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## Command responsibility and *Organisationsherrschaft*: ways of attributing international crimes to the ‘most responsible’

K A I A M B O S \*

### I. Introductory remarks

The increasing trend to prosecute and punish international crimes and criminals, to fight against the widespread impunity for gross violations of human rights, with the means of (international) criminal law (see para. 4 of the preamble of the ICC Statute) is certainly to be welcomed and has received broad support in the academic literature, including by this author.<sup>1</sup> At the same time, however, one must not lose sight of the fundamental principles of criminal law which are the product of centuries’ long fights for fairness and the rule of law and which must not be ignored by the international criminal tribunals, especially the International Criminal Court (hereinafter ‘ICC’).

Indeed, from a national criminal law perspective, rooted in the tradition of enlightenment, there exists a tension between International Criminal Law (hereinafter ICL)/international criminal jurisdiction and national criminal law/domestic jurisdictions at least in two respects. On the one hand, the increasing trend to criminalization, especially in its extreme form promoted by certain NGOs as prosecution and punishment at whatever cost, often conflicts with the traditional criminal law

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<sup>1</sup> K. Ambos, *Straflosigkeit von Menschenrechtsverletzungen, Zur “impunidad” in südamerikanischen Staaten aus völkerstrafrechtlicher Sicht* (Max Planck Institute, Freiburg 1997); *Impunidad y Derecho Penal Internacional* (2nd ed, Ad Hoc, Buenos Aires 1999).

principles grounded in the rule of law (*Rechtsstaat*).<sup>2</sup> To a lesser extent, the criminalization efforts at the international level may conflict with decriminalization efforts at the national level, either by a reduction of the substantive criminal law (downgrading criminal offences to mere administrative infringements of the law) or by procedural means using the well-known techniques of procedural discretion, abbreviations of criminal proceedings or various forms of negotiations (guilty plea, *conformidad*, *pattagamiento*, *transactie*, etc.).<sup>3</sup> On the other hand, the relationship between the system (criminality) and the individual (criminality) is not free from doubt. While it is clear that ICL is concerned with macro-criminality in the sense of Herbert Jägers' fundamental study<sup>4</sup> and that domestic criminal law is, normally, concerned with ordinary and individual criminality, the boundaries between the system and the individual level are blurred. While criminal law, at whatever level and in whatever form, always goes after the individual perpetrator, it is clear that ICL cannot do without investigating and understanding the political, social, economic and cultural framework and background of the crimes (the 'crime base') and thus goes well beyond the establishment of mere individual responsibility. This is all the more true if we take into account that current practice in ICL concentrates increasingly, as a matter of law or fact, on the top or high-level perpetrators and leaves the mid- or low-level perpetrators to the domestic jurisdictions.<sup>5</sup> The focus on the top necessarily leads to an

<sup>2</sup> For a radical critique in this respect with regard to Latin America, see D. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', *Nueva Doctrina Penal* (Buenos Aires, Ediciones del Puerto 2005 A) 73 *et seq.*

<sup>3</sup> See on the increasing trend against mandatory prosecution (principle of legality in its procedural form) recently Jehle and Wade (eds.), *Coping with Overloaded Criminal Justice Systems: the Rise of Prosecutorial Power Across Europe* (Springer, Berlin 2006).

<sup>4</sup> H. Jäger, *Makrokriminalität. Studien zur Kriminologie kollektiver Gewalt* (Suhrkamp, Frankfurt 1989).

<sup>5</sup> Cf. ICC, Office of the Prosecutor ('OTP'), Paper on some policy issues before the Office of the Prosecutor (September 2003) [www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) 3, 7, accessed 2 July 2008 ('focus ... on those who bear the greatest responsibility'; more recently OTP, Fourth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005) (14 December 2006) [www.icc-cpi.int/library/organs/otp/OTP\\_ReportUNSC4-Darfur\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC4-Darfur_English.pdf) 4 accessed 2 July 2008. For Pre-Trial Chamber I this *ratione personae* limitation is also ensured by the gravity threshold of Art. 17(1)(d) (situation in the DRC in the case of the *Prosecutor v Thomas Lubanga Dyilo*, Decision concerning PTC I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06 (24 February 2006) para. 50: 'intended to

