors and judges by allowing them to overcome the lack of evidence at their disposal. Nevertheless, it would seriously violate the rights of the defendants. In particular, it would violate the principle of personal criminal responsibility endorsed in art. 27 Cost[1182] and would favour the establishment of a form of strict liability[1183].

As will be seen shortly, this approach has been adopted by courts during emergency periods, such as the "*years of lead*", in which there was a certain automatism between the status of leaders and their responsibility as moral

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[1179] CANZIO G., *Responsabilità dei partecipi*, pp. 3163-3183.

[1180] SPAGNOLO G., *Il problema dei limiti*, p. 43. On the interrelation of the two aspects in a concrete case (the *Francese* case): TULUMELLO G., *Il giudice e lo storico*, pp. 2508- 2517. More in general on the relationship between substantial criminal law and the trials related to organised crimes, *inter alia*: NOBILI M., *Associazioni mafiose*, pp. 223-241; INSOLERA G., *Diritto penale*, p. 177; VIOLANTE L., *La formazione della prova*, pp. 474-496.

[1181] DE FRANCESCO*, L'estensione delle forme*, p. 413.

[1182] For an overview in English of the principle of personal criminal responsibility in Italian criminal law: MILITELLO V., *Italian Report*, pp. 299-300. See also, inter alia: PULITANO' D., *Personaità della responsabilità*, pp. 1231 ff.

[1183] GALLO E., *Concorso di persone*, p. 25. An example of criminal responsibility due to the position of the individual was endorsed in art. 57 of the original version of the Italian penal code, according to which "*qualora si tratti di stampa periodica chi riveste la qualità di direttore o redattore responsabile risponde, per ciò solo, del reato commesso, salva la responsabilità dell'autore della pubblicazione*". The reference made here relates to the responsibility of the director of periodical press for the crimes committed by means of publication by his or her subordinates, that are attributed to him or her only on the basis of his or her position. This article was reformed with law 4 March 1958, n. 127. The responsibility of the director was reformulated as a crime of negligence (based on the lack of control). On this regard: NUVOLONE P., *Il diritto penale*, p. 108.

accomplices for the crimes committed in the implementation of the organisational strategy. Additionally, a closer look at relevant case law demonstrates that there is not always a clear distinction between the crime of participation in a criminal organisation and the responsibility for the crimes committed in the implementation of its purpose[1184].

IV. The Italian case law and its development

In order to determine how criminal responsibility for the crimes committed by their subordinates in the implementation of the organisational strategy are attributed to the leaders of said organisations, and how the *Katanga and Ngudjolo* case (used here as a case model) would be solved according to the Italian legal system, one must take a deeper look at existing case law.

In Italy, the attribution of criminal liability for crimes committed by their subordinates to those who, despite their absence from the scene of the crime, mastermind, plan, organise, order or acquiesce to the crime's commission have absorbed the focus and energy of numerous academics and practitioners, in particular during the "*years of lead"*, and in the prosecution and punishment of the senior leaders of mafia-type organisations. For this reason, in the following paragraphs, I will focus on the most important judgments and on the approaches developed in the case law during said periods, with an in-depth analysis of a case that originated in the macro-criminal context characterising the Argentinean dictatorship (the *Astiz et al.* case).

a) The judgment of the Joint Chambers of the Court of Cassation in the *Kofler* case: a milestone decision

The 1970 judgment of the Joint Chambers of the Court of Cassation in the *Kofler* case can be considered a milestone decision for the topic under

[1184] The same holds true with regard, for example, to the crime of political conspiracy by agreement (art. 304 c.p.) and the crimes committed in furtherance of such an agreement. This aspect was clarified in the *Kofler* case.

examination[1185]. The case concerned several episodes of dynamite terrorist attacks, allegedly committed between 8 July 1962 and 17 November 1963 by individuals who wanted South Tyrol to secede from Italy.

In their reasoning, the judges established the following principle: in order for the heads of the association to be held responsible as moral participants for the crimes committed by other mermbers in the implementation of the association's purpose, it is not enough for said leaders to be charged with the crime of political conspiracy by agreement (art. 304 c.p. "*cospirazione politica mediante accordo*") – rather, their moral participation in each of the crimes committed must also be proven[1186]. In other words, according to the Court, the status of leader does not automatically imply his or her involvement in the crimes carried out by the other participants.

Despite the inestimable value of this precedent – which is in line with the principle of personal criminal responsibility endorsed in art. 27 Cost – in the period following the judgment, the principle has been sacrificed in favour of the social defence. This trend – as will be seen in the following paragraphs – is particularly manifest in the period of the so-called terrorist emergency.

b) The period of the terrorist emergency

The period of the terrorist emergency lasted from the early 1970s until the early 1980s. The period (also known as "*years of lead"*) was characterised by political and social turmoil, which was ridden with bloodshed. It also subjected the Italian people to a reign of terror, which is why this historical period is also referred to as a period of emergency. In such a climate, prosecutors and judges had to deal with the prosecution and punishment of those responsible for many crimes such as murder, kidnapping and arson.

One of the greatest difficulties they had to face concerned the identification of the direct perpetrators of the crimes. This is due to the fact that several armed groups and organisations were all highly active at the same time, were all

[1185] Cass. pen., Sez. un., 18 marzo 1970, *Kofler ed altri*, in *Foro Italiano*, 3 (1970), II, pp. 145 ff.
[1186] *Ibid.*

politically motivated and shared the same objective: to subvert the state[1187]. Moreover, during the period of terrorist emergency, the law on effective regret (the so called "*legge sui pentiti*"[1188]) was not yet in force and in most cases the defendants refused to co-operate[1189]. As a consequence, establishing the structure and internal dynamics of the operating groups and organisations was not an easy task. Another problem the judges had to face in this period concerned the identification of the criteria for attributing the responsibility for the crimes committed in furtherance of the groups' strategy to those higher up (in particular to the heads of such groups)[1190].

In the following paragraphs, I will focus only on the most relevant decisions for the topic under examination.

i) The *Alunni* and *Formazioni Comuniste Combattenti* case

The criterion developed in 1979 in the proceeding against *Alunni* and the "*Formazioni Comuniste Combattenti*" to attribute to the leaders of the armed gang ("*banda armata*") criminal responsibility (as moral participants) for the crimes committed by other members in the implementation of the gang's purpose is particularly important and was later adopted by case law[1191]. According to this criterion, the heads of the gang could be convicted for such offences only where

[1187] DE MAGLIE C., *Teoria e prassi*, p. 931.

[1188] The Italian legislator responded to the terrorist emergency with law n. 304 of 29 May 1982 (also known as "*legge sui pentiti*"). The purpose of this law was that of encouraging the dissociation from the criminal organisations and the collaboration of former terrorists with justice, in exchange of a discount of the penalty and other benefits. The declarations of the cooperating witnesses played a fundamental role also in the light of the reconstruction of the internal dynamics and structure of criminal organisations. For an analysis of the law, *inter alia*: NUVOLONE P., *Politica criminale*, pp. 143-148; NUVOLONE P., *Legalità penale*, pp. 1-15; This law played a fundamental role in the adoption, in the following years, of law n. 82 of 15 March 1991 closely related to the Mafia.

[1189] DE MAGLIE C., *Teoria e prassi*, p. 931.

[1190] For an overview on the solutions adopted by the case law during the *years of lead*: DE MAGLIE C., *Teoria e prassi*, pp. 924-972.

[1191] *Ibid.,* p. 931.

the following elements were fulfilled: (i) the crimes were undoubtedly attributable to a certain armed group, that claimed responsibility for them and whose leaders were known; (ii) the crimes were the result of the implementation of the programme of the armed group; (iii) without the organisation and the structure of the armed group the crimes perpetrated did not have a *ratio* and their commission would not have been possible; (iv) the commission of the crimes was instrumental to keeping the group alive and allowing it to pursue its goals; (v) all individuals charged under art. 306 c.p. for the crime of promoting, constituting or organising an armed gang causally contributed to the commission of crimes that were instrumental to the organisation (i.e., armed robbery) and crimes that constituted the *raison d'être* of the organisation, due to their presence in the group, the role they played within it and the ensuing approval of its general ideological programme; (vi) the leader of the organisation had this status at the time the crime was committed ("*correttivo temporale*"); (vii) the individual had a leadership position in the area where the offence was perpetrated ("*correttivo spaziale*")[1192].

