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Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration†

International criminal law lacks a coherent account of individual responsibility. This failure is due to the inability of international tribunals to capture the distinctive nature of individual responsibility for crimes that are collective by their very nature. Specifically, they have misunderstood the nature of the collective action or framework that makes these crimes possible, and for which liability can be attributed to intellectual authors and leaders. In this paper, I draw on the insights of comparative law and methodology to propose a new doctrine of perpetration that reflects the role and function of high level participants in mass atrocity while simultaneously situating them within the political and social climate that renders these crimes possible. This new doctrine is developed through a novel approach which combines and restructures divergent theoretical perspectives on attribution of responsibility in the English and German domestic criminal law systems as major representatives of the common law and civil law systems. At the same time, it harnesses social science literature to identify and capture, in doctrinal terms, the unique circumstances in which mass atrocity occurs.

I. INTRODUCTION

Mass atrocity has been an unfortunately persistent occurrence throughout human history; the phenomenon of holding individuals criminally responsible for its commission is a relatively recent development.¹ “Crimes against international law are committed by men,

* Associate Professor of Law, University of Minnesota Law School. Special thanks to Andrew Ashworth, Rebecca Williams, Claus Kress, Larry Solum, David Luban, Julie O’Sullivan, John Mikhail, Robin West, Leila Nadya Sadat, Allegra McLeod, Larry Alexander, Don Dripps, Karen Knop, Jutta Brunnée, Antony Duff, Maximo Langer, Jacqueline Ross, Mathias Reimann, and participants in the Georgetown Law Fellows Workshop, the Annual Comparative Law Works-in Progress Workshop, and the Annual Meetings of the American Society of International Law and the European Society of International Law.

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1. On the development of collective and individual criminal responsibility in international law, see, e.g., Timothy MacCormack, *Selective Approach to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681 (1996-1997); ELIES VAN SLIEDREGT, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR*

not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced"²—this ringing pronouncement by the International Military Tribunal at Nuremberg has become a talisman for international criminal lawyers ever since the historic trials conducted after World War II.³ The specter of collective guilt has sought to be banished with repeated incantations of the principle of individual responsibility by international tribunals and scholars.⁴ The puzzle of the collective, however, endures: like an unloved catchy tune, it lingers in the crevices of modes of responsibility fashioned by tribunals. Who should be considered the perpetrator of a crime such as genocide—an offense that necessarily involves participation by several hundreds of individuals? How can individual responsibility reflect the multifarious ways in which various persons contribute to it? Should intellectual authors of a genocidal policy be held to account as perpetrators, or should they also be labeled accessories, and punished accordingly?

VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 15-39 (2003); Albin Eser, *Individual Criminal Responsibility*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 774-78 (Antonio Cassese et al. eds., 2002).

2. France v. Goering, 22 I.M.T. 411, 466 (1946).

3. See, e.g., Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 82, 85 (2005); Gerry Simpson, *Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 69, 73 (André Nollkaemper & Harmen van der Wilt eds., 2009). It should be noted though that this affirmation coincides both with an argument that the responsibility may not lie exclusively with the individual, but also with the State, and of late, with increasing demands for organizational responsibility for international crimes. See, e.g., Pierre-Marie Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1085 (A. Cassese, P. Gaeta & J.R.W.D. Jones eds., 2002); Andrew Clapham, *Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. INT'L CRIM. JUSTICE 899 (2008).

4. See, e.g., Rome Statute of the International Criminal Court, art. 25(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994); The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 53, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) ("Report of the Secretary-General"); Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chambers Judgment ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6 (1998). Some scholars have taken a more nuanced view of the relationship between guilt and responsibility, holding that collective guilt (in contrast with collective responsibility) can be an appropriate response to collective wrongdoing: George Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES IN LAW 163, 168-78 (2004). Others would not go so far as to advocate collective guilt, but instead favor collective sanctions: Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 576-77 (2005); Mark Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1315-22 (2005).

One could argue that the characterization is hardly of any consequence—after all, the offender is held accountable in either case, and in the absence of any mandatory mitigation of sentences for accessories, punished equally. Indeed, quite a few domestic criminal law systems consider the distinction between principals and accessories to be largely redundant.⁵ I argue that a sophisticated understanding of the status of the accused in relation to the offense committed is crucial for the ascription of responsibility. Statements of responsibility perform an expressive function: the censure of the conduct of the accused. This expression, however, is not confined to evaluating simply whether the accused is innocent or guilty, but also what exactly he is guilty of.⁶ The rules of criminal responsibility would fulfil this essential communicative function only if they accurately express⁷ the nature of the censure, its appropriate target, and the conditions under which it is deserved.⁸ A theory of responsibility must therefore be capable of representing, as accurately as possible, both the nature of the crime in question as well as how the accused is connected to its commission.⁹

Indeed, it is precisely this motivation for accurately reflecting the accused's role in the commission of mass atrocity that has led tribunals to develop the two competing doctrines of Joint Criminal Enterprise (JCE) on the one hand, and indirect perpetration and co-perpetration on the other. JCE is largely a common law influenced doctrine, with close analogues in the doctrine of joint enterprise in English law¹⁰ and the Pinkerton conspiracy doctrine in U.S. law.¹¹ It has been in vogue for much of the existence of the ad hoc criminal

5. For instance, "formal unitary systems" such as Denmark and Italy do not recognize the distinction between principal and secondary responsibility, whereas "functional unitary systems" like Austria and Poland formally distinguish between the two but do not consider secondary responsibility to be derivative in nature: HÉCTOR OLÁSOLÓ, *THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES* 18-19 nn.35-37 (2010). In the United States, the Model Penal Code as well as the majority of States have abandoned the traditional common law distinctions between principals and accessories: WAYNE R. LAFAVE, *CRIMINAL LAW* 706-08 (2010). English criminal law treats the principal and the accomplice identically for the purposes of punishment in that they are both guilty of the full offense, but the distinction between the two still has some limited significance: A.P. SIMESTER ET AL., *SIMESTER AND SULLIVAN'S CRIMINAL LAW: THEORY AND DOCTRINE* 206 (2010).

6. VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 80 (2005).

7. Gardner holds that rules of responsibility, in the relevant sense, are ascriptive rather than normative. They are therefore directed towards making judgments on whether and how we should count what people have done more accurate. See John Gardner, *Criminal Law and the Uses of Theory: A Reply to Laing*, 14 OXFORD J. LEGAL STUD. 217, 220 (1994).

8. TADROS, *supra* note 6, at 3.

9. For recent powerful counterarguments to this position, see James G. Stewart, *The End of 'Modes of Liability' for International Crimes*, 25 LEIDEN J. INT'L L. 165, 211-13 (2012).

10. For a succinct account of the doctrine of joint enterprise in English law, see A.P. Simester, *The Mental Element in Complicity*, 122 L.Q. REV. 578 (2006); SIMESTER

tribunals, especially the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹² Co-perpetration and indirect perpetration are based on established modes of responsibility in German criminal law and are currently the favored doctrines at the International Criminal Court (ICC).¹³ Both doctrines have come under considerable criticism, for reasons ranging from the methodological to the substantive.¹⁴ With the recent Concurring Opinion of Judge Wyngaert in *Ngudjolo*,¹⁵ the status of indirect and co-perpetration at the ICC has been called into question. Having never been on a firm footing to begin with, a coherent account of perpetration responsibility for international crimes seems more precarious than ever.

In this Article, I take up the challenge of constructing a theory of perpetration that reflects the concerns at the core of responsibility doctrines in highly theorized domestic criminal law systems, and which is simultaneously attuned to the unique features of international crimes. I do so by first identifying elements that distinguish international crimes from their domestic counterparts (Part II). I then examine doctrines of principal responsibility in English criminal law (Part III), German criminal law (Part IV) and the jurisprudence of the ICC (Part V), to assess whether one can build a case for a more capacious concept of principalship for international crimes by drawing on these doctrines (Part VI).

ET AL., *supra* note 5, at 233–44; ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 420–27 (2009).

11. See *Pinkerton v. United States*, 328 U.S. 640 (1946).

12. For an excellent analysis of the prominence of JCE at the ad hoc tribunals, see generally GIDEON BOAS, JAMES BISCHOFF & NATALIE REID, *INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY, VOL I: FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW* 8–141 (2007); William Schabas, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1032 (2003); Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy*, 2 J. INT'L CRIM. JUSTICE 446 (2004).

13. On the recent ascendance of the doctrines at the ICC and their background in German criminal law, see Florian Jessberger & Julia Geneuss, *On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at the Hague?*, 6 J. INT'L CRIM. JUSTICE 853 (2008); Harmen G. van der Wilt, *The Continuous Quest for Proper Modes of Criminal Responsibility*, 7 J. INT'L CRIM. JUSTICE 307 (2009).

14. On JCE, see Danner & Martinez, *supra* note 3; Jens Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUSTICE 69 (2007); Mohamed Badar, *"Just Convict Everyone!"—Joint Perpetration: From Tadic to Stakic and Back Again*, 6 INT'L CRIM. L. REV. 293 (2006). On indirect perpetration and co-perpetration, see Jessberger & Geneuss, *supra* note 13, at 868; compare with Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 963–64 (2007) (stating that while perpetration by means is recognized in major legal systems, it had not been regulated by international criminal law instruments or courts prior to the Rome Statute).

15. *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert (ICC Trial Chamber II, Dec. 18, 2012).

A word on methodology is in order here: I choose to focus on English and German criminal law for several reasons. First, in the field of domestic criminal laws, these legal systems constitute two of the most sophisticated and influential systems representing the common law and civil law worlds respectively. Second, existing modes of responsibility in international criminal law have borrowed heavily from these systems in their jurisprudence. Third, my task is not to advocate the wholesale adoption of any doctrine in any particular legal system, but rather to restructure and combine divergent theoretical perspectives on perpetration responsibility in order to develop a suitable account of the criminal responsibility of senior and mid-level participants in mass atrocity. The attempt, therefore, is to engage fully with domestic criminal law principles while simultaneously capturing the unique features of international crimes.

II. DISTINCTIVE FEATURES OF INTERNATIONAL CRIMES

In order to formulate an appropriate concept of perpetration in international criminal law, it is important to note the most important markers of an international crime.

The most telling feature of an international crime as contrasted with its domestic counterpart is that it is inherently collective in nature, for the perpetrator as well as the victim.¹⁶ While the perpetrator of a crime such as ethnic cleansing or waging aggressive war is individually culpable, he invariably commits this crime on behalf of, or in furtherance of, a collective criminal project, be it that of a state or other authority.¹⁷ The hypothetical figure of the lone *génocidaire* hardly ever exists in practice: the perpetrator is part of and acts within a social structure that influences his conduct and in conjunction with other people.¹⁸ Similarly, the victims of international crimes are also mostly chosen not based on their individual characteristics, but because of their actual or perceived membership of a collective.¹⁹ International crimes are also collective in the sense that they are committed with the consciousness on the part of the individual perpetrator that he is part of a common project. Crimes such as crimes against humanity that are committed as a systematic and widespread attack against a civilian population cannot be understood solely in terms of the mental state of each perpetrator. Rather, one

16. George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1514 (2002); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 605 (2002).

17. Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 56 (2007).

18. *Id.*, at 56.

19. Drumbl, *Collective Violence*, *supra* note 4, at 571.

must address the social structures and group solidarity that renders them possible—whether that is based on fear of violence, ethnic hatred, or religious intolerance.²⁰

The second distinctive aspect of international crimes is that the individual crimes do not deviate from, but conform to, the prevailing social norm.²¹ In this sense, they are indeed “crimes of obedience” as coined by Kelman: they are acts carried out under explicit instructions from makers of official policy, or at least in an environment in which they are sponsored, expected or tolerated by them, and which are considered illegal or immoral by the larger community.²² This is regardless of whether the crimes are also committed for personal motives or with zeal.²³ The perpetrator of an international crime acts within a moral and cultural universe where his actions correspond to the values of the group to which he belongs. He may conceive of himself as being in the right and working to prevent injustice or even in self-defense.²⁴ Some authors go so far as to assert that in such a climate, it is paradoxically those who refuse to commit the crimes that act in deviance to the social norm. Criminal law in these circumstances appears to be something that can only be adhered to by exceptional individuals.²⁵

George Fletcher offers a slightly different account of this dimension of international crimes in terms of the denial of the perpetrator’s opportunity for self-correction. The moral climate of hate does not cause the crime to be committed, but rather deprives people of their second order capacity for self-restraint (from criminal conduct). The perpetrator is subject to the world of the senses but always has the capacity to choose the world of reason and let his conduct be governed by the moral law. The circumstances in which he operates, however, can make this exercise of choosing the moral order far more demanding.²⁶ It is for this reason that the dramatically different background, which Carlos Nino terms “radical evil,”²⁷ in which international crimes are committed must be paid serious attention to in any theory of responsibility for an international crime.