inquiry into the criminal structures they represent. In this sense, it also seems clear that the system and individual level are not mutually exclusive but rather complement each other; a one-sided focus on one or the other would not fully take into account the complexities of macro criminality. For the analysis of individual criminal responsibility, this means that one should focus on the rules of imputation or attribution for the top perpetrators, the intellectual mastermind, the ‘man in the background’, i.e. the people running the criminal organization or enterprise responsible for the atrocities.<sup>6</sup> This brings us to the three possible forms of attribution which may be applied alternatively or cumulatively: joint criminal enterprise (‘JCE’); command responsibility; and control/domination of the act by virtue of a hierarchical organization (hereinafter: *Organisationsherrschaft* or ‘domination by virtue of an organization’).<sup>7</sup> As the first one is the object of another study in this book, by Harmen van de Wilt, I will focus on command responsibility (in section II) and *Organisationsherrschaft* (section IV) and treat JCE only in relation to the former (section III).<sup>8</sup>

## II. Command responsibility

### 1. *The basics*

Modern case law lists *three requirements* for the responsibility of the superior:<sup>9</sup>

ensure that the Court initiates cases only against the most senior leaders as being the most responsible’).

<sup>6</sup> For the purpose of imputation in criminal law the ‘man’ or people in the background are always natural, not juridical persons. This does not deny that system criminality, as defined in the introductory chapter of this book, refers to situations where collective entities order or encourage, or permit or tolerate the commission of international crimes. This collective element precisely concerns the system level of macro criminality and explains the existence of a collective or context element in international crimes.

<sup>7</sup> It is difficult to find a precise translation of the German term ‘*Organisationsherrschaft*’; for the substance of the concept the reader should turn to section IV below.

<sup>8</sup> For my view on JCE, see ‘Joint criminal enterprise and command responsibility’ (2007) 5 JICJ 159–83 and *Internationales Strafrecht* (Beck, München 2006), § 7 marginal numbers (mn) 19 *et seq.*

<sup>9</sup> *Prosecutor v Delalic et al.*, IT-96–21, Judgment, Trial Chamber (16 November 1998) para. 346. See also the following ICTY Judgments: *Prosecutor v Aleksovski*, IT-95–14/1, Judgment, Trial Chamber (25 June 1999) para. 69 *et seq.*; concurring Appeals Chamber (24 March 2000) paras. 69–77; *Prosecutor v Blaskić*, IT-95–14, Judgment, Trial Chamber (3 March 2000) para. 289 *et seq.* (294); concurring Appeals Chamber (29 July 2004) para. 484; *Prosecutor v Kordić and Čerkez*, IT-95–14/2, Judgment, Trial Chamber

1. the existence of a superior-subordinate relationship;
2. the superior's failure to take the necessary and reasonable measures to prevent the criminal act of his subordinates or punish them;
3. the superior's knowledge or having reason to know that a criminal act was about to be committed or had been committed.

As a fourth element one may consider the principal crime(s) to be committed by the subordinates,<sup>10</sup> yet this is rather an 'external' requirement, flowing quite logically from the conceptual structure of command responsibility.<sup>11</sup> Possibly the most important (objective) requirement is implicit in the first requirement, namely the material (factual) ability to exercise sufficient *control* over the subordinates so as to prevent them from committing crimes. In *Kayishema/Ruzindana* this ability was called 'the touchstone' of the doctrine, 'inherently linked with the factual situation' in the concrete case.<sup>12</sup> The third requirement, referring to the *mens rea*, can be subdivided into two different *subjective thresholds*: either the