At a first glance, it is possible to note that such elements are strictly related to the need to find a criterion capable of adequately capturing the responsibility of those in a leadership position. Nevertheless, according to these elements, the responsibility of the leaders appears to be strictly related to their position within the organisation. The concrete application of this criterion has been the subject of criticism. Indeed, the judges did not pay much attention to the analysis of the factual relationship between the leaders and the direct perpetrators of the crime, nor to their involvement in the commission of such offences[1193]. The rule of experience ("*regola d'esperienza*") according to which it was highly probable that the heads of the armed group decided on the targets to be hit, equipped the direct perpetrators with the necessary arms, offered them protection before and after the commission of the crime, and thus were responsible as moral participants, was

[1192] G.I. Milano, 11 settembre 1970, *Alunni*, unedited (the criterion adopted by the investigating Judge Guido Galli in his order was implemented in Ass. Milano, 21 giugno 1980 and in Ass. App. Milano, 11 febbraio 1982, both unedited). For a detailed analysis of the proceedings and for a commentary: DE MAGLIE C., *Teoria e prassi*, pp. 931-938.

[1193] DE MAGLIE C., *Teoria e prassi*, p. 937.

applied almost automatically by the judges[1194]. As a result, although the judges invoked the respect of the principle of personal criminal responsibility, they essentially based the responsibility of the leaders on their status[1195].

The approach adopted by case law[1196] (which focused on the correspondence between the role and the typical activities performed by those who organise or constitute an armed group and their responsibility as moral participants in the crimes committed by the other members) rendered the lines distinguishing the crime of participation in a criminal organisation (in this case an armed gang under art. 306 c.p. "*Banda armata: formazione e partecipazione*") and participation in criminal activities carried out by the organisation unclear[1197].

More generally, with regard to the associative crimes ("*reati associativi*"), it is important to state that the conduct of the individual taking part in the criminal group or organisation does not automatically imply his or her involvement in the specific crimes committed by the other participants[1198]. In other words, the responsibility for joining a criminal organisation implies only a general acceptance of the group's general criminal purpose.

ii) The trials against the Red Brigades

For the purpose of the present analysis, particular attention must be paid to a certain approach adopted by the Courts of First Instance in the trials against the

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[1194] *Ibid.*

[1195] *Ibid.*, pp. 934-938.

[1196] *Inter alia*: Ass. Brescia, 22 ottobre 1983, *Massenti*, unedeted. This judgment refers to the terrorist activity of the "*Nuclei Armati per il Potere Operaio*" (NAPO) and to the "*Nuclei Armati Comunisti*" (NAC)). For a detailed analysis of the proceedings and for a commentary: DE MAGLIE C., *Teoria e prassi*, pp. 938- 942.

[1197] DE MAGLIE C., *Teoria e prassi*, p. 939; DE FRANCESCO G., *Riflessioni sulla struttura*, pp. 710-711.

[1198] DI MARTINO A., *Concorso di persone*, p. 190; FIANDACA G., *Sulla responsabilità concorsuale*, p. 17 (the author also highlights that with regard to those in a leadership position, such as the promoters or organisers, it is not always possible to distinguish between the crime of participation in a criminal organisation and the moral participation in the crimes committed in furtherance of the organisational strategy).

Red Brigades and its offshoots. The Red Brigades were a left-wing terrorist group that operated in Italy between the early 1970s and the beginning of the 1980s[1199]. The goal of the group was to disrupt the capitalist structure of the State (identified by the same group also as "*Stato Imperialista delle Multinazionali*" or SIM) and create a dictatorship of the proletariat. For this purpose, the group carried several attacks against symbols of capitalism and against the Italian government (in particular the Christian Democratic Party). During the attacks, the militants destroyed properties (such as factories), kidnapped magistrates and killed individuals, among them many politicians.

The Red Brigades was a tightly hierarchical organisation and operated clandestinely. At its top was the "executive committee". This organism played a fundamental role within the organisation. It had wide decision-making powers, defined the political line, delineated the strategy to be pursued by the organisation, and coordinated the activities of the organisation both at the national and local levels. The local level of the organisation was composed by columns ("*colonne*") and fronts ("*fronti*")[1200].

In this period, specific case law attributed the responsibility of the crimes committed by the members of the Red Brigades to its leaders primarily due to their position within the group[1201]. This is the case, for example, of the members of the organisation's executive committee[1202]. As a result, by applying this approach, the courts were able to establish the criminal responsibility (as moral participants under art. 110 c.p.) of those who were members of the committee for

[1199] The successor of the Red Brigade was the Red Brigades Fighting Communist Party (BR-PCC). On the history of the Italian Red Brigades, *inter alia*: RAIMONDO C. (ed.), *The Red Brigades*.

[1200] For an analysis of the structure of the Red Brigades: ORSINI A., *Anatomy of the Red Brigades*, p. 56. See also DE MAGLIE C., *Teoria e prassi*, p. 943 (in particular footnote n. 82).

[1201] Ass. Torino, 26 luglio 1983, *Acella ed altri*; Ass. Genova, 26 febbraio 1983, *Azzolini ed altri*; Ass. Roma 24 gennaio 1983, *Andriani ed altri*, pp. 187 ss.; DE MAGLIE C., *Teoria e prassi*, pp. 942-946.

[1202] The judges extended the reasoning developed for the members of the executive committee also to the members of the "*national logistic front*" ("*fronte nazionale logistico*") and to the "*national mass front*" ("*fronte nazionale di massa*") on the basis of the strict connections of these two entities with the executive committee.

the offences perpetrated by the direct agents in the implementation of the strategy adopted at the highest level[1203]. The judges inferred the existence of the leaders' causal contribution to the crimes from the "essential" role that they played in the predisposition of the apparatus carrying out the purpose of the group[1204].

With regards to the mental element, they established that the leadership position implied that those in such a position had a complete overview of the subversive design – and as a result, allowed them to foresee and accept the results deriving from the implementation and development of the associative programme[1205]. Using this reasoning, the judges established that the crimes committed by the members of the organisation during the implementation of the strategy adopted by the group had to be attributed to the national leaders due to their position of supremacy. Additionally, the crimes committed by the members of the local groups, such as the columns, had to be attributed to the heads of the local groups[1206].

This approach is based on an evidentiary simplification in the determination of the responsibility justified by the state of emergency in Italy and on the need to attribute a greater degree of responsibility to the leaders rather than to the direct perpetrators[1207]. Without a doubt, it favoured the social defence, but it also impinged the protection of the defendant's rights and more in particular the principle of personal criminal responsibility[1208]. The responsibility of the leaders was indeed presumed until proven otherwise on the basis of their status within the organisation[1209].

Academic literature has highlighted that, in order to be responsible also for the

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[1203] Ass. Torino, *Acella e altri*, 16 luglio 1983; Ass. Genova, *Azzolini e altri*, 26 febbraio 1983.

[1204] Ass. Genova, 26 febbraio 1983, *Azzolini e altri*.

[1205] *Ibid.*

[1206] *Ibid.*

[1207] CANZIO G., *Responsabilità dei partecipi*, pp. 3165-3166.

[1208] In the academic literature is has been emphasised that the risk of this approach is that of creating a form of strict liability, in violation of the principle of personal criminal responsibility, in this vein: GAMBERINI A., *Responsabilità per reato*, p. 153; GALLO E., *Concorso di persone*, p. 25.

[1209] Ass. Roma, 24 gennaio 1983, *Andriani ed altri*.

crimes committed by other members in the implementation of the associative purpose, it is not enough for an individual to merely participate in a criminal association[1210]. In contrast, it must be proven that each individual causally contributed to the commission of the crimes and had the intention of doing so[1211]. The same holds true with regard to the leaders of the organisation.

iii) Subsequent case law: in particular, the *Marino et al.* case

The approach adopted during the period of the terrorist emergency received strong criticism. According to the dominant view, it was unacceptable to renounce to the fundamental guarantees, even during periods of emergency[1212]. Therefore, the following case law[1213] revitalised the approach of the Court of Cassation expressed in the *Kofler* case.