20. MARK J. OSIEL, *MAKING SENSE OF MASS ATROCITY* 187-88 (2009).

21. Andre Nollkaemper, *Introduction*, in *SYSTEM CRIMINALITY*, *supra* note 3, at 1, 6; Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 *EUR. J. INT’L L.* 561, 575 (2002); Fletcher, *supra* note 16, at 1541.

22. Herbert C. Kelman, *The Policy Context of International Crimes*, in *SYSTEM CRIMINALITY*, *supra* note 3, at 26, 27.

23. *Id.*, at 27.

24. See José E. Alvarez, *Crimes of State / Crimes of Hate: Lessons from Rwanda* 24 *YALE J. INT’L L.* 365, 396-97 (1999); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 *N.Y.U. L. REV.* 1221, 1243, 1245 (2000).

25. Drumbl, *Collective Violence*, *supra* note 4, at 568; Tallgren, *supra* note 21, at 573.

26. Fletcher, *supra* note 16, at 1541-43.

27. CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* vii (1996).

Finally, a theory of perpetration for international crimes has to be sensitive to the number and motivations of the participants in the crime. It must recognize that these participants will be spatially and temporally dispersed and that for this reason, unlike in domestic crimes, a theory of responsibility cannot afford to focus solely on the time and place where each individual offense (such as rape) constituting the overall crime (war crime) occurred. It should also be cautious of simplifying the social, cultural, and structural forces that make mass atrocity possible and resist the temptation to make all cases of mass violence fit into a preconceived mold. International crimes can take place in diverse organizational settings—they can be highly organized and rigidly hierarchical ones, or deliberately encourage arbitrariness and spontaneity.²⁸

It is also important to keep in mind that the image of the participant as a soulless bureaucrat who is only “doing his job” as part of the enterprise of mass atrocity²⁹ presents only part of the truth about the reality of mass atrocity. As academics have noted in their studies of the phenomenon of mass atrocity, more often than not, there is a “communal engagement with violence.”³⁰ Atrocity cannot be perpetrated on such a widespread basis unless it is accompanied by vigorous participation by a very large number of ordinary people.³¹

While the calculating bureaucrat and the crazed ideological killer represent two extremes of the kinds of actors in international crimes, most perpetrators will display some or a combination of various kinds of motives.³² Mann even classifies perpetrators according to their motives: ideological killers, bigoted killers, fearful killers, careerist killers, materialist killers, disciplined killers, comradely killers, and bureaucratic killers.³³ In fact, no case of mass atrocity will have only one type of perpetrator.

These distinctive features of international crimes—their collective nature, conformity to the prevailing social norms, and widespread participation by different levels of participants acting on different motives—must be kept in mind while evaluating domestic criminal law principles for constructing a theory of perpetration for international crimes. We can now turn to this analysis by first considering principal responsibility in English criminal law.

28. Mark J. Osiel, *Constructing Subversion in Argentina's Dirty War*, 75 REPRESENTATIONS 119, 127 (2001).

29. See Sloane, *supra* note 17, at 64.

30. Fletcher & Weinstein, *supra* note 16, at 605.

31. Drumbl, *supra* note 4, at 569; Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013, 1026 (2005).

32. On Rwanda, see Drumbl, *supra* note 24, at 1246-51.

33. MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY* 27-29 (2006).

III. THE PRINCIPAL IN ENGLISH CRIMINAL LAW THEORY

A. *Causation and the Concept of the Principal*

English criminal law provides a seemingly straightforward definition of the principal party to a crime—it is the person who most directly and immediately fulfills the definitional elements of the offense.³⁴ There can be more than one principal party to an offense, for instance where P1 and P2 both separately meet all elements of the relevant offense, or where P1 and P2 are joint principals such that both have the requisite *mens rea* and their actions, in combination, fulfill the *actus reus* required for the offense.³⁵ In this situation, P1 will personally not commit at least some part of the *actus reus* for the offense.³⁶

The distinction between the principal and other parties to a crime is based on the notion of immediacy of the causal connection between the conduct of the offender and its consequences.³⁷ Generally speaking, the principal P's volitional actions are considered the cause of an act or omission if they constitute the ultimate human conduct before the result.³⁸ Thus, the voluntary intervention by a third party D is regarded as having broken the chain of causation, resulting in D being held liable as the principal and P only being considered as an accessory to the offense, provided he meets the relevant *actus reus* and *mens rea* requirements.³⁹ This view of what constitutes causation is grounded in Hart and Honoré's influential work distinguishing between occurrences in the realm of nature and those in the field of human relationships, based on the autonomy and agency of human actions. Thus, while it may be logical to talk about events in the natural world as having been "caused" by other events or by a human agent, the conduct of a voluntary human actor cannot be said to be "caused" by any other human being—the latter can at best give "reasons for action" for the former.⁴⁰ This is because every human being, in Kadish's inimitable style, is ultimately a "wild card" who is, in the final analysis, free to make any decision he likes or to change his mind.⁴¹

The only exception that Hart and Honoré recognize to this view of human actions is when the conduct of the primary actor P is invol-

34. KJM SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 27-28 (1991).

35. SIMESTER ET AL., *supra* note 5, at 207.

36. SMITH, *supra* note 34, at 28.

37. *Id.*, at 80.

38. ASHWORTH, *supra* note 10, at 105.

39. *Id.*, at 106-111 (discussing in detail the exceptions to this principle).

40. HLA HART & AM HONORÉ, CAUSATION IN THE LAW 48-54 (1959). For a critical look at this thesis, see J.H. Mansfield, *Causation in the Law—A Comment*, 17 VAND. L. REV. 487, 510-14 (1963).

41. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 360 (1985).

untary or not wholly voluntary. They cite instances of when an accused D intends P to perform a particular action and P's action is not fully voluntary in that it is induced by coercion, deceit or the exercise of authority. In these situations, D may still be considered the principal party.⁴² The exact scope of "not fully voluntary actions" in their thesis is unclear. They suggest that these are not limited to cases where P would be exempt from criminal liability.⁴³ Thus, the scope of non-voluntary actions appears broader than situations where P would either be excused or justified in his conduct. At another place, they also list a number of non-exhaustive factors that may take away from the voluntariness of P's conduct, including lack of muscular control or consciousness, duress, and predicaments created by D for P where P cannot be said to have a "fair choice."⁴⁴ They do not however elaborate further on these circumstances or on the limits of their operation. As we shall later explore, resolving this ambiguity is crucial to constructing an appropriate concept of principalship.

The traditional formulation of the accessory's liability in English law conceives of it as derivative in nature, that is, it arises from and is dependent upon D's contribution to or participation in the offense committed by the primary party P.⁴⁵ There are different views, however, on what must be the nature of this participation. For instance, does D's liability result from his participation in the crime perpetrated by P, or does it flow from his participation in the wrongful act carried out by P?⁴⁶ If the latter is the case, D could possibly incur criminal responsibility even when P is excused (for example on grounds of duress), but not when P is justified in committing the act.⁴⁷ Second, must the nature of D's participation be "causal" in some way, that is, should it have made a difference to the outcome of the ultimate offense by P?⁴⁸ Alternatively, is it sufficient that D intentionally contributed to P's conduct while possessing the *mens rea* required for the offense committed by P and intending that P perform

42. HART & HONORÉ, *supra* note 40, at 323-24.

43. *Id.*, at 340.

44. *Id.*, at 70.

45. Kadish, *supra* note 41, at 337. It should be noted that this rationale has come increasingly under attack and prominent commentators consider other theories that attach more importance to D's independent conduct to have gained precedence. See ASHWORTH, *supra* note 10, at 426-27. Other prominent common law countries such as the United States also adhere to the derivative approach. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 466 (2009).

46. On the implications of this distinction, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 641-45 (2000). Several commentators have advocated basing the responsibility of the accessory on the wrongful act of the principal, rather than on the offense: see Kadish, *supra* note 41, at 379-82; Peter Alldridge, *The Doctrine of Innocent Agency*, 2 CRIM. L. FORUM 45, 46-47 (1990).

47. FLETCHER, *supra* note 46, at 6421-43.

48. SMITH, *supra* note 34, at 7, 246.

the actions that ultimately resulted in P's liability?⁴⁹ As we shall see in the following sections, these questions have a bearing on our notion of principalship.

B. *The Problem of the Accessory's Greater Liability*

Since on the traditional account, the accessory's liability is derivative in nature, the orthodox view was that the accessory D's liability cannot exceed that of the principal P. In the frequently cited case of *R v. Richards*,⁵⁰ the defendant hired two men with the intention that they grievously hurt her husband, but the men instead inflicted only minor injuries. The issue was whether the defendant can be charged as an accessory for the more serious offense of unlawful and malicious wounding with intent to do grievous bodily harm, when the principals were only convicted of unlawfully and maliciously wounding another person. The court answered the question in the negative, holding that since only one offense had been committed, and that this offense was one of unlawful wounding, it was not possible to hold any accessory liable for an offense greater than the one that had actually been committed. This position was overturned by the decision of the House of Lords in *Howe*,⁵¹ where the court affirmed that a secondary party can be convicted of murder, despite the principal having been convicted only of manslaughter. The court's reasoning for this proposition, however, was quite cursory, and it did not address the theoretical basis for taking this position.⁵² Indeed, the decision in *Howe* has been interpreted by some commentators to constitute a partial abandonment of the derivative theory, since D's liability can hardly be said to derive from the more serious offense of murder which was never committed. It is instead based on his own personal culpability stemming from what he intended or contemplated.⁵³

49. Kadish, *supra* note 41, at 346-50. English law seems to have followed Kadish in not requiring that the accessory's contribution have any causal potency: see Glanville Williams, *Complicity, Purpose and the Draft Code—I*, 1990 CRIM. L. REV. 4, 6; C.M.V CLARKSON ET AL, CLARKSON AND KEATING'S CRIMINAL LAW: TEXT AND MATERIALS 548-49 (2007). Dennis remarks that the accessory's causal connection with the offense may be immaterial—I.H. Dennis, *The Mental Element for Accessories*, in CRIMINAL LAW: ESSAYS IN HONOUR OF J.C. SMITH 40, 41 (Peter Smith ed., 1987). The position is somewhat similar in the United States: LAFAVE, *supra* note 5, at 711-12. There have however been calls for taking the causation element in accomplice liability more seriously: Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427 (2008).

50. [1974] Q.B. 776. The case has been the subject of much debate. See FLETCHER, *supra* note 46, at 672-73; CLARKSON & KEATING, *supra* note 49, at 578-79.

51. *R v. Howe*, [1987] 1 A.C. 417.

52. SMITH, *supra* note 34, at 130; CLARKSON & KEATING, *supra* note 49, at 578-79.

53. ASHWORTH, *supra* note 10, at 427; Simester and Sullivan dispute this interpretation by arguing that murder and manslaughter should not be considered as independent offenses since the core of the wrong is identical in both cases: SIMESTER ET AL., *supra* note 5, at 249-50.

The problem of accessorial liability that potentially exceeds that of the principal may perhaps be dismissed as a minor anomaly in the theory of derivative liability. Most situations that we encounter in our lives, and those that come before courts, would involve principals that our intuitions would consider more culpable than their accessorial counterparts. However, examples abound of situations where convicting the “secondary party” D of a lesser offense would seem to understate the degree of his culpability versus the “primary party” P.⁵⁴ English criminal law’s solution to the conundrum of the secondary party’s greater liability has been twofold:⁵⁵ the first relies on a broader conceptualization of the derivative nature of accessorial liability, whereas the other depends on an expansion of the concept of principalship.

C. *A Broader Conception of Derivative Liability*

The broader conception of accessorial liability rests the liability of the accessory D, not on the crime committed by the principal P, but on the objectively harmful wrong perpetrated by P.⁵⁶ It has been recommended as a sound basis for derivative accessorial liability by academics drawing upon German criminal law theory,⁵⁷ and has also been proposed by the Law Commission’s Report, “Participating in Crime.”⁵⁸ The argument is that while wrongfulness is a feature of the act objectively considered, culpability is always personal in nature.⁵⁹ P’s culpability cannot therefore be imputed to D and instead must be judged in terms of D’s own mental state with respect to the objectively wrongful act.⁶⁰

At first glance, the theory appears especially promising for attributing liability for international crimes.⁶¹ Imputation of liability for international crimes is a very different enterprise from that for domestic crimes. Unlike a reduction of liability from murder to manslaughter that P may incur due to some excuse, in a prosecution for

54. Commentators frequently take inspiration from Othello in signaling how even though Othello the principal is clearly guilty in killing Desdemona, the greater culpability lies with the mastermind Iago.