(26 February 2001) para. 401 *et seq.*; partly reversed by Appeals Chamber (17 December 2004) but no change with regard to the requirements for superior/command responsibility, see *ibid.*, para. 827; *Prosecutor v Brđanin*, IT-99-36, Judgment, Trial Chamber II (1 September 2004) para. 275; *Prosecutor v Strugar*, IT-01-42 Judgment, Trial Chamber II (31 January 2005) para. 358; *Prosecutor v Halilović*, IT-01-48, Judgment, Trial Chamber (16 November 2005) para. 55 *et seq.* (confirmed by the App. Ch. (16 October 2007); *Prosecutor v Limaj et al.*, IT-03-66, Judgment, Trial Chamber (30 November 2005) para. 520 *et seq.*; *Prosecutor v Hadzihasanovic/Kubura*, IT-01-47-T, Judgment, Trial Chamber (15 March 2006) para. 76 *et seq.*; *Prosecutor v Oric*, IT-03-68-T, Judgment, Trial Chamber II (30 June 2006) para. 294 (confirmed by the App. Ch. (3 July 2008) para. 18); *Prosecutor v Mrksic/Radic/Slijivancanin*, IT-95-13/1, Judgment, Trial Chamber II (27 September 2007) para. 558; *Prosecutor v Boskoski/Tarculovski*, IT-04-82-T, Judgment, Trial Chamber II (10 July 2008) para. 406, *Prosecutor v Delic*, IT-04-83-T, Judgment, Trial Chamber I (15 September 2008) para. 56.

For the ICTR: *Prosecutor v Akayesu*, ICTR-96-4, Judgment, Trial Chamber (2 September 1998) para. 486 *et seq.*; *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1; ICTR-96-10, Judgment, Trial Chamber II (21 May 1999) paras. 208-31; *Prosecutor v Rutaganda*, ICTR-96-3, Judgment, Trial Chamber I (6 December 1999) para. 31 *et seq.*; *Prosecutor v Bagilishema*, ICTR-95-1A, Judgment, Trial Chamber I (7 June 2001) para. 38; *Prosecutor v Kajelijeli*, ICTR-98-44A, Judgment, Trial Chamber II (1 December 2003) paras. 754-82 (772); *Prosecutor v Semanza*, ICTR-97-20, Judgment, Trial Chamber III (15 May 2003) paras. 375-407.

<sup>10</sup> *Prosecutor v Oric*, IT-03-68-T, Judgment, Trial Chamber (30 June 2006) para. 294

<sup>11</sup> See also *Oric* Trial Judgment (n. 10) para. 295: 'so obvious that there is hardly the need of it being explicitly stated.'

<sup>12</sup> *Kayishema and Ruzindana* Trial Judgment (n. 9) para. 229 *et seq.* Concurring A. M. Danner and J. S. Martinez, 'Guilty associations: joint criminal enterprise, command responsibility, and the development of international criminal law' (2005) 93 *California Law Review* 122, 130; B. L. Bonafé, 'Finding a proper role for command responsibility' (2007) 5 *JICJ* 608 *et seq.*

superior must have actual *knowledge* with regard to the crimes; or he must possess *information* of a nature which would put him on notice of the risk of such crimes by indicating the need for additional investigation in order to ascertain whether they were committed or were about to be committed.<sup>13</sup> It follows that ignorance with regard to the commission of crimes cannot be held against the superior if he/she has properly fulfilled his/her duties of supervision (in particular, did not ignore information which indicated the commission of crimes) but still did not find out about the crimes committed by the subordinates.

## 2. Doctrinal considerations

The doctrinal analysis of a legal concept so complex as command responsibility is not a purpose *per se* or, as the French would say, *l'art pour l'art*. It is important to understand the concept fully, with a particular view to its theoretical justification and practical consequences. Article 28 of the ICC Statute, the most advanced codification of the command responsibility doctrine, can be characterized as a genuine offence or *separate crime of omission* (*echtes Unterlassungsdelikt*), not an improper form of omission in the sense of a *commission par omission*.<sup>14</sup> Although, in structural terms, the superior is to be blamed for his/her improper supervision (a 'neglect of duty'),<sup>15</sup> he/she is not only punished for this reason but also for the crimes of the subordinates. As a result, the concept creates, on the one hand, *direct* liability for the lack of supervision, and, on the other, *indirect* liability for the criminal acts of others (the subordinates), thereby producing a kind of *vicarious liability*.<sup>16</sup> The liability for the failure to

<sup>13</sup> This standard was established for the first time in *Delalic et al.* Trial Judgment (n. 9) para. 383; it was most recently confirmed in *Prosecutor v Hadzihasanovic/Kubura*, IT-01-47, Judgment, Appeals Chamber (21 April 2008) paras. 26 *et seq.*

<sup>14</sup> See, for an explanation, K. Ambos, 'Superior responsibility', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the ICC: A commentary* (vol. I, Oxford University Press, Oxford 2002), pp. 850–1.