The Joint Chambers of the Court of Cassation reaffirmed this approach in the *Marino et al.* case[1214]. The judgment related to the killing of a police commissioner (Luigi Calabresi) in Milan on 17 May 1972. The killing was attributed to "*Lotta continua*", a far left extra parliamentary organisation particularly active in Italy in the 1970s.

The judges reaffirmed that in order to be convicted for the crimes committed by the members of an organisation in furtherance of the organisation's strategy, the mere fact that one occupied a leadership position was insufficient to justify a conviction. Rather, the leader's concrete involvement in the crimes carried out by

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[1210] PADOVANI T., *Il concorso dell'associato*, p. 761.

[1211] DE FRANCESCO G., *Dogmatica e politica criminale*, p. 1273. In this vein: GAMBERINI A., *Responsabilità per reato*, pp. 150-154.

[1212] DE FRANCESCO G., *Dogmatica e politica criminale*, p. 1274.

[1213] In this vein, *inter alia*: Cass. pen., Sez. I, 31 maggio 1985, Pecchia ed altri; Cass. pen., Sez. I, 14 febbraio 1984, Sebregondi, pp. 150-159. In the *Segrebondi* case the Court of Cassation emphasised the importance of keeping distinct the conduct of participation in a criminal association and the participation in the crimes committed in the implementation of the organisational purpose. For further references: CANZIO G., *Responsabilità dei partecipi*, pp. 3168-3169.

[1214] Cass. pen., Sez. un., 21 ottobre 1992, *Marino, Bompressi ed altri*, pp. 210-211.

the direct perpetrators must also be proven. The attribution of the responsibility only on the basis of the status or the position of the individual would have violated the principle of personal criminal responsibility provided by art. 27 Cost. and the rules governing the burden of proof in criminal proceedings[1215].

c) The mafia trials

The attribution of the responsibility for the crimes committed in pursuance of the organisational strategy to the leaders of criminal organisations has been a thorny issue also in the fight against the Mafia phenomenon. The solutions and mechanisms adopted in the most relevant case law to face such a problem are reported in the following paragraphs.

i) The *Abbate et al.* case

The first maxi trial ("*maxiprocesso*") against hundreds of individuals alleged to be members of the criminal organisation "*Cosa Nostra*" took place in Palermo[1216]. It started on 10 February 1986[1217] and lasted until 30 January 1992[1218]. This trial was of great importance for several reasons: (i) it was the first big trial against *Cosa Nostra*; (ii) a great amount of individuals were convicted for Mafia-related crimes; and, (iii) for the first time, the judges delineated the structure and functioning of *Cosa Nostra*, thanks also to the declarations of the former members of the criminal organisation who became cooperating witnesses.

This proceeding is particularly relevant for the topic under examination because of how the judges attributed the "*excellent*" murders (i.e., the killings

[1215] *Ibid.*

[1216] This case regards the murders of: Alfio Ferlito, a mafia boss; Boris Giuliano, the director of the mobil squad of the police headquarters of Palermo; three policemen of the escort (the so called massacre of the "*Circonvallazione*"); Paolo Giaccone, legal doctor and professor; Carlo Alberto Dalla Chiesa prefect of Palermo and his wife Emanuela Setti Carraro.

[1217] The first phase of the proceedings ended with the following judgment: Ass. Palermo, 16 dicembre 1987, Abbate ed altri, pp. 77-103.

[1218] Cass. pen., Sez. I, 30 gennaio 1992, *Abbate ed altri*, pp. 15-45.

committed against members of the judiciary, politicians, or individuals in particularly high positions, the so-called "*uomini d'onore*") to the components of the "*cupola*" or "*commissione*", the organism at the top of the organisation.

On the basis of the organisation's structure and features, the judges determined a series of principles ("*massime d'esperienza*") on which they based the responsibility of its leaders for the crimes committed by others in pursuance of the organisational purpose. These principles are also known as *Buscetta* theorem ("*teorema Buscetta*"), after the name of Tommaso Buscetta, the cooperating witness who played a central role in the reconstruction of the internal dynamics of *Cosa Nostra*[1219]. This theorem initially adopted in the first maxi trial was further used in the following trials[1220].

During the maxi trial, the judges adopted a vision of *Cosa Nostra* as a unitary, centralised and hierarchically structured organisation[1221]. At the top of the hierarchy was the provincial Commission ("*Commissione provinciale*"), the supreme organ to which the different families belonging to the organisation were subordinated[1222]. It was composed of the bosses of each district: the so-called "*capimandamento*". The Commission deliberated, or at least authorised, the execution of the *excellent* murders, carried out as part of the implementation of the organisational goals[1223]. As a consequence, if an *excellent* murder was committed, it was possible to infer that it resulted from a preceding deliberation or authorisation of the Commission, as it was unthinkable that the direct perpetrator carried it out autonomously[1224]. Moreover, the deliberation or authorisation of the Commission did not need to be explicit; it could also be tacit. This happened

[1219] For an analysis of this theorem: CORVI A., *Regole di esperienza*, pp. 786-787 (further reference to this article will be made in the description of the theorem).

[1220] The construction elaborated by Buscetta refers in particular to the organisational structure and to the functioning of the Commission until the late 70s, early 80s. For further details: FIANDACA G., *Sulla responsabilità dei singoli*, pp. 980-982.

[1221] This view was not undisputed, for a critical view: FIANDACA G., ALBEGGIANI F., *Struttura della mafia*, pp. 77-103, p. 80.

[1222] CORVI A., *Regole di esperienza*, p. 786.

[1223] *Ibid.*

[1224] *Ibid.*

where, for example, the Commission was informed of the direct agent's intention to commit the crime, but did nothing to prevent its commission[1225]. Last but not least, the decision of the majority of the members of the Commission bound any of the Commission's dissenting members, unless, as a consequence of their disapproval, they decided to dissociate themselves entirely from the criminal organisation[1226]. In broad terms, these observations were at the basis of the *Buscetta* theorem.

The Court of Assizes applied the theorem, but not in its entirety. It excluded the possibility that merely belonging to the Commission would be sufficient to trigger individual criminal responsibility as a moral participant for the *excellent* murders, if it was otherwise not possible to prove the individual's interest in the commission of the crime and the causal connection between the individual's behaviour within the Commission and the offence carried out[1227]. This aspect is particularly important because it was adopted in order to distinguish between the responsibility for participating in the criminal organisation and responsibility for the crimes committed in the implementation of the organisation's criminal purpose.

The Appeal Court of Assizes confirmed the approach adopted by the Court of First Instance. It reaffirmed that in order to be charged with the *excellent* crimes it was not sufficient to be a member of the Commission, but that each suspect's individual involvement in the crimes must be assessed[1228].

The Court of Cassation criticised the approach adopted by the Appeal judges with particular regard to the way they applied the criterion adopted[1229]. In contrast to the Appeal Court of Assizes, the Supreme Court emphasised the importance of the "tacit or passive consensus" of the members of the Commission, as a relevant

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[1225] *Ibid.*

[1226] *Ibid.*, p. 787.

[1227] FIANDACA G., ALBEGGIANI F., *Struttura della mafia*, p. 77; FIANDACA G., *Sulla responsabilità concorsuale*, p. 16. See also: CANZIO G., *Orientamenti giurisprudenziali*, p. 593.

[1228] Ass. App. Palermo, 10 dicembre 1990, unedited (reference to this judgment is made by: FIANDACA G., *Sulla responsabilità concorsuale*, p. 16); CANZIO G., *Responsabilità dei partecipi*, p. 3172.