55. I will not discuss the introduction of the offenses of “encouraging or assisting crime” here, which introduce a wholly new category of parties to a crime by holding persons responsible for the inchoate offenses of encouragement or assistance under Sections 44 to 46 of the Serious Crime Act 2007.

56. SMITH, *supra* note 34, at 130.

57. Kadish, *supra* note 41, at 390; FLETCHER, *supra* note 46, at 641-44.

58. LAW COMMISSION, PARTICIPATING IN CRIME ¶¶ 4.14, 4.15 (Law Com No 305 Cm 7084, 2007).

59. Fletcher defines culpability as a form of accountability, which is distinct from it in that it is limited to wrongful acts (and not those that are justified) and that it is linked to the degree of wrongdoing: FLETCHER, *supra* note 46, at 459.

60. *Id.*, at 642.

61. Ashworth’s objection to the Howe holding on the ground that the greater crime for which the accessory is convicted never took place would be inapplicable in this context. See ASHWORTH, *supra* note 10, at 427.

an international crime such as genocide, P may be culpable for an entirely different crime such as murder. P's "objectively wrongful act" appears a much stronger basis for assessing D's liability. As long as D possesses the requisite mental state for the crime of genocide while intending P to commit the single crime of murder, D's liability would still be derivative of P's act. This would of course only be a partial explanation of D's liability, as one murder by itself does not constitute an international crime. D's liability would ultimately be derivative of thousands of wrongful acts carried out by principals such as P, with D possessing the *mens rea* for genocide, and regardless of whether P and the other physical perpetrators conceived of their actions as amounting to genocide.

Whichever doctrine of accomplice liability one chooses to follow, the problem still persists that holding D responsible only as an accessory misstates his actual role and participation in the offense. While language can possibly bear the strain of an accessory being held liable for murder while the principal is convicted only of manslaughter, it is more difficult to assign the label of an "accessory" to a *génocidaire* where the principal is guilty only of murder. It also goes against the notion of the principal as the "dominant party" in the chain of events leading up to the wrongful act.⁶² Is it possible then to conceive of D as the principal while remaining true to English law's theory of complicity and participation in crime? This is what we will next examine.

D. *Innocent and Semi-Innocent Agency*

The principal as a party to the crime is not widely discussed in English criminal law, which lavishes most of its attention on the accessory and the elements of accessorial liability. This is in contrast to legal systems such as Germany, where the principal is the primary focus of discussion and the accessory is defined negatively by first identifying the potential scope of principal conduct.⁶³

This problem becomes apparent when one considers situations in which English criminal law departs from its basic premise that P's voluntary conduct is the cause of an offense if it is the final human conduct before the result, and expands the scope of principals to include parties whose conduct in relation to an offense is interrupted by

62. On the principal as the actor who occupies center stage in a criminal scheme, see FLETCHER, *supra* note 46, at 656.

63. SMITH, *supra* note 34, at 80-81. Indeed, the subject of parties to a crime as a whole, including complicity, has commanded even less attention in common law countries with otherwise rich and influential academic scholarship in the criminal law, such as the United States: see Dressler, *supra* note 49, at 429; Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 222 (2000).

the act of an intervening third party.⁶⁴ The most striking instance of this is found in the doctrine of "innocent agency" where the "innocent agent" is a person whose actions are not deemed free, informed and voluntary due to some personal factors such as insanity, ignorance, or minority, and for this reason can be regarded as having been "caused" by the words or conduct of another person (for instance through coercion or deception).⁶⁵

The typical case in international criminal law merits a slightly different approach; the range of actions that would be considered excused or justified in domestic crimes, and therefore labeled "involuntary" is broader than similar conduct in international crimes. International criminal law permits the defenses of duress and superior orders to the physical perpetrator of the crime in very limited circumstances.⁶⁶ Moreover, there is something intuitively false in speaking of the actions of a person who commits a murder, even if his conduct stems from its permissibility in a climate of mass atrocity, as "innocent."

The better approach is to consider his responsibility under the doctrine of "semi-innocent" agency. As described by the Law Commission, the notion of semi-innocent agency applies when the perpetrator P satisfies the fault element of a less serious offense, but is innocent because he lacks the fault element for the more serious offense intended by the secondary party D, and which shares the same *actus reus*.⁶⁷ P's actions are considered less than fully voluntary, but not to such an extent so as to fully absolve him of any criminal responsibility.⁶⁸ They can be characterized as having been "caused" to the extent that he does not possess complete knowledge with respect to the nature or circumstances of his conduct.⁶⁹ This certainly seems a logical extension of the doctrine of innocent agency. As Williams puts it, if D can act through a completely innocent agent P1, there is no reason why he cannot do so through a semi-innocent agent P2. It would be unreasonable for the partial guilt of P2 to operate as a defense

64. ASHWORTH, *supra* note 10, at 106-11. Ashworth mentions three such situations—non-voluntary conduct of third parties; conduct of doctors; and conduct of the victim.

65. Glanville Williams, *Innocent Agency and Causation*, 3 CRIM. L. FORUM 289, 294 (1992). In the United States, the Model Penal Code as well as several state statutes recognize the doctrine of innocent agency: see John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 255-56 (2008). On the doctrine generally, see DRESSLER, *supra* note 45, at 468-69.

66. See, e.g., Rome Statute, *supra* note 4, at arts. 31, 33.

67. LAW COMMISSION REPORT, *supra* note 58, at ¶¶ [4.14], [4.15]; SMITH, *supra* note 34, at 130.

68. Kadish, *supra* note 41, at 388 (citing HART & HONORÉ, *supra* note 40, at 296-304).

69. SMITH, *supra* note 34, at 130.

against D.⁷⁰ P2 would be treated as an innocent agent in respect of "part of the responsibility" of D.⁷¹

This doctrine would perhaps capture the relationship and consequent liability between a senior leader or a person in a position of authority who intends to commit genocide and the individual physical perpetrator of an offense such as murder quite well. Two issues that would need to be fleshed out in greater detail would be to what extent the *actus reus* of the two offenses can be considered "shared" given that the *actus reus* of murder (by P2) will usually form a tiny part of the *actus reus* of genocide (by D), and whether there are conceptual problems with aggregating the *actus reus* of several offenses in order to form that of the larger offense perpetrated by D. The second is the extent to which P2 can strictly be called an "agent" of D in a situation of mass conflict, where P2 and D may not form part of a vertical chain of command and where P2 may in fact be unaware of D's existence and machinations.

E. Joint Criminal Enterprise

1. Elements and Structure of Joint Enterprise Liability

One way to analyze the relative poverty of doctrines of principal responsibility in English law is to consider that since principals and accessories are punished equally, the real debate has centered round the requirements for secondary responsibility. Indeed, one of the most prominent doctrines of perpetration responsibility for international crimes—Joint Criminal Enterprise (JCE)—bears a marked similarity to the mode of joint enterprise liability, which is a form of accessorial liability in English law. Joint enterprise liability can take one of two forms. The first or basic form is when D and P agree or act in concert to commit crime X (say burglary). D will be party to the joint venture if he intended that the burglary be committed or if he foresaw that P or any other party to the agreement might commit the burglary.⁷² The second and more controversial form, which Smith labels "parasitic accessory liability,"⁷³ arises when in the course of committing crime X, P goes on to commit a further crime Y (say murder). Here, D will be liable on the basis of joint enterprise liability if:⁷⁴ 1) D and P embark on a joint venture for the commission of crime

70. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 374 (1983).

71. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 391 (1961).

72. J.C. Smith, *Criminal Liability of Accessories: Law and Law Reform* 113 L. Q. REV. 453, 454 (1997); Robert Sullivan, *First Degree Murder and Complicity—Conditions for Parity of Culpability between Principal and Accomplice*, 1 CRIM. L. & PHIL. 271, 274 (2007).

73. Smith, *supra* note 72, at 454-55.

74. *Id.*, at 455; Sullivan, *supra* note 72, at 275; ASHWORTH, *supra* note 10, at 420; DAVID ORMEROD, SMITH AND HOGAN CRIMINAL LAW: CASES AND MATERIALS 209 (10th ed. 2009).

X; 2) D had foreseen that in the course of committing crime X, there was a real risk that P might commit a further crime; and 3) Crime Y committed by P occurred as an incident of the joint enterprise and did not fundamentally differ from the crime anticipated by D.

The issue of the accessory's foresight is central to the determination of responsibility arising out of participation in a joint criminal venture. The very scope of the joint enterprise depends on "what was contemplated by parties sharing that purpose."⁷⁵ Thus, D will not be liable for a crime Y committed by P in the course of committing crime X if the act done by P was "fundamentally different" from what D contemplated.⁷⁶ The question of what makes P's act fundamentally different from that contemplated by D has caused some confusion, that is, whether it relates to the difference in weapons⁷⁷ used by P, his actions or intentions, or the consequences of his acts.⁷⁸ For instance in *Rahman*, D, along with a group of people armed with a variety of blunt instruments, engaged in a gang fight during the course of which the victim was stabbed, resulting in his death. D argued that he did not know that any of the members possessed a knife or that they would act with the intent to kill. The House of Lords held that P's intent to kill was not fundamentally different from the real risk of death or grievous bodily harm being caused intentionally that had been foreseen by D.⁷⁹ The test of fundamental difference applied to the nature of P's acts or his actual conduct rather than to his intent.⁸⁰

Simester and Sullivan interpret the concept of fundamental difference to be most closely related to the degree of dangerousness, that is, if the weapon used by P was different from, but equally dangerous as, the weapon which D contemplated he may use, D will still be liable under joint enterprise liability.⁸¹ The degree of dangerousness is, however, not evaluated solely according to the weapon used, but also by taking into account the context and other evidence.⁸² This interpretation of fundamental difference as based on dangerousness

75. *R v. Powell*, [1999] 1 A.C. 1, 11 (citing with approval *McAuliffe v. R.* (1995) 130 A.L.R. 26, 30 and *Hui Chi-ming v. R.* [1992] 1 A.C. 34. See CLARKSON & KEATING, *supra* note 49, at 557.

76. OMEROD, *supra* note 74, at 210.

77. *English*, [1997] 4 ALL E.R. 545, 564; SIMESTER ET AL, *supra* note 5, at 237.

78. OMEROD, *supra* note 74, at 213.

79. *R v. Rahman*, [2008] UKHL 45; [2009] 1 A.C. 129. See ASHWORTH, *supra* note 10, at 423, 425.

80. ASHWORTH, *supra* note 10, at 425; SIMESTER ET AL, *supra* note 5, at 238. As has been recently emphasized, this holding does not imply that D need not foresee that P might act with intent. P must foresee not only that D may commit the *actus reus* of crime Y, but that he may do so with the requisite *mens rea* for crime Y: *R. v. A.* [2010] EWCA Crim 1622; [2011] Q.B. 841 (Can.); David Ormerod, *Case Comment: R. v. A.* [2011] CRIM L. REV. 61, 63-4.

81. SIMESTER ET AL, *supra* note 5, at 238-39. They also cite the decision of the Court of Appeal in *Uddin*, [1999] Q.B. 431, 441 as supporting this reasoning.

82. *Id.*, at 239.

seems too narrow as it concerns primarily cases of differences in weapons and does not yield a broader principle that would apply to other deviations. A more useful approach is to look at whether P acted so as to bring about the consequence which D contemplated. Whether P chooses to use a knife or a gun, the victim is equally dead in either case. The method by which he accomplished this result should be irrelevant.⁸³ Conversely, even if D knew that P had a knife, if he contemplated only that P would use it to frighten the victim, he should not be held responsible if P stabbed the victim instead, causing his death.⁸⁴ The test of foresight or contemplation thus seems mostly closely related to the expected outcome of P's conduct.⁸⁵

2. Justification for Joint Enterprise Responsibility

At first glance, liability arising out of participation in a joint criminal venture, particularly D's liability for the collateral offense committed by P, appears to unduly extend the scope of D's liability for offenses to which he has made no direct contribution. Several arguments, both normative and pragmatic, have been adduced to support this extension. One set of arguments focuses on the conduct of the secondary party and is grounded in his voluntary association with a criminal venture. The element of collusion not only constitutes a manifestation of D's criminal proclivities⁸⁶ but also makes his conduct an independent wrong.⁸⁷ D's participation in the unlawful enterprise represents his affiliation with a segment of society that has set itself against the rule of law.⁸⁸ Even if D does not make any direct contribution to the collateral offense, he is indirectly causally connected to it as he helps create or contribute to the situation in which it occurs.⁸⁹ In more close-knit ventures, D may also be in a position of authority to exercise supervision over the other members and restrain their conduct.⁹⁰ This reasoning appears to base D's conviction on his "criminal proclivities," which is not particularly persuasive. Apart from being circular, the argument does not have anything to say about how the same logic should not then apply to D's liability for aiding and abetting. D's purported affiliation with anti-rule of law sentiments as a basis for his extended liability is also un-

83. J.C. Smith, *Case and Comment: R. v. Powell and Daniels*, [1998] CRIM. L. REV. 48, 50; ASHWORTH, *supra* note 10, at 425; OMEROD, *supra* note 74, at 214; CLARKSON & KEATING, *supra* note 49, at 563.