<sup>15</sup> See, most recently, *Oric* Trial Judgment (n. 10) para. 293; B. Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem* (BWV, Berlin 2008), pp. 261 *et seq.*, 461, 464; R. Kolb, 'Droit international pénal', in R. Kolb (ed.), *Droit international pénal* (Helbing Lichtenhahn, Bâle 2008), p. 185.

<sup>16</sup> For the similarity to the employer's criminal responsibility see Ambos (n. 14) 844 *et seq.*; also E. van Sliedregt, *The Criminal Responsibility of Individuals for Violation of International Humanitarian Law* (TMC Asser Press, The Hague 2003), p. 352; C. Meloni, 'Command responsibility: mode of liability for the crimes of subordinates or separate offence of the superior?' (2007) 5 JICJ 628 *et seq.* On the '*objet de la responsabilité du supérieur*' see also *Hadzihasanovic* Trial Judgment (n. 9) para. 67 *et seq.* (69). For an

intervene is put on an equal footing with (accomplice) liability for not adequately supervising the subordinates and not reporting their crimes. In fact, recent case law takes the position that the superior is charged with his failure to comply with the duty of supervision<sup>17</sup> but this responsibility still seems to be understood as a direct one (as a principal) instead of downgrading it to accomplice liability. This is but one of the problems of the doctrine with regard to the principle of culpability.<sup>18</sup>

Responsibility for omission presupposes a *duty to act* of a person with a specific position of a 'guarantor' (*Garantenstellung und -pflicht*). This duty justifies the moral equivalence between the failure to prevent harm and the active causation of harm. As to command responsibility, it is supported by case law, scholarly writings and now, with Article 28 of the ICC Statute, regulated by statute. In essence, the status of the superior as a guarantor flows from his/her responsibility for a certain area of competence and certain subordinates (see Article 1 of the Hague Convention of 1907 and Article 4(A)(2) of the Geneva Convention III of 1949). The superior possesses the status of a *supervising guarantor* with duties to observance and control vis-à-vis his/her subordinates who constitute a potential source of danger or risk.<sup>19</sup> These duties are defined in Article 87

innovative distinction between four forms of superior responsibility (knowledge superior responsibility before the fact, knowledge superior responsibility after the fact; lack-of-knowledge superior responsibility before the fact, lack-of-knowledge superior responsibility after the fact) with different liability with regard to the conduct of the subordinates and the result produced by this conduct recently, V. Nerlich, 'Superior responsibility under Art 28 ICC Statute: for what exactly is the superior held responsible?' (2007) 5 JICJ 667–8 and *passim*.

<sup>17</sup> *Prosecutor v Krnojelac*, IT-97–25, Judgment, Appeals Chamber (17 September 2003) para. 171: 'It cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty to exercise control.'

<sup>18</sup> For this reason the German International Criminal Law Code (*Völkerstrafgesetzbuch*, Bundesgesetzblatt 2002 I 2254; for an English translation see [http://jura.uni-goettingen.de/k.ambos/Forschung/laufende\\_Projekte\\_Translation.html](http://jura.uni-goettingen.de/k.ambos/Forschung/laufende_Projekte_Translation.html), accessed 22 March 2007) distinguishes between liability as a *perpetrator* (principal) for the failure to prevent the subordinates' crimes (section 4) and *accomplice liability* for the (intentional or negligent) failure to properly supervise the subordinates (section 13) and to report the crimes (section 14); concurring A. Cassese, *International Criminal Law* (2nd edn, Oxford University Press, Oxford 2008), pp. 244–47; Meloni (n. 16) 637 with n. 108.

<sup>19</sup> Cf. T. Weigend, '*Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht*' (2004) 116 ZStW 1004, 1013. See also Burghardt (n. 15) 186 *et seq.*, 192; H. Olásolo, *Unlawful Attacks in Combat Situations* (Martinus Nijhoff, Leiden 2008), p. 193. According to O. Triffterer, 'Command responsibility' – *crimen sui generis* or participation 'as otherwise provided' in Art. 28 ICC Statute in J. Arnold *et al.* (eds.), *Festschrift für Albin Eser* (Beck, München 2005), p. 910, the duty is based on the requirement of effective control.