[1229] FIANDACA G., *Sulla responsabilità concorsuale*, p. 16.

element according to which it was possible to make them responsible, as moral participants under art. 110 c.p., of the *excellent* crimes[1230]. In other words, according to the judges, in the absence of elements proving otherwise, the tacit or passive consensus was sufficient to establish the responsibility of the individuals in a leadership position (i.e., the members of the Commission) for the crimes carried out by others, when such crimes formed part of the organisational strategy that had been deliberated at the highest level of the organisation[1231]. The approach adopted by the Court recalls the *Buscetta* theorem. Academic literature has been critical of this approach, in particular because in those cases it would have presumed the existence of the consensus and it would have entailed the violation of the rules governing the burden of proof in criminal proceedings[1232].

ii) The *Madonia et al.* case

The judgment of the Court of Cassation in the *Madonia et al.* case[1233] is particularly relevant for the present analysis because the approach adopted by the judges in this case notably differs from the one used by the Court in the *Abbate et al.* case. In this case, the judges rejected any kind of automatism between the quality of member of the Commission and the individual's involvement in the commission of the offences carried out in furtherance of the organisational strategy[1234].

The Court highlighted that the internal dynamics of the Commission changed and that the power of some members – such as *Riina* and *Madonia* – also increased. The Commission progressively lost its deliberative power as a unitary

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[1230] *Ibid*.

[1231] Cass. pen., Sez. I, 30 gennaio 1992, *Abbate ed altri*, pp. 16-18.

[1232] DE FRANCESCO G., *Dogmatica e politica criminale*, pp. 1282-1283. With regards to the tacit consensus: CORVI A., *Regole di esperienza*, pp. 787-788.

[1233] Cass. pen., Sez. V, 14 novembre 1992, Madonia ed altri, p. 1497. The case regards the murder of Emanuele Basile, the commander of the Carabinieri, of which were allegedly responsible, as instigators, *Francesco Madonia*, *Michele Greco* and *Salvatore Riina*. Reference to this judgment is made also by CANZIO G., *Orientamenti giurisprudenziali*, pp. 594-596.

[1234] CANZIO G., *Responsabilità dei partecipi*, pp. 1794 ff.

entity because, in substance, not all its components were in the same position and had the same influence[1235]. As a result, it could no longer be considered an organism operating collegially. The Court further established that *Riina* and *Madonia* could be considered morally responsible under art. 110 c.p. for having ordered the murder of Basile[1236]. This statement was based not only on their position within the Commission, but also on the recognition of the defendants' specific interest in the killing.

iii) Subsequent case law

For many years (in particular between the end of the 1980s and the beginning of the 1990s) the judges – although not unanimously – relied on the *Buscetta* theorem in order to attribute the crimes committed by the organisation's members to the leaders of the criminal organisation (i.e., the members of the Commission) [1237]. Nevertheless, throughout the course of several years, the structure and the internal dynamics of *Cosa Nostra* changed significantly and the theorem was no longer capable of capturing the features and dynamics of such an organisation. As a result, the *Buscetta* theorem gradually lost its practical importance and was later abandoned. It is noteworthy that the theorem had been developed mainly on the basis of the declarations of Buscetta and on his observations of *Cosa Nostra* in a specific historical period [1238]. On a more substantial level, the automatic application of the theorem endangered the principle of personal criminal responsibility. Moreover the application of the criteria of the implicit consensus, as well as the collegial adoption of the decisions implying the commission of *excellent* murders, posed several problems[1239].

In light of these observations, a peculiar approach developed in case law which was based on a more cautious application of the *Buscetta* theorem, aimed at

[1235] CANZIO G., *Orientamenti giurisprudenziali*, p. 594.

[1236] *Ibid.*, p. 595.

[1237] CORVI A., *Regole di esperienza*, p. 788.

[1238] *Ibid*., pp. 789-790. In this vein also: Cass. pen., Sez. V, 27 aprile 2001, Riina, pp. 359-384.

[1239] For a detailed analysis of these elements: CORVI A., *Regole di esperienza*, pp. 787-788.

avoiding the attribution of criminal responsibility on the basis of mere presumptions. Because of this, judges developed and adopted additional criteria to corroborate the principles at the basis of the theorem and ensured their proper application. For example, in order to be considered as a boss, one had to: be an effective member of the Commission at the time the crime was deliberated (even if he or she was detained); be in a position to express his or her opinion before the commission of the crime (in order to attribute relevance to his eventual dissent)[1240]. Particular attention was also paid to the common interest and to the individual's satisfaction following the commission of the crime[1241]. Nevertheless, such elements had to be added to other, more meaningful, elements used to establish the individual's involvement in the commission of the crimes.

The judgments of the Court of Cassation in the cases against *Salvatore Riina et al.*, (respectively related to the murders of Salvo Lima[1242] and Mario Francese[1243]) are particularly relevant. In the first case, the Court reaffirmed the principle according to which it was not sufficient to be a member of the Commission in order to be called to respond for the *excellent* crimes[1244]. It further highlighted – along the line of the *Mandonia et al.* case – that the structure and internal dynamics of the organisation changed significantly and, as a result, it was no longer possible to establish that the Commission had adopted the decision in a collegial way, because a few individuals had increased their power within the organism[1245].

It is important to note that, in a more recent decision, the Court claimed that it is also possible that a certain principle – developed on the basis of the observations of the organisation throughout a certain historical period – may be disregarded. In other words, it could very well be that the Commission operated

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[1240] *Ibid*., p. 789.

[1241] *Ibid*.

[1242] Cass. pen., Sez. V, 27 aprile 2001, Riina ed altri, pp. 359-384. For a commentary on this judgment: MELILLO G., *Sulla responsabilità dei singoli*, pp. 975-993.

[1243] Cass. pen., Sez. I, 2 dicembre 2003, Riina ed altri, pp. 415-420. For a commentary on this judgment: TULUMELLO G., *Il giudice e lo storico*, pp. 2508- 2517.

[1244] Cass. pen., Sez. V, 27 aprile 2001, Riina ed altri, p. 359.

[1245] *Ibid.*

differently, deviating from the general rule in force at that time, requiring that decisions be taken in a collegial form[1246]. This consideration emphasises the limits of the "*massime d'esperienza*" and the need to verify their applicability in the concrete case.

In the second case, related to the murder of Mario Francese, the Court of Cassation established that the implicit consensus to commit a crime could lead to responsibility as a moral participant under art. 110 c.p., when the factual premises of such a consensus could be proven[1247]. It further established that a general interest to kill an individual was not sufficient. It required the intent to kill, that although expressed tacitly, was capable of influencing the decision jointly taken by the Commission[1248]. This judgment is particularly relevant because the Court categorically excluded the possibility of basing the responsibility of an individual on his or her "mere" position within the Commission[1249]. The need to avoid the attribution of the responsibility to those in a leadership position in the contexts under examination on the basis of presumptions was also highlighted recently by the Court of Cassation[1250]. In reality, this approach appears to be a constant theme in the case law of the Court of Cassation, since what is most important is to safeguard the principle of personal criminal responsibility.

In this perspective the adherence to the rules governing the evaluation of evidence is indispensable in order to avoid a "mere" formal adherence to the principle and unacceptable simplifications on the evidentiary level. Therefore it further contributes to ensure the compliance also with arts. 27(2) and 111 of the Italian Constitution.

[1246] As an example: Cass. pen., Sez. VI, 20 aprile 2005-16 febbraio 2006, Aglieri e altri, p. 791 (in the specific case the automatic application of the *Buscetta* theorem would have been denied by the evidence at disposal of the judges).

[1247] Cass. pen., Sez. I, 2 dicembre 2003, Riina ed altri, p. 415.

[1248] *Ibid*., p. 419.

[1249] *Ibid.,* p. 415.

[1250] Cass. pen., Sez. VI, 17 settembre 2014 (dep. 27 febbraio 2015), Tagliavia, n. 8929. DELLA TORRE J., *La Cassazione tra reati-associativi*.

d) The crimes committed in macro-criminal contexts: the *Astiz et al.* case

The *Astiz et al.* case originated in the context of the mass crimes committed during the Argentinean dictatorship between 1976 and 1983[1251]. The case deals with the killings of Angela Maria Aieta, and Giovanni and Susanna Pegoraro. Before being murdered, they were kidnapped and brought to the clandestine detention centre in the ESMA (*Escuela Superior de Mecánica de la Armada*), where they were also tortured[1252]. In many cases, prisoners in ESMA were killed by being thrown out of the plane into the sea.