84. Smith, *supra* note 83, at 51.

85. See ASHWORTH, *supra* note 10, at 425.

86. SMITH, *supra* note 34, at 6.

87. SIMESTER ET AL, *supra* note 5, at 244, n.260; Simester, *supra* note 10, at 600-01.

88. SIMESTER ET AL, *supra* note 5, at 244; Simester, *supra* note 10, at 600.

89. See Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 633 (1984).

90. See SMITH, *supra* note 34, at 233.

convincing. Arguably, anyone who commits or facilitates the commission of an offense in any manner exhibits the same characteristics.

A second set of justifications for joint enterprise liability stems from a risk/endangerment rationale similar to that used for inchoate offenses. Through his association with a criminal enterprise, D increases the likelihood that the collateral offense will occur.⁹¹ Criminal enterprises also represent a greater threat to public safety than individuals acting alone, as the members of the enterprise tend to mutually reinforce individual criminal tendencies, discouraging withdrawal and often resulting in an escalation of crime.⁹² Moreover, liability based on participation in the joint enterprise deters people from associating with criminal ventures and thus makes the offenses less likely to occur.⁹³ These are empirical claims that have some merit, but perhaps need to be supported by fairly comprehensive studies in other areas of the social sciences. The argument on deterrence especially does not seem very plausible. At least in cases of joint enterprise that involve spontaneous outbreaks of violence such as street fights, it is unlikely that the potential for punishment would feature very strongly in the decision making calculus of a party to the enterprise. Neither is it entirely clear that even if one or more persons are deterred from participating in the joint venture, this would necessarily mean that an offense is less likely to be committed. Offenses that are committed pursuant to joint ventures which involve a relatively large number of persons, or in which individual actors are more or less dispensable, would be just as likely to occur.

IV. THE PRINCIPAL IN GERMAN CRIMINAL LAW THEORY

A. *Forms of Participation in German Criminal Law*

German criminal law presents a complicated and minutely theorized account of the principal party to a crime, especially as compared to English criminal law. This is partly on account of the fact that a party to a crime can only be classified as an accessory once it has been established that he cannot be considered a principal.⁹⁴ In contrast with prominent common law systems such as England and the United States, the label of a perpetrator also has important sentencing consequences, since Section 27 of the German Criminal Code

91. *Id.*, at 6.

92. Simester, *supra* note 10, at 600-01; SIMESTER ET AL, *supra* note 5, at 244; ASHWORTH, *supra* note 10, at 403.

93. SMITH, *supra* note 34, at 233; *see also* ASHWORTH, *supra* note 10, at 404.

94. SMITH, *supra* note 34, at 80-81.

(StGB)⁹⁵ provides for a mandatory mitigation of sentence for aiders (though not for instigators).

The StGB regulates the following categories of participation in a crime:

Section 25

Principals

(1) Any person who commits the offense himself or through another shall be liable as a principal.

(2) If more than one person commit the offense jointly, each shall be liable as a principal (joint principals).

Section 26

Instigation

Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

Section 27

Aiding

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

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

Thus, a principal or perpetrator is one who commits the offense himself (*unmittelbare Täter* or direct perpetrator); or through another person (*mittelbare Täter* or indirect perpetrator); or jointly with another principal (*Mittäter* or co-perpetrator). In addition, commentators recognize the category of *Nebentäterschaft*, or independent multiple principals, acting alongside each other towards the commission of an offense.⁹⁶ An accessory is one who intentionally induces another person to intentionally commit an unlawful act (*Anstifter*, or instigator); or who intentionally renders aid to another in the latter's intentional commission of an unlawful act (*Gehilfe*, or aider).⁹⁷

95. Strafgesetzbuch [StGB] [Criminal Code], Nov. 13, 1998, BGBL. I 3322. I have relied on the English translation by Michael Bohlander authorized by the Federal Ministry of Justice, available at http://www.gesetze-im-internet.de/englisch_stgb/index.html. The only variation I have introduced is in the translation of the term *Anstiftung* as "Instigation" rather than the original "Abetting" as I believe it is a more appropriate reflection of the term in English law. I am grateful to Claus Kress and Rebecca Williams for helping me arrive at an accurate translation.

96. JOHANNES WESSELS & WERNER BEULKE, STRAFRECHT, ALLGEMEINER TEIL: DIE STRAFTAT UND IHR AUFBAU (SCHWERPUNKTE) 179 (2008); MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 153 (2009).

97. SCHWERPUNKTE, *supra* note 96, at 179; BOHLANDER, *supra* note 96, at 153.

The StGB is silent on the criterion for the dividing line between principals and accessories. While the Federal Court of Justice (*Bundesgerichtshof* or BGH) favors a subjective approach towards this demarcation,⁹⁸ the criterion of control is most influential among criminal law commentators:⁹⁹

B. Act Domination or Control Theory (Tatherrschaftslehre)

The theory most widely endorsed in current scientific literature is the theory of “act domination” or control (*Tatherrschaftslehre*). On this account, the decisive criterion for establishing the boundary between principals and accessories is control over the act: the perpetrator dominates or controls the commission of the act, and the accessory participates in its occurrence without domination. To have control over the act means to hold in one’s hands the elements constituting the offense (with the requisite intent).¹⁰⁰ This control can take different forms: direct domination over the act in the case of direct perpetration (*Handlungsherrschaft*); control over the will of the direct perpetrator or domination arising out of the superior knowledge of the indirect perpetrator in the case of indirect perpetration (*Willensherrschaft*); functional domination of the participating joint actor in the case of co-perpetration (*funktionale Tatherrschaft*).¹⁰¹ The perpetrator is the person who, as the key figure (*Zentralgestalt*) in the events, exercises this control through his ability to strategically mastermind the commission of the act or through his joint hegemony over the act.¹⁰²

The control theory was first systematized by Claus Roxin, and is now endorsed by the majority of commentators, though in varying forms. Further, the current jurisprudence of the BGH comes quite close to it in its use of objective criteria for the identification of the will of the perpetrator.¹⁰³ The following section discusses the catego-

98. The subjective theories differentiate between parties to a crime based on the will and inner attitude of the participant. While the later jurisprudence of the BGH continues to adhere to a subjectively oriented demarcation criterion, it is overlaid by considerable objective elements in its assessment of this subjective criterion: see Ulrich Sieber & Marc Engelhart, *Strafbare Mitwirkung von Führungspersonen, in Straftätergruppen und Netzwerken in Deutschland 16-17* (2009) (unpublished report, Max-Planck-Institut für ausländisches und internationales Strafrecht) (on file with author) [hereinafter MPICC report]; SCHWERPUNKTE, *supra* note 96, at 182-83.

99. Objective theories, according to which the perpetrator is the person who realizes the elements of an offense, either in full or in part, himself and all other contributors to the offense are accessories, are seldom advanced today: STRAFGESETZBUCH LEIPZIGER KOMMENTAR (GROßKOMMENTAR): BAND I 1848 (Heinrich Wilhelm Laufhütte et al. eds., 2006).

100. SCHWERPUNKTE, *supra* note 96, at 181; MPICC report, *supra* note 98, at 17.

101. SCHWERPUNKTE, *supra* note 96, at 181.

102. *Id.*, at 181-82; MPICC report, *supra* note 98, at 17.

103. LEIPZIGER KOMMENTAR, *supra* note 99, at 1848, 1856-57. See e.g., *Katzenkönigfall* (Cat King Case), BHGSr 35, 347.

ries of indirect perpetration and co-perpetration based on the control theory.

C. Indirect Perpetration and Co-Perpetration

1. Indirect Perpetration (*Die mittelbare Täterschaft*)

Section 25 states that a person who commits a crime through another is an indirect perpetrator. The word "through" signifies that the indirect perpetrator (*Hintermann*) controls the direct perpetrator (*Vordermann*) of the act in such a manner that he uses him as an instrument. Due to this "tool" function, the *Vordermann* normally possesses some deficit (for instance, he lacks the requisite intent for the offense), which the *Hintermann* exploits in order to dominate him.¹⁰⁴ While the *Vordermann* still possesses *Handlungsherrschaft* (act hegemony), this is overlaid by the *Willensherrschaft* or domination over the will of the *Vordermann* by the *Hintermann*.¹⁰⁵

Roxin formulates three main categories of indirect perpetration: coercion; utilization of a mistake on the part of the *Vordermann* or on the basis of the *Hintermann's* superior knowledge; and hegemony through control over an organizational apparatus (*Organisationsherrschaft*), which I will discuss below.¹⁰⁶

2. Co-perpetration (*Mittäterschaft*)

Co-perpetration is the joint commission of a criminal act¹⁰⁷ through the knowing and willing co-operative conduct of the individual participants.¹⁰⁸ It is based on the functional act domination of each co-perpetrator, which arises from the principle of division of labor and functional role allocation.¹⁰⁹ This ensures that the success of the criminal act is possible only through the co-operation of all co-perpetrators.¹¹⁰ Co-perpetration has an objective requirement of collective act execution for the realization of the elements of the offense, and a subjective requirement of a common act plan.¹¹¹

a. Collective act execution

The co-perpetrators must work together jointly, based on a division of labor towards the result of the elements of the offense. The act contribution of each co-perpetrator must therefore be of sufficient

104. MPICC report, *supra* note 98, at 19; SCHWERPUNKTE, *supra* note 96, at 190.

105. CLAUS ROXIN, TÄTERSCHAFT UND TÄTHERRSCHAFT 143 (2006) [hereinafter ROXIN, TT].

106. *Id.*, at 242.

107. StGB § 25.

108. MPICC report, *supra* note 98, at 29; SCHWERPUNKTE, *supra* note 96, at 186.

109. LEIPZIGER KOMMENTAR, *supra* note 99, at 1931.

110. *Id.*, at 1931-32.

111. MPICC report, *supra* note 98, at 29.

weight and importance such that it grounds the necessary co-domination over the act.¹¹²

There is a good deal of controversy over whether act contributions in the preparation stage suffice for co-perpetration. According to the BGH, even a small co-operation in the preparation stage may lead to liability as a co-perpetrator if it is carried out with the will of a perpetrator,¹¹³ but commentators are divided on this requirement. One strand of opinion insists that the co-perpetrator must take part in some manner in the execution of the crime.¹¹⁴ Others argue that unlike an accessory, an individual such as a gang leader who does not take part in the execution does not participate in the act of another; instead the result follows from a willing collective participation in a joint act.¹¹⁵

There is, however, merit in the argument that since perpetration is tied to the realization of the elements of the offense, co-perpetration must consist of joint domination of these elements.¹¹⁶ Thus, only co-operation in the execution stage would justify responsibility as a co-perpetrator.

b. Common act plan

Co-perpetration requires that the contributors to the criminal act reach an agreement to commit the act as equal partners.¹¹⁷ There must be mutual consent over the joint realization of the act at the time, or even before the beginning, of the act; this agreement may not take place explicitly, but can also take place by implication.¹¹⁸ Co-perpetration is also possible if the individual participants do not know each other, as long as each person is conscious that there are other participants who are likewise working towards a common goal, and these other participants have the same knowledge.¹¹⁹

From the necessity for a common act plan it follows that the act of one of the contributors that goes beyond the plan, the so-called "excess," cannot be attributed to the others.¹²⁰ This is because the other

112. *Id.*, at 30.