of the Additional Protocol I to the Geneva Conventions of 1977 ('AP I') in relation with Article 43(1) AP I. Accordingly, military commanders are obliged to prevent, suppress and report breaches of the Conventions and AP I by members of their armed forces and other persons under their control (Article 87(1) AP I). In a way, one can speak of a legal or positive duty to act, since the duty to act is based on a positive norm of treaty law which, in addition, is regarded as customary law. This general duty to act is complemented by the various specific rules of positive conduct as laid down in the AP I.<sup>20</sup> Although these rules were initially addressed only to state parties, they have always served as conduct rules for individuals and for prosecution of individual violators;<sup>21</sup> in any case, they must now be considered the basis of rules of responsibility for an individual's failure to act, since the doctrine of superior responsibility and the major part of the offences established by the Geneva law (including AP I) have been 'individualized' by the ICC Statute and by national implementation laws.

The minimum requirement of command responsibility is that the superior concerned have *command*,<sup>22</sup> based on a *de iure* or *de facto* position of superiority.<sup>23</sup> A superior with command and authority normally *controls* his/her subordinates, but this control (command, authority) has to be '*effective*'.<sup>24</sup> This is not a mechanical, naturalistic but a highly normative standard.<sup>25</sup> For the control requirement is an element

<sup>20</sup> J. de Preux, 'Commentary on Articles 86 and 87 of Protocol Additional I', in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1988 to the Geneva Conventions of 12 August 1949* (Nijhoff, Geneva 1986) mn 3536; Burghardt (n. 15) 187 *et seq.*

<sup>21</sup> Cf. C. Greenwood in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press, Oxford 2008) mn 134.

<sup>22</sup> On the sources of *de iure* command, see I. Bantekas, 'The contemporary law of superior responsibility' (1999) 93 AJIL 578–9. For a detailed analysis of the *de facto* command and its preconditions, see Burghardt (n. 15) 108 *et seq.*, 152 *et seq.*

<sup>23</sup> Most recently, *Oric* Trial Judgment (n. 10) para. 309; *Mrksic* Trial Judgment (n. 9) para. 560; *Prosecutor v Karera*, ICTR-01-74, Judgment, Trial Chamber I (7 December 2007) para. 564.

<sup>24</sup> *Delalic* Trial Judgment (n. 9) para. 378; concurring Judgment, *Delalic et al.*, IT-96-21, Judgment, Appeals Chamber (20 February 2002) para. 346; *Aleksovski* Trial Judgment (n. 9) para. 76; *Blaskic* Trial Judgment (n. 9) paras. 301, 335; *Bradjanin* Trial Judgment (n. 9) para. 276; *Oric* Trial Judgment (n. 10) para. 311; *Mrksic* Trial Judgment (n. 9) para. 560; *Strugar* Trial Judgment (n. 9) para. 362; *Karera* Trial Judgment (n. 23) para. 564; *Hadzihasanovic* Appeals Judgment (n. 13) para. 21. See also I. Bantekas (n. 22) 580; M. Osiel, 'Modes of participation in mass atrocity' (2005) 39 *Cornell International Law Journal* 795–6; M. Osiel, 'The banality of the good: aligning incentives against mass atrocity' (2005) 105 *Columbia Law Review* 1774 *et seq.*; Olásolo (n. 19) 190 *et seq.* See also the critical overview of the ICTY case law by Burghardt (n. 15) 156 *et seq.*, 181 *et seq.*

<sup>25</sup> See also Osiel (n. 24) (*Columbia Law Review*) 1779.



of the objective imputation of the crimes to the superior and modern theories understand this imputation normatively.<sup>26</sup>

While it is clear that the form of control may differ according to the position of the superior,<sup>27</sup> the standard must be concretely determined on a case-by-case basis. In fact, the case law has developed certain criteria that indicate to some extent the degree of control necessary, for example the power to issue orders or to take disciplinary action.<sup>28</sup> Yet fine points are controversial: for example, whether a direct control of subordinates is necessary or whether this control can be mediated by other superiors/subordinates and to what extent the superior must be able to identify the subordinates.<sup>29</sup> In any case, the superior's liability for her omission stands and falls – on an objective level – with her effective authority and control: the possibility of control forms the legal and legitimate basis of the superior's responsibility; it justifies her duty of intervention. Article 28 of the ICC Statute requires that the crimes of the subordinates be 'a result' of the superior's 'failure to exercise control properly', i.e. – setting aside the ICTY case law<sup>30</sup> – a *causal relationship* between the superior's failure and the subordinate's commission of crimes must exist. The causality requirement also follows from the fact that the underlying crimes of the subordinates constitute the point of reference of the superior's failure of supervision, i.e. the occurrence of the crimes was 'caused' by the failure of supervision.<sup>31</sup>