The present case does not deal with the responsibility of those who physically killed the three individuals by throwing them into the sea – as they remain unknown[1253]. Rather, this analysis addresses the responsibility of *Alfredo Ignacio Astiz* ("*Astiz*") and other military leaders who operated in the ESMA.

This case is especially relevant for the present analysis for at least two reasons: (i) the macro-criminal context in which the crimes occurred; and (ii) the criteria adopted by the judges in order to attribute the killings to the defendants despite their absence from the scene of the crime.

The Court of Assizes established that the defendants had to be charged for the killings because they participated materially in the causal chain that led to the killing of the individuals (they chose the objectives to hit, kidnapped, tortured, detained and handed over the three victims to those who threw them into the sea)[1254]. The judges based such reasoning on the equivalence of all causes

[1251] The *Astiz* case is not the only case that was celebrated in Italy and that originated in such a context. The first one is the *Suarez Mason and Riveros* case, that was concluded with the judgment of the Court of Cassation on 28 April 2004. For further references: MACULAN E., *Crimini di massa*, p. 1442 and in particular footnote n. 5; AMATI E., *Il giudice e lo storico*, pp. 564-581.

[1252] For further details on the factual background: MACULAN E., *Crimini di massa*, p. 1442 and in particular footnote n. 5.

[1253] In macro-criminal contexts the individuation of those responsible is particularly difficult due to the great amount of individuals involved at different levels in the commission of the crimes and to the depersonalization of the individual criminal conduct. Moreover, identifying the direct executors is even harder in cases of forced disappearance because such operations are carried out in secrecy.

[1254] MACULAN E., *Crimini di massa*, pp. 1444, 1451. For a critical view *ivi*, pp. 1453-1454.

contributing to the event and considered the defendants' conduct as concurring causes[1255]. To a large extent, the Appeal Court of Assizes confirmed the approach adopted by the first instance judges.[1256].

With particular regard to *Astiz*, the Court of Cassation relied on his position within the detention centre in order to establish that, although it could not be proved that he had a direct contact with the victims, he nonetheless materially contributed to their killing because one of the objectives of the detention centre was to suppress the detained[1257]. The deprivation of the liberty constituted the necessary premise and condition of the suppression of the targeted individuals[1258]. However, the Court did not only rely on the material participation of the defendant – it also referred to instigation[1259]. According to the judges, the defendant's acceptance of the heinous policy of suppression actually strengthened the criminal purpose of those who committed the murders[1260].

In this case, the crimes were committed through an apparatus of power. Therefore, it was not easy for the judges to clearly delineate the responsibility of the defendants, even more so considering that there was no evidence of their involvement in the killing of the three Italians.

The criteria adopted by the judges at the different stages of the proceedings slightly changed. They relied on figures belonging to both material and moral participation. This approach highlights the difficulties faced by the judges in the correct qualification of the figure capable of better capturing this type of responsibility[1261].

[1255] *Ibid.*, pp. 1444, 1451.

[1256] *Ibid.*, pp. 1445-1446, 1451.

[1257] Cass. pen., Sez. I, 26 Febbraio 2009 (18 Marzo 2009), Astiz, n. 11811, para. 4.3.

[1258] *Ibid.*

[1259] *Ibid.*

[1260] *Ibid.*

[1261] For a critical view: MACULAN E., *Crimini di massa*, pp. 1453-1458 (according to the author the Italian legal system is not capable to adequately capture the responsibility of those involved in the commission of crimes committed in contexts such as the one under examination).

e) Concluding observations

In light of the aforementioned, the attribution of responsibility to those in a leadership position for the crimes committed by their subordinates poses several problems, both on the substantive level (particularly related to the correct qualification of their responsibility for such crimes) and on the evidentiary level (closely connected to the proof of their involvement in the offences). This holds true regardless of the type of organisation involved in the commission of the crimes (i.e., armed gangs, mafia-type organisations, state apparatuses of power).

With regard to the substantive level, the larger an organisation is, the more difficult it is to clearly delineate the conduct of the individuals involved in the commission of the crimes. This is particularly so when the crimes are perpetrated in macro-criminal contexts and the individuals are far removed from the scene of the crime. This is particularly evident in large organisations where a plurality of individuals makes up the chain of command (e.g., the *Astiz et al*. case). With particular regard to the individuals in leadership positions, it must be noted that their contribution to the crime can be manifest in several forms and it is not always easy to label their responsibility. Nevertheless, with regard to the unitarian model, this aspect does not play as fundamental a role as it plays in the differentiated participation model, where a specific title of responsibility must be applied to the defendant at the very outset of the proceedings.

The positive aspect of the unitarian model endorsed in art. 110 c.p. concerns its capability of capturing all different forms in which such a contribution can manifest. What matters is the following: on one hand, that a causal link between the individual conduct and the commission of the crime exists; and, on the other, that the individual fulfils the subjective element of the crime, is aware and has the requisite intent to cooperate with others in the commission of the crime.

The attribution of responsibility to those in a leadership position for the crimes committed by their subordinates also poses several problems on an evidentiary level. These problems relate strictly to the difficulties in gathering evidence of their involvement in the commission of the offence carried out by the direct perpetrators. Indeed, in most cases, it is not possible to identify a specific, clear

and written order of the leaders. Furthermore, because criminal organisations generally operate in secret, it is even more difficult to identify those who, despite their absence from the scene of the crime, are responsible for the worst atrocities.

In the case law analysed above[1262] it is possible to identify two different approaches. The first and minority approach is based on a sort of presumption, according to which the individual in the leadership position, because of his or her status, was *necessarily* aware ("*non poteva non sapere*") of the crimes committed by his or her subordinates in the implementation of the organisational strategy and was therefore responsible for them. This approach was adopted in particular by the Courts of First Instance during the emergency period and in the mafia trials. It appears to be the response to the following needs: (i) the need to adequately capture the responsibility of the leaders for the crimes committed in the implementation of the organisational strategy, and thereby avoiding their conviction only for the crime of participation to the criminal organisation; (ii) the necessity to face the lack of evidence necessary to prove their involvement in the commission of the crime, increased by the fact that in most cases they did not materially participate in the crime.

This approach, clearly adopted for reasons of social defence, cannot be justified even in times of emergency. In fact, while it is the simplest way to overcome the lack of evidence of the leaders' involvement in the crimes committed in the implementation of the organisational strategy, it relies on "mere" presumptions and creates a risk of violating the principle of personal criminal responsibility.

The second and dominant approach – which is more respectful of defendants' rights – must be the chosen course of action. It requires a leader's material and/or moral contribution to the crimes committed by his or her subordinates, and adds that such a contribution must be concretely proven. According to this approach, in

[1262] The case law related to criminal organisations is exterminated and involves also other criminal organisations, such as *Camorra* and *Ndrangheta*, but I selected the most significant in order to present the different approaches that were adopted by the judges in the course of the years and that are recurrent also in other decisions. With regards to *Camorra*: ARGIRÒ F., *La responsabilità dei capi-clan*, pp. 1189-1203.

order to be considered a moral participant under art. 110 c.p. for the crimes carried out by the direct agents in the implementation of the organisational strategy, the leaders must have causally contributed to the execution of such crimes with the requisite mental intent.

An element that can be used in order to establish whether the leader is involved in the commission of such crimes can be, for example, his or her participation in a meeting where the commission of a certain crime was planned or that decided on the specific targets to be hit.

Nevertheless, it is not always easy to distinguish between the crime of participation in a criminal organisation and the participation in the commission of the crimes carried out in furtherance of the organisational strategy. This aspect is particularly manifest with regard, for example, to the leaders of the organisation. There are no doubts that there might be an overlap, or at least an area of interference, between the leadership position within an organisation and the functions deriving from such a role (i.e., predisposition of the apparatus to the implementation of the organisational strategy), and the leader's involvement in the commission of the crimes carried out in pursuance of the organisational purpose.