113. LEIPZIGER KOMMENTAR, *supra* note 99, at 1942 and cases cited therein.

114. ROXIN, TT, *supra* note 105, at 298-300.

115. SCHWERPUNKTE, *supra* note 96, at 190.

116. See LEIPZIGER KOMMENTAR, *supra* note 99, at 1943.

117. MPICC report, *supra* note 98, at 31; LEIPZIGER KOMMENTAR, *supra* note 99, at 1938.

118. MPICC report, *supra* note 98, at 31; LEIPZIGER KOMMENTAR, *supra* note 99, at 1938.

119. MPICC report, *supra* note 98, at 31; LEIPZIGER KOMMENTAR, *supra* note 99, at 1939.

120. MPICC report, *supra* note 98, at 32; LEIPZIGER KOMMENTAR, *supra* note 99, at 1940.

contributors do not have hegemony over the act or the requisite intention regarding the deviation.¹²¹

3. *Organisationsherrschaft*

a. Overview

The category of *Organisationsherrschaft* developed by Roxin refers to cases where the *Hintermann* has an organized power apparatus at his disposal through which he can accomplish the offenses he aims at, without having to leave their realization contingent on an independent decision by the *Vordermann*.

The special position of the *Hintermann* results from the specific mode of action within the framework of the organizational apparatus. Such an organization develops a life which is independent of the changing existence of its members and of the decisions of the individual act executors; it functions, as it were, automatically. To use a figure of speech, the *Hintermann* sits at the operational center of the organizational structure and if he presses a button to order a killing, he can expect it to be fulfilled without him even knowing who executes the action.¹²² This expectation of fulfillment does not arise from any deception or duress on the part of the *Hintermann*. Instead, it is based on the fungibility of the executing organs, such that if one organ refuses to participate, another immediately steps into its place and the execution of the total plan continues unhindered. Each executing organ is therefore an anonymous and arbitrarily exchangeable figure, much like a simple cog in the machine-like organization, that places the *Hintermann* in the central position of the occurrence and lends him domination over the act.¹²³

It is irrelevant for *Organisationsherrschaft* whether the *Hintermann* acts on his own initiative or on the instructions of more highly placed superiors. All that is required is that he can direct or steer the part of the organization which is subordinate to him, without having to rely on the resolution of his subordinates for the commission of the offense.¹²⁴

Other versions of *Organisationsherrschaft* that differ from Roxin's account have been suggested. For instance, for Schroeder, in-

121. MPICC report, *supra* note 98, at 32. There are some limited exceptions to this rule: see MPICC report, *supra* note 98, at 32; LEIPZIGER KOMMENTAR, *supra* note 99, at 1940; SCHWERPUNKTE, *supra* note 96, at 189.

122. Claus Roxin, *Straftaten im Rahmen organisatorischer Machtapparate*, GOLDTAMMER'S ARCHIV FÜR STRAFRECHT 193, 200 (1963); ROXIN, TT, *supra* note 105, at 245.

123. Roxin, *supra* note 122, at 200-01; ROXIN, TT, *supra* note 105, at 245.

124. Roxin, *supra* note 122, at 203; ROXIN, TT, *supra* note 105, at 248. This aspect of *Organisationsherrschaft* has been criticized by Ambos: Kai Ambos, *The Fujimori Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus*, 9 J. INT'L CRIM. JUST. 137, 152-53 (2011).

stead of the fungibility of the act intermediaries, the responsibility of the *Hintermann* is based on his use of a *Vordermann* who is already determined to carry out the criminal act. In this case too, the *Hintermann* may rely on the almost automatic regular implementation of his criminal goal due to the intermediary's already complete, though conditional, readiness to commit the offense.¹²⁵ The culpability of the *Hintermann* arises from the fact that he consciously provides the igniting spark for the explosive material and avails himself of a pliable tool for a criminal result in his own interest.¹²⁶

Schroeder and Roxin's versions both find their way into the BGH's decision in the German border guards case,¹²⁷ which combines Roxin's account of *Organisationsherrschaft* with Schroeder's criterion of the intermediary's (absolute) readiness to realize the criminal act,¹²⁸ though with some departures from the original formulations.¹²⁹

b. Elements of *Organisationsherrschaft*

There are three main elements in Roxin's theory of *Organisationsherrschaft*: (1) the existence of a vertical hierarchically structured power apparatus; (2) the direct executor's fungibility within the apparatus; and (3) the apparatus's detachedness from the law.¹³⁰

125. Thomas Rotsch, *Tatherrschaft kraft Organisationsherrschaft?*, 112 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 518, 524 (2001).

126. F.C. SCHROEDER, DER TÄTER HINTER DEM TÄTER: EIN BEITRAG ZUR LEHRE VON DER MITTELBAREN TÄTERSCHAFT S. 158 (1965). Schroeder's position has been effectively criticized in literature: see Rotsch, *supra* note 125, at 525; Harro Otto, *Täterschaft kraft organisatorischen Machtapparates*, 2001 JURA 753, 757-58; Claus Roxin, *Anmerkung*, 1995 JURISTEN-ZEITUNG 49, 51; Kai Ambos, *Tatherrschaft durch Willensherrschaft kraft organisatorischer Machtapparate*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 226, 230 (1998). Recently however, Roxin himself has suggested that the direct perpetrator's readiness to commit the act could have a symbolic value and be considered a characteristic, rather than an independent criterion, of *Organisationsherrschaft*: Claus Roxin, *Bemerkungen zum Fujimori-Urteil des Obersten Gerichtshofs in Peru*, 4 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 565, 567 (2009).

127. BGHSt 40, 218-40.

128. See Roxin, *Organisationsherrschaft und Tatentschlossenheit*, 7 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 293, 293-94 (2006).

129. For instance, on the BGH's extension of *Organisationsherrschaft* to economic entities, see MPICC Report, *supra* note 98, at 23-24; Thomas Weigend, *Perpetration through an Organization: The Unexpected Career of a German Legal Concept*, 9 J. INT'L CRIM. JUST. 91, 99 (2011).

130. Henning Radtke, *Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 350, 354 (2006). In his article on the Fujimori judgment rendered by the Peruvian Supreme Court, Ambos refers to two additional criteria cited by the court: a responsible command of the indirect perpetrator and the direct perpetrator's readiness to commit the criminal act: Ambos, *supra* note 124, at 149-50.

4. Taut Hierarchical Organizational Structure

Roxin's elucidation of *Organisationsherrschaft* requires an organizational structure which functions such that the instructions of the *Hintermann* lead to an automatic implementation of the elements of the offense. Roxin also talks of an organization that is independent of its individual members who act as functional parts of a larger machine like structure; this is the basis on which he excludes a group of asocial elements who simply unite to commit common criminal offenses.¹³¹ This presupposes a fairly tightly organized hierarchical structure.¹³²

Roxin ties this structure to the existence of a large number of fungible act intermediaries. It is a little difficult, however, to reconcile these two elements: the larger the number of act intermediaries, the more difficult it would be to control the system so that the *Hintermann's* instructions are implemented smoothly.¹³³ This is even more so if these intermediaries are arbitrarily replaceable. Roxin could be taken as referring to a functionally differentiated large enterprise, where the actors often do not know of each other's exact roles and perform their tasks more or less independently. It is, however, more difficult to ensure a "regular operational sequence" within such a structure¹³⁴ and the arbitrary replaceability of the intermediaries becomes far more limited.

Moreover, as far as international crimes are concerned, Roxin's organizational structure, though conceded by him to be an "ideal type,"¹³⁵ does not reflect the reality of the majority of situations of mass conflict.¹³⁶ Crimes committed by the direct perpetrators in these situations are often spontaneous, or crimes of opportunity. The direct executor can hardly be said to be part of any power structure, and even less a tightly organized and controlled one, especially given that the crimes are spatially and temporally widespread.

131. Roxin, *supra* note 122, at 206; ROXIN, TT, *supra* note 105, at 251.

132. Ambos, *supra* note 126, at 240-41.

133. Rotsch, *supra* note 125, at 557.

134. Rolf D. Herzberg, *Mittelbare Täterschaft und Anstiftung in formalen Organisationen*, in INDIVIDUELLE VERANTWORTUNG UND BETEILIGUNGSVERHÄLTNISSE BEI STRAFTATEN IN BÜROKRATISCHEN ORGANISATIONEN DES STAATES, DER WIRTSCHAFT UND DER GESELLSCHAFT 33, 36 (Knut Amelung ed., 2000).

135. Roxin, *supra* note 122, at 207; ROXIN, TT, *supra* note 105, at 252.

136. Ambos relies on few cases decided by the Peruvian courts and the ICC to argue that the criterion can be applied even to less formal non state groups, but does not cite any independent arguments to support his conclusion: Ambos, *supra* note 124, at 150. Compare with Stefano Manacorda & Chantal Meloni, *Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?*, 9 J. INT'L CRIM. JUST. 159, 171 (2011).

5. Fungibility of the Act Intermediaries

Commentators have been highly critical of the criterion of fungibility, which forms a central part of Roxin's theory. It is argued that the expectation of automatic implementation of the elements of the offense by the intermediaries contradicts holding them criminally responsible as direct perpetrators.¹³⁷ The assumption of soulless humans is also contested; even in the most tightly controlled structure, the fundamental unpredictability of freely acting humans cannot be done away with. *Organisationsherrschaft* presents us with a crooked picture of humans who are merged into an organizational structure and become one with the machine. Just because some or all of the individuals are replaceable, however, does not make the enterprise any less a union of human beings, or lessen the imponderability of the result that follows. If the image of the soulless power apparatus is taken seriously, it is hard to see why this does not at the same time justify relieving the act executors from criminal responsibility.¹³⁸

These internal contradictions of a criminally responsible yet machine-like direct executor can be partially resolved if one distinguishes more clearly between individual and collective unlawfulness—that is, unlawfulness that arises in organizational settings.¹³⁹ Unlike in the normal case of indirect perpetration where the responsibility of the *Hintermann* is based on his direct control over the direct perpetrator, in cases of macro-criminality, the *Hintermann* controls the intermediary only indirectly through the mechanism of the organizational apparatus.¹⁴⁰ The direct perpetrator is, on the one hand, responsible for his own criminal acts; on the other hand, his actions are part of the acts of the organization as a whole. This organizational aspect does not relieve him as an individual for the individual unlawfulness. However, the only person who can be held responsible for this organizational unlawfulness is the person who has control over the organization—the *Hintermann*.¹⁴¹ This response is particularly relevant in the context of international crimes. It signals that principles of attribution may be different in cases of individual and collective criminality. It nevertheless fails to address the troubling aspect of viewing the direct perpetrator as a soulless tool of the *Hintermann*.

This objection is connected to the second set of arguments against fungibility: in the context of the concrete act, there are only a limited number of act intermediaries. For instance, in the case of the

137. Otto, *supra* note 126, at 755.

138. Uwe Murmann, *Tatherrschaft durch Weisungsmacht*, GOLT DAMMER'S ARCHIV FÜR STRAFRECHT 269, 273-74 (1996).

139. Ambos, *supra* note 126, at 234; see also Ambos, *supra* note 124, at 148.

140. Ambos, *supra* note 126, at 234; see also Ambos, *supra* note 124, at 148.

141. Rene Bloy, *Grenzen der Täterschaft bei fremdhändiger Tatausführung*, GOLT DAMMER'S ARCHIV FÜR STRAFRECHT 424, 441 (1996).

border guards posted between East and West Germany, in the context of the concrete act of preventing the escape of refugees, only a few soldiers were present.¹⁴² At best then, the soldiers were not instantly but only successively replaceable. This would not differ in any material way from other forms of indirect perpetration or guarantee automatic implementation of the elements of the concrete offense.¹⁴³

One response to this objection is to consider that control over the “act” has a different meaning in the context of *Organisationsherrschaft*. In the usual case of indirect perpetration, the “act” represents the direct criminal act committed by the *Frontmann*. In *Organisationsherrschaft*, the “act” may be taken to refer to the entire expiration of events leading to the fulfillment of the result of the elements of the offense. The *Hintermann* would thus have the central position if he controls the sequence of events till the implementation of the crime.¹⁴⁴ However, this would result in a decoupling of the domination over the act from the elements of the offense. If Roxin were to accept this solution, it would contradict his stance that the perpetrator must have the key position in the execution action constituting the elements of the offense.¹⁴⁵

This objection may not, however, apply with the same strength in the case of international crimes. This is because international offenses have an inbuilt collective element in their definition—a crime against humanity is not an individual act of murder or rape; such individual acts reach the level of an international crime only if they are part of a widespread or systematic practice. The *Hintermann* can thus only be someone who occupies the central position in this entire sequence of events, including the collective element of the crime. To decouple his involvement from each micro crime that comprises this group crime would still not result in a detachment from the elements of the offense.