The superior must take the necessary and reasonable measures to *prevent* the criminal acts of his subordinates or *punish* them. These are two distinct duties, the former being the primary one with respect to future crimes and the latter being subsidiary with respect to past crimes.<sup>32</sup> The

<sup>26</sup> See, for the development from *imputatio facti* to normative imputation, K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Duncker und Humboldt, Berlin reprint 2004), p. 557 *et seq.*; K. Ambos, *La Parte General del Derecho Penal Internacional* (Temis, Bogotá 2006), p. 143 *et seq.*

<sup>27</sup> See Osiel (n. 24) (*Cornell International Law Journal*) 796.

<sup>28</sup> For a summary of the case law, see *Oric* Trial Judgment (n. 10) para. 312.

<sup>29</sup> For a broad interpretation on both points, see *Oric* Trial Judgment (n. 10) para. 311. The defence in this case required the 'identification of the person(s) who committed the crimes' (quoted in (n. 10) para. 315).

<sup>30</sup> See recently, with further references, *Oric* Trial Judgment (n. 10) para. 338. See also the critical analysis by Burghardt (n. 15) 206 *et seq.*

<sup>31</sup> Osiel (n. 24) (*Columbia Law Review*) 1779 *et seq.*; Olásolo (n. 19) 190; see also Meloni (n. 16) 629–30; Nerlich (n. 16) 673, arguing for a risk-increase-standard (following Ambos (n. 14) 860); Kolb (n. 15) 189. See also the different approach adopted by Burghardt (n. 15) 215 *et seq.* (219), 225, 261 *et seq.*, 405, 463 *et seq.*

<sup>32</sup> *Oric* Trial Judgment (n. 10) para. 326, with further references to the case law.



duty is triggered by the awareness of the crimes<sup>33</sup> or reasonable suspicion as to the commission of past crimes.<sup>34</sup> The type of countermeasure depends on the circumstances of each case, criteria being, for example, the degree of effective control, the gravity of the crime, etc.<sup>35</sup> Concrete measures include giving special orders for seeking compliance with the law of war, investigating alleged crimes, protesting against criminal action, reporting to competent authorities, etc.<sup>36</sup> While with regard to the duty to *prevent* (future) crimes, the commander must be in control at the moment of the possible commission (principle of coincidence) – otherwise he will not be able to prevent them – the duty to *punish* also arises for earlier crimes, i.e., crimes committed under the former commander but subsequently known to his successor who therefore has the duty to punish the subordinates.<sup>37</sup> As the duty to punish is a distinct and independent duty which operates *ex post* – i.e. after the subordinates' crimes but at a moment when the new commander is already in charge – it does not make sense, contrary to the Appeals Chamber's view,<sup>38</sup> to apply the coincidence principle to this duty. In addition, this would have the consequence that these crimes remain unpunished, i.e. the subordinates would benefit from the former superior's failure to supervise them adequately.

The nature or scope of the *crimes of the subordinates* is controversial. The Oric Trial Chamber, relying on a former decision,<sup>39</sup> recently argued for a broad liability of the superior with regard to all acts or omissions of the subordinates, be it direct acts (e.g. torture, maltreatment), forms of participation (instigating, aiding or abetting) or omissions<sup>40</sup> with regard to inchoate or completed crimes.<sup>41</sup> The Chamber justifies this broad liability with the purpose of superior responsibility which is to impose on commanders an affirmative duty 'to ensure that subordinates do not violate international humanitarian law, either by harmful acts or by omitting a protective duty'.<sup>42</sup> As to the omission situation the Chamber refers

<sup>33</sup> Oric Trial Judgment (n. 10) para. 328.   <sup>34</sup> Oric Trial Judgment (n. 10) para. 336.

<sup>35</sup> Oric Trial Judgment (n. 10) paras. 329–30.   <sup>36</sup> Oric Trial Judgment (n. 10) para. 331.