In any case, what is certain is that the status of leader, as such, does not automatically imply the responsibility of the leader for the crimes committed by the other participants and that, as a result, the leader's involvement in the commission of such crimes cannot be presumed (it must actually be established). In other words, it is not enough for the leader to be generally aware that a certain crime could result from the implementation of the organisational strategy. Rather, the leader must intend to causally contribute to the commission of the crime with other people. The mental element of the leader plays a fundamental role in order to be punished as a moral participant for the crime carried out in the implementation of the organisational strategy.

B. The *Katanga and Ngudjolo* case according to the Italian legal system

The *Katanga* and *Ngudjolo* cases were analysed in greater detail in the first

part of this study. Here, I only refer to the *Katanga and Ngudjolo* case and more precisely to the elements upon which the pre-trial judges established the individual criminal responsibility of the two commanders and the modes of liability reflecting their involvement in the crimes committed during the Bogoro attack.

The *Katanga and Ngudjolo* confirmation of charges decision is particularly important because it is the cornerstone decision on the implementation of the *Organisationsherrschaftslehre* at the ICC[1263].

In the course of the proceedings related to the two commanders, the mode of responsibility used to convict *Katanga* changed from art. 25(3)(a) ICCSt to art. 25(3)(d) ICCSt and *Ngudjolo* was acquitted. Nevertheless, I refer to *Katanga and Ngudjolo* as a case model in order to determine the mode of liability that the Italian judges would adopt when relying on the same elements used by the pre-trial judges and upon which they applied the *Organisationsherrschaftslehre*[1264].

For this reason, it appears relevant to briefly recall that the *Katanga and Ngudjolo* were the alleged leaders of the two military groups that attacked Bogoro on 24 February 2003, respectively the FRPI (mainly composed of Ngiti combatants) and the FNI (predominantly composed of Lendu fighters).

The pre-trial judges confirmed the charges against the two commanders for the following crimes: intentional attack against the civilian population as a war crime under art. 8(2)(b)(i) ICCSt; wilful killing as a war crime under art. 8(2)(a)(i)

[1263] In spite in the *Katanga* judgment the Trial Chamber refined the elements and premises of the the control over the organisation theory application, the confirmation of charges decision so far plays a fundamental role, also for what concerns the application of the combined mode of liability (co-perpetration and indirect perpetration).

[1264] It is noteworthy that despite the ratification of the Rome Statute with law n. 232/1999 ("*Ratifica ed esecuzione dello Statuto istitutivo della Corte Penale Internazionale*") the process of internal adjustment to the Rome Statute is so far not complete. In fact, the adoption of law n. 237/2012 ("*Norme per l'adeguamento alle disposizioni dello statuto istitutivo della Corte Penale Internazionale*") involved procedural aspects and the relationship between Italy and the ICC, but it did not touch upon substantial law and the definitions of the crimes. For an analysis of the Italian model of responsibility in light of art. 25 ICCSt and of the crimes under the jurisdiction of the ICC: DI MARTINO A., *La disciplina del concorso*, pp. 189-214; DI MARTINO A., *Täterschaft und Teilnahme*, pp. 429-449.

ICCSt; destruction of property as a war crime under art. 8(2)(b)(xiii) ICCSt; pillaging as a war crime under art. 8(2)(b)(xvi); using children to participate actively in hostilities as a war crime within the meaning of art. 8(2)(b)(xxvi) ICCSt; murder as a crime against humanity under art. 7(1)(a) ICCSt; and, by majority, sexual slavery and rape as war crimes under art. 8(2)(b)(xxii) ICCSt; and, sexual slavery and rape as crimes against humanity under art. 7(1)(g) ICCSt[1265]. The mode of liability used by the judges to attribute such offences to the two leaders was indirect co-perpetration, with the only exception being the crime of using children under the age of fifteen to participate actively in hostilities as a war crime within the meaning of art. 8(2)(b)(xxvi) ICCSt. For this offense, *Katanga* and *Ngudjolo* were charged as co-perpetrators.

The main elements used by the judges to establish the responsibility of *Katanga* and *Ngudjolo* for the war crimes and crimes against humanity committed during the Bogoro attack are the following: (i) the two commanders were the *de jure* and *de facto* commanders, respectively of the FRPI and FNI; (ii) they gave instructions on the distribution of arms and ammunitions to their subordinates, who also reported to them[1266]; (iii) they signed peace agreements, made decisions regarding amnesty and more generally signed official documents[1267]; (iv) they had the capability of jailing, adjudicating and punishing[1268]; (v) they decided how to train the soldiers and in many cases they were present during their parade[1269]; (vi) they shared the common plan to "wipe out" Bogoro "by directing the attack against the civilian population, killing and murdering the predominately Hema population and destroying their properties" [1270]; (vii) they participated in the meeting regarding the planning of such an attack, distributed the plan to the other commanders and met several times before the attack[1271]; (viii) they encouraged their subordinates, gave them instructions, congratulated after the actions and

[1265] *Katanga and Ngudjolo* Confirmation of Charges, pp. 209-212.

[1266] *Ibid.*, para. 541.

[1267] *Ibid.*, para. 542.

[1268] *Ibid.*, paras. 542, 544.

[1269] *Ibid.*, para. 547.

[1270] *Ibid.*, para. 549.

[1271] *Ibid.*, para. 548.

ordered the burial of the civilians' bodies in order to hide the evidence of the crimes carried out[1272].

With particular regard to the war crime of using children under the age of fifteen years to participate actively in hostilities (art. 8(2)(b)(xxvi) ICCSt), there was evidence showing that the two commanders committed such an offence directly[1273]. Indeed, they used child soldiers as their personal escorts and numerous child soldiers were in the militias that participated in the Bogoro attack[1274]. Moreover, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that the crimes of pillaging (and by majority, the crimes of rape and sexual enslavement, although they were not part of the plan) would have occurred in the ordinary course of events in the implementation of the common plan[1275].

Let us assume that the elements examined above were at disposal of the Italian judges. Such elements show a direct involvement of the two commanders in the crime of using children under the age of fifteen to participate actively in hostilities and their indirect involvement in all the other offences. With particular regard to the latter, the figure reflecting the responsibility of *Katanga* and *Ngudjolo* is that of moral participation (in the form of agreement and instigation). The existence of a causal link between the conduct of the commanders and the crimes committed by the direct perpetrators is manifest. *Katanga* and *Ngudjolo* participated in the meeting in which the Bogoro attack was planned. The attack included the killing and murdering of civilian population and destroying their properties. They also instructed and encouraged their subordinates to commit the offences and concealed evidence of the crimes. Their awareness and intent to cooperate in the commission of the crimes carried out by their subordinates, as well as the existence of the mental element required to be punished for all crimes – with the exception of pillaging, rape and enslavement (which need to be treated separately) – are manifest in the same elements used to establish the existence of a causal link

[1272] *Ibid.*, paras. 548, 558-559.

[1273] *Ibid.*, para. 553.

[1274] *Ibid*.

[1275] *Ibid*., paras. 550-551.

and consequently do not need to be further examined. As a result, the involvement of *Katanga* and *Ngudjolo* in the attacks against a civilian population, killing and destroying properties is reflected by art. 110 c.p.

In contrast, in order to attribute the crimes of pillaging, rape and enslavement perpetrated by their subordinates to the two commanders one must verify whether it is possible to rely on art. 116 c.p. Such a determination would include assessing whether: (i) there is a causal link between the conduct of *Katanga* and *Ngudjolo* and the crimes differing from the ones planned; (ii) the commission of such crimes, although not included in the plan, could be foreseeable in the ordinary course of events in the implementation of the common plan to attack Bogoro.

With particular regard to the position of *Katanga* and *Ngudjolo*, since they were the *de facto* and *de jure* supreme commanders of the two organisations, it would be possible to charge them with the aggravating circumstance provided by art. 112(1) n. 2 c.p. for those who organised, promoted or directed the commission of the crime committed by several individuals. In fact, in their quality as leaders of their respective groups, they further had the capacity to sign official documents, enter into peace agreements and make decisions regarding amnesty. They coordinated the activities of the militias and the distribution of weapons to the combatants.