6. Detachedness from the Legal Order

Roxin limits the operation of *Organisationsherrschaft* to organizations that are detached from the legal order, for it is only in these organizations that the administration and execution organs of the power apparatus are not bound to laws that have a higher ranking. The latter would normally exclude the automatic implementation of the *Hintermann*'s illegal instructions. This criterion is challenged primarily by Ambos, who argues that if the organization forms part of

142. Murmann, *supra* note 138, at 273.

143. Ambos, *supra* note 126, at 232.

144. Thomas Rotsch, *Neues zur Organisationsherrschaft*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 13, 15-16 (2005). Other authors have suggested that Roxin's theory in fact does not explain domination over any particular act at all, but only over the end result. See Weigend, *supra* note 129, at 100 and references therein.

145. Rotsch, *supra* note 144, at 15-16.

the legal order, the *Hintermann's* domination over the act is even greater.¹⁴⁶ For instance, non-State power apparatuses which have a symbiotic relationship with the State, such as the Sicilian mafia or Colombian drug cartels, are not detached from the law, but integrated into it in order to achieve a common interest. This does not change anything in the effective domination of the top management of the apparatus over the act and direct executors.¹⁴⁷ Ambos is guilty here of eliding the distinction between the government and the "State"—a symbiotic relationship between the former and the organization cannot be equated with an integration of the organization within the positive legal order which may still be committed to fighting the organization's criminal acts.

Ambos is more careful of this distinction when discussing state organized power apparatuses, where the legal order forms the basis of state sanctioned crime, such as in the military dictatorships of Argentina and Chile, and crimes are perpetrated in the name of the law by the authority of the executive and through the instrumentality of the courts. Here, there is no element of detachedness from the law; instead, with the concentration of unlawfulness and the authority of the law in the hands of the same national power apparatus, the automatic implementation of the illegal instruction by the act intermediary is even more assured than in a case of law detachedness.¹⁴⁸

Ambos admits that "law" in Roxin's sense can also refer to natural rather than positive law; the state apparatus may act in violation of the natural law even if it is in conformity with the positive law. He rejects this interpretation though, on the ground that it is too abstract and that such unwritten supra legal principles cannot be readily understood by the act executor. Thus, they cannot form a normative barrier to the execution of the *Hintermann's* orders.¹⁴⁹

Ambos's criticism on law detachedness is convincing in the context of a state apparatus if Roxin indeed takes law to mean positive law. It is not clear, however, in what sense Roxin uses the term. In a later article,¹⁵⁰ Roxin attempts to dispel two main, mistaken interpretations of this element: first, he claims that the organization need not operate outside the law in every case, but merely in those areas where the crimes are committed; second, the criterion must be assessed not from the point of view of the law in operation in the criminal systems, but from that of the current law. Using this reasoning, he concludes that even if some of the measures undertaken by the GDR regime were in accordance with the law, shooting to prevent

146. Ambos, *supra* note 126, at 242.

147. *Id.*, at 242-43.

148. *Id.*, at 244.

149. *Id.*, at 244-45.

150. Roxin, *supra* note 128.

flights across the border between East and West Germany was clearly detached from the law.¹⁵¹ This is not a particularly convincing explication of the criterion. 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 is limited to the domestic law of the State where the crimes are committed, or if it also includes international law. Moreover, the certitude with which Roxin is able to state that the shootings at the border were undisputed instances of this law-detachedness, and to do so without any reference to any positive law, seems to point more in the direction of some notion of "natural law." Roxin's earlier references to a "higher ranking" of this law¹⁵² and to the rarity of such an organization existing in a constitutionally stable legal order¹⁵³ also support such an interpretation.

This may in fact be one of the major strengths rather than weaknesses of Roxin's theory when applied to international crimes. It is exactly because an act executor who operates under the ideological glare that surrounds mass atrocity cannot immediately comprehend such unwritten higher laws, that they do not present a barrier to him for executing the *Hintermann's* illegal instructions. Roxin's criterion of law detachedness would then perform two very important functions in clarifying the basis for international criminal responsibility: it would capture the social context in which mass crimes are committed; 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.

V. THE CONTROL THEORY AT THE ICC

Article 25(3)(a) of the Rome Statute of the ICC defines the perpetrator as the person who commits a crime, "whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible."

Prior to Judge Wyngaert's eloquent Opinion in *Katanga*, the control theory seemed poised to become the dominant interpretation of this Article and the basis for perpetration responsibility at the ICC.¹⁵⁴ The Pre-Trial Chamber of the ICC, in particular, endorsed the theory in a string of decisions dealing with the confirmation of

151. *Id.*, at 298.

152. Roxin, *supra* note 122, at 204; ROXIN, TT, *supra* note 105, at 249.

153. Roxin, *supra* note 122, at 207; ROXIN, TT, *supra* note 105, at 252.

154. Judge Fulford also rejects the control theory and the doctrine of co-perpetration on which it is based in the *Lubanga* Trial Judgment: Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2482, Judgment Pursuant to Art. 74 of the Statute, Separate Opinion of Judge Adrian Fulford (ICC Trial Chamber I, Mar. 14, 2012). It is difficult though to predict to what extent their objections will influence the development of the theories at the ICC.

charges against the accused and spelt out the elements of co-perpetration and indirect perpetration based on the control doctrine.¹⁵⁵

In *Lubanga*, the Pre-Trial Chamber specified the objective and subjective elements of co-perpetration, which have formed a template for subsequent iterations of the elements. The objective elements consist of, first, an agreement or a common plan between two or more persons. This plan can be implicit and should include an element of criminality, even though it need not be directed specifically at the commission of a crime.¹⁵⁶ The second objective element is coordinated essential contribution by each perpetrator at any stage of the crime resulting in the realization of the objective elements of the crime.¹⁵⁷

The manner in which some of these elements have been fleshed out, in particular in the Trial Chamber's first ever judgment in the *Lubanga* case,¹⁵⁸ give rise to some concerns. For instance, the Chamber does not require that the common plan is intrinsically criminal, as long as it includes an element of criminality, i.e., its implementation should embody "a sufficient risk that, if events follow the ordinary course, a crime will be committed."¹⁵⁹ As Ambos argues, this is an unnecessarily confused formulation which does not sufficiently exclude the possibility of a plan that is predominantly non-criminal and that does not necessarily include a concrete crime.¹⁶⁰ The Chamber also vacillates between an objective and a subjective risk requirement. Initially, it emphasizes that under Article 30 of the

155. See, e.g., Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges ¶¶ 330-41 (ICC Pre-Trial Chamber I, Jan. 29, 2007); Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008); Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ¶ 349 (ICC Pre-Trial Chamber I, June 15, 2009); Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Corrigendum of the Decision on the Confirmation of Charges ¶ 152 (ICC Pre-Trial Chamber I, Feb. 8, 2010); Prosecutor v. Abdallah Banda and Saleh Jerbo, Case No. ICC-02/05-03/09, Corrigendum of the Decision on the Confirmation of Charges ¶ 126 (ICC Pre-Trial Chamber I, Mar. 7, 2011); Prosecutor v. Ruto, Kosgey and Sang, Case No. ICC-01/09-01/11, Decision of the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ¶ 291 (ICC Pre-Trial Chamber II, Jan. 23, 2012); Prosecutor v. Muthaura, Kenyatta and Ali, Case No. ICC-01/09-02/11, Decision of the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ¶ 296 (ICC Pre-Trial Chamber II, Jan. 23, 2012);

156. Lubanga, *supra* note 155, at ¶¶ 343-45; Katanga and Ngudjolo, *supra* note 155, at ¶¶ 522-23; Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 399-400; Banda and Jerbo, *supra* note 155, at ¶¶ 129-35; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 301-04; Abu Garda, *supra* note 155, at ¶¶ 160, 163-32.

157. Lubanga, *supra* note 155, at ¶¶ 346-48; Katanga and Ngudjolo, *supra* note 155, at ¶¶ 524-26; Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 401-406; Banda and Jerbo, *supra* note 155, at ¶¶ 136-49; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 305-312; Abu Garda, *supra* note 155, at ¶¶ 160, 180-232.

158. *Lubanga Judgment*, *supra* note 154.

159. *Id.*, at ¶¶ 984-87.

160. Kai Ambos, *The First Judgment of the International Criminal Court* (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues, 12 INT'L. CRIM. L. REV. 115, 139-40 (2012).

Rome Statute which defines intent, the co-perpetrators must be (subjectively) aware of the risk that the implementation of the plan will result in the crime.¹⁶¹ This is undoubtedly the correct approach, but is diluted in subsequent formulations where it is replaced by the (objective) requirement that the plan's implementation "will result in the commission of the relevant crime in the ordinary course of events."¹⁶²

The Trial Chamber also affirms the second objective element of co-ordinated essential contribution by the co-perpetrators.¹⁶³ The Pre-Trial Chamber had been criticized for inferring Lubanga's responsibility for the crime of recruitment of child soldiers from the fact of his essential role in the common plan between him and some military leaders of the Forces Patriotiques pour la Libération du Congo (FPLC) to broaden the base of their army.¹⁶⁴ The Pre-Trial Chamber had thus omitted to clarify what it deems as the object of essential contribution—the specific crime or the common plan. The Trial Chamber also fails to resolve the ambiguity in the object of the essential contribution. It merely states that the accused must have provided an "essential contribution to the common plan that resulted in the commission of the relevant crime."¹⁶⁵ A strict construction of this standard would imply that the accused's contribution need not be essential for the crime itself. The factual assessment by the Chamber also pays far greater attention to Lubanga's overall role in the UPC/FPLC and lays insufficient emphasis on how it was additionally essential to the recruitment of the child soldiers,¹⁶⁶ which should have formed the main focus of the analysis.

The subjective elements of co-perpetration were also first laid down in the Pre-Trial Chamber's *Lubanga* decision, but there has been a significant amount of controversy about the requirements in subsequent decisions. According to the *Lubanga* Pre-Trial Chamber, the first subjective element is the accused's fulfillment of all subjective elements of the crime with which he is charged, including the specific intent for crimes such as genocide.¹⁶⁷ The second subjective

161. *Lubanga Judgment*, *supra* note 154, at ¶ 986.

162. *Id.*, at ¶ 1018, also ¶ 1136. Indeed, Wirth argues that the Chamber replaces the subjective risk requirement with an objective one. See Steffen Wirth, *Co-Perpetration in the Lubanga Trial Judgment*, 10 J. INT'L. CRIM. JUST. 971, 986 (2012).

163. *Lubanga Judgment*, *supra* note 154, at ¶¶ 999-1000, 1003-05.

164. See *Lubanga*, *supra* note 155, at ¶ 377. The FPLC is the military wing of a political group in the DRC called the Union of Congolese Patriots (UPC). For criticism of this inference, see Thomas Weigend, *Intent, Mistake of Law and Co-Perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT'L. CRIM. JUST. 471, 486-87 (2008).

165. *Lubanga Judgment*, *supra* note 154, at ¶¶ 1006, 1018.

166. *Id.*, at ¶ 1270-71.

167. *Lubanga*, *supra* note 155, at ¶¶ 349-60. See also Katanga and Ngudjolo, *supra* note 155, at ¶¶ 527-32; Bemba, *supra* note 155, at ¶ 351; Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 410-17; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 333, 338-

element is that all co-perpetrators must be mutually aware of and accept that the execution of the common plan may result in the realization of the objective elements of the crime. If there is a substantial likelihood that the objective elements of the crime would occur, this mutual acceptance can be inferred from the co-perpetrators' awareness of this likelihood and their decision to nonetheless implement the plan. If, on the other hand, the risk is low, the co-perpetrators must have expressly accepted that implementing the plan would result in the realization of the objective elements of the crime.¹⁶⁸ The third subjective factor is the accused's awareness of the factual circumstances enabling him to jointly control the crime.¹⁶⁹

The second subjective element outlined by the Pre-Trial Chamber is unconvincing for several reasons. The Chamber infers that the co-perpetrators mutually accept that the execution of the plan may result in the realization of the objective elements of the crime in low-risk cases from their express acceptance of this result.¹⁷⁰ As an example of this express acceptance, the Chamber points to when "killing is committed with 'manifest indifference to the value of human life'"; on the other hand, intent is absent when the actor perceives a non-substantial risk but believes that his expertise will prevent the realization of the offense.¹⁷¹ It is difficult, however, to see how "manifest indifference" in the first case can imply "acceptance" of the victim's death, apart from treating this as an acceptance of the risk of death (which in the Chamber's formulation is not sufficient to prove intent in low-risk cases). In contrast, one could say in the second case that the actor "accepts the risk" and is simply mistaken about his ability to prevent the risk, the level of his expertise, or both.¹⁷²

The second element as defined by the *Lubanga* Pre-Trial Chamber also incorporates the *mens rea* of *dolus eventualis* which is

47; Abu Garda, *supra* note 155, at ¶ 161; Banda and Jerbo, *supra* note 155, at ¶¶ 150-57.