<sup>37</sup> Oric Trial Judgment (n. 10) paras. 327, 335.

<sup>38</sup> *Hadzihasanovic*, Jurisdiction Appeal Decision para. 37 *et seq.*, 51.

<sup>39</sup> *Prosecutor v Boskoski and Tarculovski*, Decision on Prosecution's motion to amend the indictment, IT-04-82-PT (26 May 2006) paras. 18 *et seq.*

<sup>40</sup> Oric Trial Judgment (n. 10) para. 298 *et seq.*

<sup>41</sup> Oric Trial Judgment (n. 10) paras. 328, 334 with further references to the inconsistent case law. The judgment was, however, reversed since the T. ch. failed to resolve the issue of whether Oric's subordinate incurred criminal responsibility, Oric Appeals Judgment (n. 9) paras. 36 *et seq.* (47).

<sup>42</sup> Oric Trial Judgment (n. 10) para. 300.

to cases where the subordinates 'are under a protective duty to shield certain persons from being injured, as in the case of detainees kept in custody'. If these persons are injured due to a failure of protection by these subordinates, their superior incurs responsibility for these culpable omissions.<sup>43</sup> The approach of the Chamber is not free from doubt.<sup>44</sup> First, it is questionable whether a 'possibility of a different interpretation'<sup>45</sup> with regard to the meaning of 'committed' in Art. 7(3) of the ICTY Statute (or, *mutatis mutandi*, in Art. 28 ICC Statute) can support the Chamber's extensive interpretation to the detriment of the accused. This interpretation may conflict with the principle of legality, in particular in its form of *nullum crimen sine lege stricta* (prohibition of analogy), since it entails a broadening of the scope of the liability of the superior which is not clearly covered by the wording of Art. 7(3). On the contrary, a closer look at the meaning of committed as a form of individual criminal responsibility in Art. 7 of the ICTY Statute shows that committed is understood as a form of direct perpetration besides other forms of participation listed as 'planned, instigated, ordered ... or otherwise aided and abetted' in Art. 7(1); even if one construes 'committed' as including indirect perpetration (through another person)<sup>46</sup> the wording clearly indicates that aiding and abetting is not covered by 'committed'. Article 25(3) of the ICC Statute similarly conceives committing a crime as a form of direct (co) perpetration or perpetration through another person (sub-para. (a)) to be distinguished from other forms of participation such as 'orders, solicits or induces' (sub-para. (b)) or 'aids, abets or otherwise assists' (sub-para. (c)). In addition, in the ICTY's case law the term 'committing' has been construed as meaning 'physically perpetrating a crime or engendering a culpable omission'.<sup>47</sup> The relatively clear wording of Art. 7(3) regarding the scope of the crimes to be 'committed' by the subordinates cannot be outweighed by a teleological interpretation, invoking an alleged purpose of the command responsibility doctrine. Even if one accepted the purpose argument as such, assuming, for the sake of argument, that the literal

<sup>43</sup> *Oric* Trial Judgment (n. 10) para. 305.

<sup>44</sup> See also the Appeals Brief by V. Vidovic and J. Jones, filed on 16 October 2006, para. 340 *et seq.*

<sup>45</sup> *Oric* Trial Judgment (n. 10) para. 299. <sup>46</sup> See nn. 85 *et seq.* below and main text.

<sup>47</sup> *Prosecutor v Tadic*, IT-94-1, Judgment, Appeals Chamber (15 July 1999) para. 188; *Prosecutor v Kunarac/Kovac*, IT-96-23-T & IT-96-23/1-T, Judgment, Trial Chamber (22 February 2001) para. 390; *Prosecutor v Krstić*, IT-98-33, Judgment, Trial Chamber (2 August 2001) para. 601; *Prosecutor v Kvočka et al.*, IT-98-30/1, Judgment, Trial Chamber (2 November 2001) para. 243.

interpretation is inconclusive, it is highly dubious if such a broad purpose can be read into the command responsibility doctrine. It would convert a military commander into a quasi-policeman with a general responsibility for law and order in the zone under his command and it would find little support in state practice. Thus, in the end it would be counterproductive, since states, especially the ones engaged in armed conflicts all over the world, would refrain from applying this concept in their military law and practice.