Last but not least, according to the Italian system, where it was possible to demonstrate that the FRPI and FNI were criminal organisations within the meaning of art. 416 c.p. ("*associazione per delinquere*") it would also be possible to attribute responsibility to the two commanders for the crime, which would be further aggravated by their role as leaders (art. 416(1) c.p.).

Conclusion

a) The *Organisationsherrschaftslehre* was developed in Germany primarily in order to address the inadequacy of traditional modes of liability (i.e., instigation, aiding or abetting) to reflect the responsibility of the individuals in the background – in most cases in a leadership position – for the crimes committed by their subordinates (or, more precisely, by means of the organisation they control). Roxin elaborated this doctrine as part of the broader "control over" or "domination of the act" theory ("*Tatherrschaftslehre*"), that he developed to distinguish between principal perpetrators and secondary participants. According to this theory, only those who exert control over the act can be considered principals to the crime, while other individuals are "mere" participants and as such must receive a lesser punishment.

The *Organisationsherrschaftslehre* is strictly related to the needs of the differentiated participation model endorsed in the German Penal Code. Indeed, it addresses the need to attribute principal criminal liability to those who, despite their absence from the scene of the crime, play a fundamental role in the commission of the worst atrocities. In other words, through this theory, it is possible to consider as principal perpetrators of a crime those individuals who exert control over the will of the direct perpetrators (and thus over the act itself) by means of the organisation (*Willensherrschaft kraft organisatorischer Machtapparate*). Therefore, this form of indirect perpetration must be added to the more traditional forms of indirect perpetrations, in which the direct perpetrator acts under duress or mistake.

The scenario that Roxin had in mind when he elaborated his theory for the first time was the National Socialist dictatorship in Germany and the magnitude of the crimes committed through bureaucratic apparatuses and organised power structures. He focused in particular on the *Eichmann* and *Stashynsky* cases. At the same time, however, he did not reject the possibility of extending the application of his theory to other situations and contexts, such as mafia-type organisations, gangs, underground movements, secret organisations and similar groups.

It is noteworthy that when Roxin's seminal work "*Straftaten im Rahmen organisatorischer Machtapparate"* was first published in 1963, the German legal system lacked legislation specifically related to criminal organisations and to the prosecution and punishment of their members as such. This holds true also with regards to the absence of adequate mechanisms of attribution to the leaders of such organisations for the crimes committed by their subordinates in the implementation of an organisational strategy or policy. As a result, the *Organisationsherrschaftslehre* has the potential to reflect different scenarios, so much so in fact that it has been applied in Germany also to punish leaders of business enterprises for criminal acts.

Nevertheless, the theory's true success is linked to its application outside its country of origin. After its first application in Argentina during the *Juntas* trial, it was used not only in Germany, but also in Chile, Peru and Colombia for the purpose of punish individuals in leadership positions. However, this does not come as a surprise because the abovementioned countries are based on a participation differentiated model, and are heavily influenced by German law and legal theory. Moreover, at the time the *Organisationsherrschaftslehre* was applied in Peru – which has thus far provided the most elaborated case law on the application of the theory – the doctrine had already appeared at the ICC, where it has since progressively gained ground.

b) The *Organisationsherrschaftslehre* played a fundamental role in the interpretation of art. 25(3)(a), third alternative, ICCSt. However, the control over the organisation theory resulting from the application of the German theory at the ICC differs significantly from its original version, to such an extent that one of its constitutive elements (the detachedness of the organisation from the law) has, so far, failed to be applied by ICC judges, while its other elements have been implemented, albeit in a different way. This is not surprising because the doctrine was developed in order to deal with very specific situations, involving structured and hierarchical apparatuses of power, and similar approaches can also be recognised in Latin American case law (e.g., the *Fujimori* case).

The ICC judges stretched the limits of the doctrine in order to apply it beyond its original context. This is particularly manifest in the *Katanga* judgment, in

which the judges addressed the criticism raised against the theory, in particular following its application in the *Katanga and Ngudjolo* confirmation of charges decision. More precisely, in the subsequent case law on the topic, the specific constitutive elements of the theory elaborated by Roxin became among the factors to be evaluated when determining whether to charge an individual under art. 25(3)(a), third alternative, ICCSt. The reference is, in particular, to the fungibility of the members of the organisation and to its hierarchical structure. In order to compensate for the absence or weakness of those elements in concrete cases, the judges relied on so-called "soft or weak factors" which include, for example, the affiliation of origin, the ethnicity and the spiritual beliefs or the socio-familiar bonds of the members. They also include the training of children, payment and punishment mechanisms, and intensive and violent regimes. As a result, the formal characterisation of the organisation is not important in order to apply the control over the organisation theory.

Concerning the mental element, the ICC judges established that the individual in the background must fulfil the subjective elements of the crimes perpetrated, including any required additional intent (such as *dolus specialis*) and must be aware of the factual circumstances enabling him or her to exercise control over the crime through the organisation. The first of the two elements prescribed reflects the typical mental element required by traditional cases of indirect perpetration as interpreted in differentiated models of participation in a crime (i.e. German model).

c) At the ICC, the majority reliance on such a theory in the interpretation and application of indirect perpetration through a responsible person – endorsed in art. 25(3)(a), third alternative, ICCSt – is strictly related to the reading of the provision along the lines of a differentiated model of participation in a crime and on a normative approach to liability.

In the dominant view – affirmed by the *Lubanga* Appeals Chamber – subparagraph (a) contains principal or primary modes of liability, while subparagraphs (b)-(d) list accessory or secondary modes of liability and, with the exception of the *Katanga* judgment, individuals falling under the former category are considered more blameworthy than those associated with the latter.

Nevertheless, it is reasonable to believe that art. 25(3) ICCSt endorses neither a differentiated nor a pure unitarian model of participation in a crime, but rather a model that resembles the functional unitarian model. From this point of view, art. 25(3) ICCSt (jointly with art. 28 ICCSt on the "*responsibility of commanders and other superiors*") establishes a list of modes of liability that are capable of reflecting the ways through which an individual can be held responsible for the commission or participation in the crimes under the jurisdiction of the Court. Therefore, it is not likely to attribute a different and decreasing degree of blameworthiness to the modes of liability provided in subparagraphs (a)-(d). This reading of the provision is supported both by normative and empirical elements.

With regard to the first aspect, art. 77(1) ICCSt provides for a unique range of punishment. According to Rule 145(1)(c) RPE "*the degree or participation of the convicted person*" and "*the degree of intent*" are only some of the elements that the judges have to consider in the determination of the sentence under art. 78 ICCSt. Instead, with regard to the second aspect, it seems possible to assert that in macro-criminal contexts the individual who directly carries out the offence in most cases is only – to use Roxin's words – a cog in the machinery. Along these lines, it is unlikely to automatically claim that art. 25(3)(a), first alternative, ICCSt entails a greater degree of blameworthiness as opposed to the other modes of liability provided for in the provision.

This is particularly evident if we consider that in macro-criminal contexts there might be many direct perpetrators, each of them carrying out one or few offences, one individual ordering the commission of such offences and only one individual providing the arms to all combatants. In this case, it is possible to exclude that the direct perpetrators are the most responsible. This example shows how the degree of blameworthiness of the individual conduct cannot be determined in abstract, relying on the mode of liability, but on the basis of the way and circumstances in which such a conduct was concretely carried out.

As a result, there is not a predetermined (although implicit) degree of blameworthiness among the modes of liability listed in art. 25(3) ICCSt.