168. Lubanga, *supra* note 155, at ¶¶ 361-65; Katanga and Ngudjolo, *supra* note 155, at ¶¶ 533-37.

169. Lubanga, *supra* note 155, at ¶¶ 366-67; Bemba, *supra* note 155, at ¶ 351; Banda and Jerbo, *supra* note 155, at ¶¶ 150, 160-61; Abu Garda, *supra* note 155, at ¶¶ 161. The last subjective element has mostly been dropped by Pre-Trial Chamber Confirmation Decisions which combine co-perpetration and indirect perpetration into indirect co-perpetration as a mode of responsibility. In this new formulation, the last subjective element for indirect co-perpetration is that the perpetrator must be aware of the factual circumstances that enable him to exercise joint control over the crime's commission through another person. See Katanga and Ngudjolo, *supra* note 155, at ¶¶ 533-37; Muthaura, Kenyatta and Ali, *supra* note 155, at ¶ 410; Ruto, Kosgey and Sang, *supra* note 155, at ¶ 292. The Lubanga Trial Chamber mentions it (Lubanga Judgment, *supra* note 154, at ¶ 1008) but does not finally apply the standard (Lubanga Judgment, *supra* note 154, at ¶ 1013): see Ambos, *First Judgment*, *supra* note 160, at 148.

170. See Lubanga, *supra* note 155, at ¶ 354 n.436, quoting *Stakic*, Case No IT-97-24-T, Trial Judgment at ¶ 587.

171. See Lubanga, *supra* note 155, at ¶ 355 n.437.

172. See Weigend, *supra* note 164, at 483.

unlikely to meet the "intent" and "knowledge" test required under Article 30 of the Rome Statute and has subsequently been rejected.¹⁷³ Thus, the co-perpetrators must "know the existence of a risk that the consequence will occur," that is, they must be aware that the consequence will occur "in the ordinary course of events."¹⁷⁴ This is clearly the more logical interpretation of Article 30¹⁷⁵ and a more suitable subjective requirement for co-perpetration liability under the Rome Statute.

In the decision on confirmation of charges in *Katanga and Ngudjolo*, the Pre-Trial Chamber focused on the elements of liability for joint perpetration through another person and combined the doctrines of "co-perpetration" and "indirect perpetration" to form "indirect co-perpetration" as a mode of liability.¹⁷⁶ It then set out the objective elements for perpetration by means, focusing specifically on the doctrine of *Organisationsherrschaft*.¹⁷⁷ These elements have been reiterated in subsequent Pre-Trial Chamber Confirmation of Charges decisions.¹⁷⁸

The first element consists of the perpetrator's control over the organization.¹⁷⁹ The second element is the existence of an organized and hierarchical apparatus of power.¹⁸⁰ The organization must include a sufficient number of fungible subordinates to ensure manifest compliance with orders that lead to the commission of crimes. The leader must exercise authority through means such as his power to hire, train, discipline, and provide resources to his subordinates to secure this control.¹⁸¹

The interpretation of this element has posed some difficulties in the Kenya Confirmation of Charges decisions.¹⁸² In the *Ruto, Kosgey and Sang* Confirmation Decision, the Pre-Trial Chamber upheld the

173. Bemba, *supra* note 155, at ¶¶ 352-70. See also Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 334-36; Banda and Jerbo, *supra* note 155, at ¶ 159; Lubanga Judgment, *supra* note 154, at ¶ 1011.

174. Lubanga Judgment, *supra* note 154, at ¶ 1012.

175. See also Ambos, *supra* note 160, at 149-50.

176. Katanga and Ngudjolo, *supra* note 155, at ¶¶ 490-93; see also Ruto, Kosgey and Sang, *supra* note 155, at ¶ 287, 289; Abu Garda, *supra* note 155, at ¶¶ 156-57. See Weigend, *supra* note 129, at 110 (stating that there is nothing novel about this mode of liability which is merely a combination of two accepted modes of perpetration).

177. See Katanga and Ngudjolo, *supra* note 155, at ¶¶ 495-99.

178. Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 407-10; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 313-32.

179. See Katanga and Ngudjolo, *supra* note 155, at ¶¶ 500-10; Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 407-10; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 313-32.

180. Katanga and Ngudjolo, *supra* note 155, at ¶¶ 511-14; Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 408; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 313-17.

181. Katanga and Ngudjolo, *supra* note 155, at ¶ 514, citing ROXIN, TÄTERSCHAFT UND TÄTHERRSCHAFT at 245; BGHSt 40, 218, 236.

182. Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 408-09, 191-213; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 315, 197, 315.

Prosecution's contention that William Ruto had control over an organization called the "Network"¹⁸³ which was used to carry out attacks against civilians who were perceived supporters of the Party of National Unity (PNU) in Kenya.¹⁸⁴

This characterization of the "Network" as an organization was challenged by Judge Kaul. Though his dissent focused on whether the jurisdictional requirements of a crime against humanity are met if the crimes are not committed pursuant to the policy of a State or "organization,"¹⁸⁵ his factual conclusions are also pertinent to assessing whether the Network would satisfy the objective element of *Organisationsherrschaft*. In Judge Kaul's assessment, the Network was an ad hoc "ethnically based gathering of perpetrators" that was created for the sole purpose of assisting the ethnic community's political aspirations during Kenya's 2007 presidential elections. An "amorphous alliance" of "co-ordinating members of a tribe with a predisposition towards violence with fluctuating membership" was not transformed into an organization merely by having planned and co-ordinated violence during a series of meetings.¹⁸⁶ This is a persuasive objection to the characterization of the Network as an "organization" which would be equally valid in rejecting it as satisfying the second objective element for indirect perpetration.

The third element is execution of the crimes through "automatic" compliance with orders.¹⁸⁷ This automatic compliance may not only be derived from the fungibility of the direct perpetrator, but can also be achieved through intensive and violent training regimens for subordinates.¹⁸⁸ Additional methods of securing automatic compliance with orders, such as swearing an oath of fealty, use of disciplinary measures, and payment and punishment mechanisms, have been identified in the Kenya Confirmation of Charges decisions.¹⁸⁹

183. Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 307-09, 316-332.

184. *Id.*, at ¶¶ 207, 216.

185. *Id.*, Dissenting Opinion by Judge Hans-Peter Kaul, at ¶¶ 8-13.

186. Ruto, Kosgey and Sang, *supra* note 155, Dissenting Opinion by Judge Hans-Peter Kaul, at ¶¶ 8-13; *see also* Prosecutor v. Ruto, Kosgey and Sang, Case No. ICC-01/09-01/11-2, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosegey and Joshua Arap Sang ¶¶ 18-49 (ICC Pre-Trial Chamber II, Mar. 15, 2011).

187. *See* Katanga and Ngudjolo, *supra* note 155, at ¶¶ 515-18; Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 409-10; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 313-32.

188. Katanga and Ngudjolo, *supra* note 155 at ¶ 518. This addition to the element of fungibility is not found in the original German doctrine: *see* Weigend, *supra* note 129, at 107 (critical of this position, stating that the Chamber may have found it necessary to adapt the doctrine to suit the exigencies of mass atrocity in Africa); for a more positive interpretation, *see* van der Wilt, *supra* note 13, at 312 (arguing that this new element introduces flexibility in the doctrine).

189. Muthaura, Kenyatta and Ali, *supra* note 155, at ¶¶ 408, 208-13; Ruto, Kosgey and Sang, *supra* note 155, at ¶¶ 317-31.

VI. TOWARDS A THEORY OF PERPETRATION FOR INTERNATIONAL CRIMES

A. Analogies and Lessons from Domestic Criminal Law

At first glance, English criminal law does not appear to offer much scope for an expansive concept of principalship that would encompass the liability of several perpetrators for a collective crime. The basic assumption for perpetrator liability is that the perpetrator directly and immediately fulfills the definitional elements of the offense¹⁹⁰ and it is difficult to establish this condition for international crimes. English law also makes it difficult to trace the chain of causation from the immediate physical perpetrator to the mastermind behind the crime such that the latter can be held responsible as a principal despite, and in addition to, the criminal responsibility of the former.¹⁹¹ It does provide for exceptions to these premises in the form of the doctrines of innocent and semi-innocent agency.¹⁹² It does not, however, address situations of mass criminality where there may be several thousand immediate perpetrators and tracing liability back to the policy level perpetrator using a simple one-to-one causation analysis (leader D "caused" the actions of immediate perpetrators A, B, C, D, . . .) will be very difficult. Moreover, it does not contemplate situations where this high level perpetrator may not know of the exact identity of his so called "agent" or have any contact with him. Neither does it capture the distinctive aspects of mass criminality: its collective nature and the climate of moral permissiveness that encourages or endorses this conduct. The reason for this paucity is partly the much greater emphasis given to the doctrines of conspiracy and joint criminal enterprise as modes of accounting for collective action. These are inchoate and accessorial forms of liability though, and themselves rest on questionable foundations.

German criminal law theory on perpetration, on the other hand, attempts to accommodate these aspects of international crimes. The emphasis on the concept of "control" rather than causation and the perpetrator as the *Zentralgestalt* based either on his functional control over the act (co-perpetration) or his control over the will of the direct perpetrator (indirect perpetration) opens up the possibility of holding several people simultaneously responsible as principals. While English law also recognizes the concept of joint principals, because of its exacting conditions for causation and the requirement that the perpetrator must personally fulfill at least some part of the *actus reus*,¹⁹³ the scope for perpetrator responsibility is much narrower.

190. See *supra* text accompanying notes 34-36.

191. See *supra* text accompanying notes 37-41.

192. See *supra* text accompanying notes 67-71.

193. See *supra* text accompanying notes 34-39.

German criminal law also recognizes the concept of the "perpetrator behind the perpetrator" in ways that are pertinent for international crimes. For instance, in the *Cat King* case, the *Hintermann's* domination over the act was grounded on the intensity of his effect on the *Vordermann* and in his inducement and exploitation of the latter's mistake of law.¹⁹⁴ This could *prima facie* apply to the relationship between the high level and physical participants in mass atrocity where the leader induces and exploits the physical perpetrators' belief that the crime is necessary and permissible. We would still need to establish, however, how this influence and effect can occur if the parties were never in contact.

Even more significant than these concepts is the category of *Organisationsherrschaft* which recognizes that individuals in leadership positions can be held responsible as perpetrators of crimes that are committed by a very large number of anonymous and exchangeable physical perpetrators.¹⁹⁵ Roxin's criterion of detachedness from the law is also sensitive to the perversion of norms that makes these crimes possible.¹⁹⁶ The doctrine's shortcomings lie in its treatment of the character of the physical perpetrator as a soulless automaton. It also oversimplifies to the point of caricature, the conditions under which mass atrocity occurs: a vertical, tautly-structured hierarchical organization is simply non-existent in most cases of international crimes.

Despite these reservations, *Organisationsherrschaft* addresses several of our intuitions about mass atrocity and provides a promising template around which one can construct a theory of perpetration for international crimes. This is, for instance, true of Schroeder's observation that the *Hintermann* should be liable as a perpetrator because he deliberately inflames the passions of the intermediary and uses him as a tool to achieve criminal results.¹⁹⁷ This is certainly one part of the reality of how high level perpetrators can harness ordinary people to physically commit the crimes which they have set in motion. The BGH's version of *Organisationsherrschaft* also emphasizes the carefully planned, culpable actions of the *Hintermann*: his liability hinges on the conscious creation and utilization of the basic framework conditions of an organizational structure that result in the realization of an offense. In both cases, the focus is, as Roxin states (though not quite for the same argument), on the *Hintermann's* ability to unleash destruction on a scale that far exceeds that of an ordinary instigator.¹⁹⁸ Though the language of the

194. MPICC report, *supra* note 98, at 22.

195. See *supra* text accompanying notes 122-123.

196. See *supra* text accompanying notes 146-153.

197. See *supra* text accompanying notes 125-126.

198. Claus Roxin, *Anmerkungen zum Vortrag von Prof. Dr. Herzberg*, in *INDIVIDUELLE VERANTWORTUNG UND BETEILIGUNGSVERHÄLTNISSE BEI STRAFTATEN IN*

law can scarcely accommodate an element as vague as “destructive potential” in its lexicon, it is an important observation to be kept in mind while constructing our theory of perpetration.

The other important insight of *Organisationsherrschaft* is the distinction between individual and collective unlawfulness. The *Hintermann*’s criminal responsibility is derived from organizational unlawfulness rather than the act of any single perpetrator.¹⁹⁹ This obviates the problem of having to trace the chain of causation from each physical perpetrator’s individual act of murder to the overall genocidal enterprise in which the *Hintermann* occupies a leadership position. It also circumvents the contradiction in holding the *Hintermann* liable despite a criminally responsible intermediary. It offers the closest domestic analogue to the uniquely collective dimension of international crimes.

The ICC, as discussed earlier, has already attempted to combine *Organisationsherrschaft* with the concept of co-perpetration for attributing responsibility to high and mid-level perpetrators. It would be useful to consider whether some promising aspects of *Organisationsherrschaft* can indeed be taken together with certain aspects of co-perpetration in German criminal law in developing a doctrine of perpetration for situations of mass atrocity.

B. A Theory of Perpetration for International Crimes

1. Responsibility Based on the Concept of Control

a. Rationale and framework

The conception of the perpetrator of a crime as the *Zentralgestalt* in the course of events constituting the offense is a powerful starting point for a theory of perpetrator responsibility: it accords with our intuitions to assign perpetrator responsibility to an individual whose contribution to the offense pushes him in the very center of its occurrence. We then need to fill this concept of the *Zentralgestalt* with content to discover what conditions would qualify for holding someone responsible as a perpetrator.

Mass atrocity cannot, strictly speaking, be “controlled” by any one individual; the spontaneity, initiative, and arbitrariness displayed by mid and low level participants that is characteristic of mass atrocity²⁰⁰ precludes a scenario where any one individual has the last and final say on whether the international crime will occur. Instead, we must shift the focus to control over what is truly central to their commission—control over the unleashing of a destructive po-

BÜROKRATISCHEN ORGANISATIONEN DES STAATES, DER WIRTSCHAFT UND DER GESELLSCHAFT (Knut Amelung Hrsg., 2000), at 55, 56.

199. See *supra* text accompanying notes 139-141.

200. OSIEL, *supra* note 20, at 98-104.

tential that can lead to the commission of mass atrocity and is intended to do so. Osiel's metaphor of the culpable village watchmaker who constructs a clock, attaches a bomb to it, and then walks away so that detonation occurs much later²⁰¹ is over simplified, but nonetheless instructive here in identifying some important features of where the crux of the action lies in mass atrocity. By assembling and winding up the clock, the watchmaker sets into motion a process that results in the explosion and the harm arising from it. He will thus be responsible for it, even if he does not know the exact identity of the potential victims or the manner in which they would be harmed.²⁰²

For cases of mass atrocity, Osiel's metaphor helps us look for the central figure in their occurrence, away from the time and place of the concrete crime, and to the scene where the machinery for their operationalization was set up. The *Zentralgestalt* in an international crime is the person who sets this entire machinery in motion and utilizes it in order to achieve the criminal results he intends, or knows, will occur. The significance of this position has been acknowledged, albeit in a different context, by most analysts of genocide and ethnic cleansing²⁰³ and lies at the heart of what commentators such as Schroeder and Roxin are concerned about: the potential for destruction possessed by the *Hintermann*. This potential can exist by virtue of his leadership position, charisma, or de facto authority over a large number of biddable individuals, and his conscious creation and manipulation of a situation²⁰⁴ that results in tremendous harm.

b. Objective/*actus reus* elements

The objective elements for perpetration responsibility that I outline here can be accommodated within the definition of perpetration under Article 25(3)(a) of the Rome Statute. They borrow in some respects from the concept of *Organisationsherrschaft* but with substantial modifications to suit the specific circumstances of mass atrocity. As we discussed above, the *Zentralgestalt* in an international crime is the person who creates and sets into motion or utilizes the process which results in the commission of mass atrocity. Following this rationale, I identify the first objective element as the perpetrator's "control over the act" by virtue of his conscious creation, operationalization or utilization of the framework conditions of the process that results in the realization of the international crime. Thus, the *actus reus* consists of the accused's creation or manipula-

201. *Id.*, at 104.

202. *Id.*, at 104.

203. See, e.g., *id.*, at 104.

204. See, e.g., MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 25-26 (2007) and references therein.

tion of the apparatus that results in the realization of the elements of a crime within the jurisdiction of the court. This may encompass a series of activities ranging from formulating a plan, deciding on the mode of its execution, setting up a framework to achieve the intended outcome, and ordering subordinates to ensure its implementation.

Several clarifications are in order here. First, instead of the direct individual criminal act committed by the physical perpetrator, hegemony over the "act" here must be taken to mean control over the sequence of events leading to the result of the elements of the offense. The perpetrator would thus have the central position if he controls the sequence of events till the implementation of the international crime.²⁰⁵ Second, this "control" is not based on the law's absolution of the physical perpetrator from criminal liability. Neither does it reflect that he has the "last and final say" over whether the crime will occur. Instead, we must shift the temporal focus of the control from the conduct that immediately precedes the commission of the crime to the conduct which results in the events leading to the mass crime.

The "control" is based on the perpetrator's creation or manipulation of the apparatus that results in mass atrocity. This does not imply that the apparatus he sets up or exploits must and can only result in the commission of an international crime. Rather, there must be a high degree of certainty, greater than that present in ordinary cases of instigation, that the crime intended will occur. The perpetrator's control will stem from the intensity of the effect of his conduct²⁰⁶ over the destructive machinery of violence. Quite often, this will be based on his occupying a position of some authority within the apparatus that initiates or fuels mass atrocity.

Second, there must exist an operational framework or apparatus which the perpetrator either establishes or uses through which he can set in motion the events that result in the commission of the crime. The perpetrator must occupy a position within, or in relation to, this apparatus which enables him to harness its potential to achieve the criminal result. This apparatus need not, however, be vertically structured or rigidly hierarchical. Informal networks of power with weak links may sometimes be more useful for the commission of international crimes than tautly structured apparatuses.²⁰⁷ Neither is it necessary that each individual physical perpetrator is part of the apparatus. The individual micro crimes committed by the direct perpetrators which comprise the international crime, however, must be related, in more than a *de minimis* way, to the activities of this operational framework. For instance,

205. See *supra* text accompanying notes 144-145 and text following note 145.

206. See *supra* text accompanying notes 124.

207. OSIEL, *supra* note 20, at 115. This would obviate the problem identified in the Ruto, Kosgey and Sang Confirmation Decision: see *supra* text accompanying notes 185 to 186.

consider a situation where X, belonging to ethnic group A, kills his neighbor Y, who is a member of ethnic group B, because he covets his property. This crime is, however, committed within a context where the public radio, owned by the government comprised of members of A, exhorts all members of A to eliminate all members of B. Militia members supported by the government distribute weapons in X's village, print pamphlets with incendiary messages targeting group B, and make public lists of all the residents of the village belonging to B. X is also conscious that members of B are being routinely killed with the approval of, or at least without fear of sanction by, the government. In this situation, the operational framework or apparatus will consist of the network of militia, media, and governmental entities that members of A utilize to encourage and perpetrate violence against members of B. The killing of Y will be related in more than a *de minimis* sense to the network of militia and state policy that sanctions the elimination of group B.

The third objective element is the existence of circumstances such that the individual crime conforms to the prevailing social norm. This element admittedly goes beyond a simple assessment of the responsibility of the individual defendant before the court and involves the court in ascertaining the veracity of complicated historical, social, and political facts. It is this element, however, that makes international crimes distinct from their domestic counterpart. Moreover, it is this perversion of norms that lends the high level perpetrator his destructive potential. It makes the commission of the individual crimes by ordinary people far more likely than in a situation where these acts are condemned by the moral and social climate, and the individual must overcome his scruples in acting against them. This does not mean that the positive legal order in the state where these crimes are committed must endorse them. There can be a formal commitment to fighting crime in a state despite the crimes being encouraged, ordered, or tolerated by the government in practice. Neither does it imply that the sanction for the crimes must come only from the government or the state. There can be a "para-state" or a state within a state that is based on achieving these criminal aims. This could even be constituted by rebel groups that enjoy a great deal of authority or power over significant portions of the population in the state where these crimes are committed.

c. Subjective/*mens rea* elements

The subjective elements for perpetrator liability are quite close to those required for indirect perpetration in German criminal law and elaborated by the ICC in its adoption of *Organisationsherrschaft* in its decision on the confirmation of charges in *Katanga and*

Ngudjolo.²⁰⁸ The perpetrator must have a "double intent"—that is, he must have intent with respect to the elements of the offense in question as well as in relation to the elements that enable him to establish his control over the "act." Thus, he must fulfill the *mens rea* elements for each individual crime with which he is charged. This part of the mental element could be included within the definition of the crime (as is the case with the definition of genocide in all international instruments) or it may be included within a separate provision that applies to all the crimes which fall within the jurisdiction of the international tribunal in question (as in Article 30 of the Rome Statute of the ICC). In addition, he must be aware of the circumstances that enable him to create and utilize the framework conditions which result in the commission of the crimes. For instance, he must have knowledge of his position or authority that allows him to harness this apparatus for the ends he desires, and the atmosphere of moral permissibility for the crimes he wants.

2. *Organisationsherrschaft* Combined with Co-perpetration

Mass atrocity often involves several individuals in leadership positions acting together to achieve the criminal results they desire. In these cases, the issue of whether the conduct of the other high level perpetrators can be mutually attributed in a manner such that they are all equally and jointly responsible for all the crimes committed by each one of them becomes relevant. The ICC recognized this possibility in its Confirmation of Charges decisions by combining the doctrine of co-perpetration with the doctrine of *Organisationsherrschaft* in order to achieve this mutual attribution.²⁰⁹ The new version of *Organisationsherrschaft* can also be employed alongside the doctrine of co-perpetration to achieve the same result. While the subjective elements have been spelt out relatively clearly, the objective elements merit further clarification:

(i) The element of a common plan requires mutual consent over the joint realization of the act, including acceptance or approval of an already formed plan. The co-perpetrators must work together jointly based on a division of labor towards the implementation of the plan with the (subjective) awareness of the risk that this will result in the commission of the crime. The plan cannot be predominantly non-criminal, and must include the commission of a concrete crime.

(ii) The act contribution of each co-perpetrator must be of sufficient weight and importance such that it grounds the necessary co-domination over the act. This essential contribution must then exist for each individual international crime with which the accused is

208. Katanga and Ngudjolo, *supra* note 155.

209. See *id.*, at ¶¶ 519–20; Ruto, Kosgey and Sang, *supra* note 155, at ¶ 287, 289; Abu Garda, *supra* note 155, at ¶¶ 156–57.

charged (the crime of recruitment of child soldiers in the *Lubanga* decision) rather than simply to the common plan (broadening the base of the army). While this contribution may be at the preparation stage, it must be of sufficient importance so that the lack of act immediacy is compensated for by the weight of the contribution. Further, even if the accused participates in the execution of the plan after it has already begun, based on a mutual understanding and with the necessary act domination through his essential functional contribution, he will be responsible as a co-perpetrator. This is particularly relevant in the context of international crimes which may be spread over several years and involve several changes in top level personnel.

VII. CONCLUSION

The modified version of *Organisationsherrschaft* that I have proposed here is a new form of perpetration responsibility for international crimes that engages with domestic criminal law principles while simultaneously capturing the unique features of international crimes. It assumes that principles of criminal responsibility developed in the domestic criminal law context are salient for international crimes. In this sense, there is no attempt to, as it were, reinvent the wheel; I take the set of doctrinal justifications that have guided the ascription of responsibility in these systems for granted and make no claims to developing any alternative account of the theoretical foundations of criminal responsibility. At the same time, rather than an indiscriminate commitment to any particular domestic conceptualization of criminal responsibility, I use these divergent justifications in the form of guideposts to develop an account of perpetration for international crimes.

Though the specific elements of this new form of perpetration constitutes a departure from settled principles of principal responsibility in both German and English criminal law (and by extension criminal law doctrine in other countries that borrow from these systems), they remain true to the fundamental concerns that guide the allocation of criminal responsibility in both jurisdictions. At the same time, I modify these principles to highlight the distinctive features of international crimes. When combined with co-perpetration as outlined above, this new version of *Organisationsherrschaft* takes us closer to an accurate picture of the role and function of high level participants in international crimes and situates them in the political context of mass atrocity perpetuated through the acts of several thousands of anonymous individuals. It is also capable of adoption as a theory of responsibility under Article 25(3)(a) of the Rome Statute to hold an accused responsible for the commission of an international crime.