This approach is also confirmed in practice by the reliance on the multiple charges, adopted by the judges of the ICC, also with regards to the title of

responsibility, in the initial stage of the proceeding and appears to be consistent with the gravity threshold endorsed in art. 17(1)(c) ICCSt. Along the lines of this reading of art. 25 ICCSt, the stigmatising character attributed to the status of principal offender (typical of the differentiated models) allegedly attributed to the modes of liability endorsed in art. 25(3)(a) ICCSt loses importance.

d) In light of the foregoing, it is now time to try to respond to the primary questions posed in the beginning of this study, namely whether: (i) it is appropriate to resort to the control over the organisation theory in order to interpret art. 25(3)(a), third alternative, ICCSt; (ii) it is preferable to interpret the "independency clause" contained in the provision (referring to the independence of the indirect perpetrator's responsibility and the responsibility of the individual he or she uses as a tool to commit the crime) in a different way; or, (iii) as a radical consequence, it is advisable to modify the Rome Statute.

d.1) The possibility of being considered responsible for the crimes committed through a fully responsible person is explicitly codified in the Rome Statute. This mode of liability was introduced for the first time in art. 25(3) ICCSt – thus far the most detailed provision on individual criminal responsibility that has ever appeared in the history of international criminal law. As a result, it is not possible to interpret the "new" mode of liability without considering the broader context in which it is endorsed. This relates to both the normative context in which it is embodied (that is to say art. 25(3) ICCSt) and more widely the entire system established by the Rome Statute, its object and purpose. It follows that the interpretation of the "new" mode of liability must be: (i) on one hand, consistent with the wording of art. 25(3)(a), third alternative, ICCSt and capable of being distinguished from the other modes of liability provided by the Rome Statute (in particular from arts. 25(3)(b) and 28 ICCSt); and (ii), on the other hand, consistent with art. 21 ICCSt on "*applicable law*" and with the entire system established by the Rome Statute.

The control over the organisation theory is compatible with the wording of art. 25(3)(a), third alternative, ICCSt and allows indirect perpetration through a responsible person to be distinguished from the other modes of liability listed in the provision, without violating in any way the principle of legality. In order to

apply the theory, it is not necessary to rely on the subsidiary sources of law provided by art. 21(1)(b)-(c) ICCSt. It is therefore not necessary to state that the theory is part of customary law or that it has attained the status of a general principle of law derived from national legal systems. This holds true in particular if we consider that the *Organisationsherrschaftslehre* was not automatically applied in its original version at the ICC, but, as highlighted in particular in the most recent case law on the topic, it functions as a "*guiding principle*" in the interpretation of the mentioned provision and is the expression of a normative approach to liability.

Such an interpretation is consistent with the system established by the Rome Statute and with its object and purpose. As provided by the preamble to the Statute, the ICC was set up to punish "*the most serious crimes of concern to the international community as a whole*" and "*to put an end to impunity for the perpetrators of these crimes*".

The control over the organisation theory is able to capture at the same time the collective nature and magnitude of the crimes under the jurisdiction of the Court, and the responsibility of those, who, despite their absence from the scene of the crime (in most cases in a leadership position), play a fundamental role in the commission of the worst atrocities.

d.2) The Rome Statute, in contrast to certain national legal systems, such as the Italian one, does not make membership in criminal organisations an autonomous criminal offence (i.e., forming or participating in criminal organisations). Nor does it provide mechanisms or specific aggravating circumstances that adequately reflect the responsibility of the individuals in the background who planned, organised, promoted the commission of the crimes, having at the same time the capability of activating the organisation at their disposal and through which those crimes are perpetrated.

In Italy, the general character of art. 110 c.p. allows for the inclusion and criminalisation of all different forms of commission and participation in a crime carried out by a plurality of persons. Moreover in the Italian system, based on a pure unitarian model of participation in a crime, it is also possible to adequately reflect the blameworthiness of the individuals who have promoted, planned the

crime or directed the activity of the individuals who participate in the crime, relying in particular on the aggravating circumstance provided by art. 112(1) n. 2 c.p. A further aggravating circumstance is contained in art. 112(1) n. 3 c.p., which applies in all cases where an individual determines that another person commit the crime due to a pre-existing relationship of authority, direction or supervision exerted over him or her.

With particular regard to the criminal organisations, it is possible to rely on the specific offences introduced to criminalise the formation of and participation in criminal organisations and on the specific aggravating circumstances introduced to properly punish those who are in leadership positions. For instance, according to arts. 416(1) and 416 *bis* (2) c.p. (applicable respectively to the crimes of unlawful association to commit a crime "*associazione per delinquere*" and mafia-type unlawful association "*associazioni di tipo mafioso anche straniere*"), the responsibility of those who promote, constitute, organise, or direct the criminal organisation is greater compared to the responsibility of the individuals who "merely" participate in the organisation.

If the Italian legal system is provided with mechanisms capable of adequately capturing the responsibility of those in leadership positions for the crimes committed through the criminal organisations they lead in the implementation of the organisational strategy, the same cannot be said about the system built by the Rome Statute. As a result, the control over the organisation theory (which revised the theory of the *Organisationsherrschaft*) must be welcomed at the ICC, regardless of the model of responsibility adopted by art. 25(3) ICCSt, but requires further elaboration.

d.3) The control over the organisation theory constitutes the basis for the development of an autonomous international criminal law doctrine relating to indirect perpetration, in which the control exerted over the crime by the individual in the background must be such that it becomes a causal contribution to the crime.

Althought the *Organisationsherrschaftslehre* played a fundamental role in the path towards the development of the new elaboration of the theory, the concept of indirect perpetration must be kept separate from the traditional concept of indirect perpetration as known in the German system. In this way, with particular regard to

the crimes requiring a special intent, it would be possible to believe that the individual in the background's awareness that the direct agents are acting with such peculiar intent would be sufficient in such cases.

The new elaboration of the control over the organisation theory should reflect the responsibility of those who plan, organise, promote the commission of the crimes and at the same time are able to activate the organisation at their disposal, which they use for the implementation of the organisational strategy or policy. Indeed, the modes of liability provided by art. 25(3)(b) ICCSt (ordering, soliciting and inducing) do not appear capable of capturing the responsibility of such individuals, in particular when they are at the top of the hierarchy. Additionally, art. 28 ICCSt provides for a form of responsibility for omission and has a limited application to "*military commander or person acting as a military commander*" and to other superiors.

Nevertheless, the attribution of the responsibility to the individuals in the background according to art. 25(3)(a), third alternative, ICCSt must not be based only on the position played within the organisation and thus cannot be simply presumed. In contrast, the conduct of the individual in the background must have concretely contributed to the commission of the crimes. This would allow one to avoid the introduction of a form of strict liability based on the "mere" position of the accused.

This aspect has been emphasised in the Italian case law dealing with the responsibility of those in leadership positions for the crimes committed by their subordinates in furtherance of the organisational strategy. In other words, in order to respect the principles of personal criminal responsibility, it is necessary that the leader with his or her conduct and with the required mental element concretely contributed to the offences carried out by other individuals.

In the new elaboration of such a theory, particular attention must be paid to the "soft or weak factors". Such factors contribute to ensure the automatic compliance of the subordinates with the leaders' orders and help determine whether the individual in the background exerts control over the organisation and, as a result, over the crime. They play a fundamental role, in particular where, as at the ICC, it

is not possible to give a unique definition of organisation due to the diversity of the contexts examined, involving both state and non-state sponsored organisations.

From this point of view, the "soft or weak factors" become "strong elements" for the essential role that they play with respect to the theory's application. Moreover, many of these elements increase the disposition of the organisation's members to commit the crime, which plays a fundamental role in the determination of the leader's control. Such a disposition further derives from the members' inclusion and willingness to remain in the organisation and from their acceptance of the organisational purpose and their willing to implement it.

d.4) In conclusion, it is possible to state that the embracement of indirect perpetration through a responsible person in art. 25(3)(a), third alternative, ICCSt and its interpretation along the lines of the control over the organisation must be welcomed at the ICC. Although it needs further refining, so far it constitutes the most "favourable" way of interpreting art. 25(3)(a), third alternative, ICCSt: (i) it is consistent with the wording of art. 25(3) ICCSt and with the entire system established by the Rome Statute; (ii) it provides for a criterion capable of differentiating it from the other modes of liability endorsed in the Statute; and (iii) it has the great capability of reflecting the typical dynamics of international crimes implying the involvement of more or less structured organisations, combining the macro-dimension of the crimes under the jurisdiction of the Court with the individual responsibility of those who are far removed from the scene of the crimes, but who nevertheless play a fundamental role in the implementation of the worst atrocities.

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