Article 28 has a peculiar structure in that it extends the superior's *mens rea*, beyond his or her own failure to supervise, to the concrete acts of the subordinates.<sup>48</sup> The degree of *mens rea* required is, apart from awareness of the aforementioned effective control<sup>49</sup> and knowledge explicitly mentioned in Art. 7(3) ICTY, Art. 6(3) ICTR and Art. 28(a)(i), (b)(i) ICC Statute, *conscious negligence or advertent recklessness*. This already follows from the wording of Art. 86(2) AP I ('had information which should have enabled them to conclude') which has been correctly interpreted as *conscious ignorance* in the sense of *wilful blindness*.<sup>50</sup> Similarly, the 'should have known' and 'consciously disregarded' standards of Art. 28(1)(a) and (2)(a) require, on the one hand, neither awareness, nor suffices, on the other, the imputation of knowledge on the basis of purely objective facts. In essence, the superior must possess *information* that enables him or her to conclude that the subordinates are committing crimes<sup>51</sup> or at least indicates the need for additional investigation in order to ascertain the commission of offences,<sup>52</sup> i.e. the superior must, in the sense of the ICTY/ICTR case law,<sup>53</sup> have reason to know. In other words, he should have known and the reason-to-know

<sup>48</sup> On the issue of the commission of (subordinates') crimes of intent by negligence, see already Ambos (n. 14) 852–3; see also Nerlich (n. 16) 676, 680, 682 arguing for a parallel structure of liability between the superior and the subordinates on the basis of a distinction between the subordinate's conduct ('base crime') and the result produced by this conduct.

<sup>49</sup> For this additional requirement correctly, *Oric* Trial Judgment (n. 10) para. 316.

<sup>50</sup> J. de Preux, 'Commentary on Articles 86 and 87 of Protocol Additional I' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1988 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, Geneva 1986) mn 3545–46.

<sup>51</sup> See Ambos (n. 14) 868–7, and 870 with further references. Confirmed recently by *Oric* Trial Judgment (n. 10) para. 321.

<sup>52</sup> Cf. (n. 13) and *Oric* Trial Judgment (n. 10) para. 322 with further references to the abundant case law and examples of such information in para. 323.

<sup>53</sup> See n. 9 above with main text.

standards are, in substance, identical.<sup>54</sup> There is, however, a difference between the standards applicable to a military and a civilian superior but it is only one of degree: while the military superior must take any information seriously, the civilian one must only react to information which ‘clearly’ indicates the commission of crimes;<sup>55</sup> this latter standard is one of conscious negligence or recklessness (as more clearly expressed by the French version of Art. 28(b)(i) ICC Statute: ‘*delibérément négligé de tenir compte d’informations qui l’indiquaient clairement*’),<sup>56</sup> yet the former one requires – contrary to the interpretation given by the case law<sup>57</sup> – less, i.e. any form of negligence, including an unconscious one.

### III. Command responsibility and JCE compared

As an analysis of JCE and command responsibility shows, the two doctrines differ fundamentally in their conceptual structure. The most striking difference is possibly that JCE requires a *positive act* or contribution to the enterprise while for command responsibility an *omission* suffices. From this perspective the doctrines seem to be mutually exclusive: either a person contributes to a criminal result by a positive act or omits to prevent a criminal result from happening. Both at the same time seem, at first sight, to be logically impossible. However, a closer look reveals that in the context of macro-criminality where criminal conduct develops over different time periods and in different geographical locations there may be cases in which the superior actively participates in a JCE and simultaneously omits to intervene in the execution of the crimes committed by the subordinates within the framework of this JCE.

Another important difference between command responsibility and JCE lies in the fact that the former requires, *per definitionem*, a superior and subordinates, i.e. a *hierarchical, vertical relationship* between the person whose duty it is to supervise and the ones who directly commit the

<sup>54</sup> See already Ambos (n. 14) 864; concurring U. Roßkopf, *Die innere Tatseite des Völkerrechtsverbrechens* (Berliner Wissenschafts-Verlag, Berlin 2007), p. 174.

<sup>55</sup> For a higher threshold for a superior ‘exercising more informal types of authority’, see also *Oric* Trial Judgment (n. 10) para. 320.

<sup>56</sup> For a detailed analysis, see Ambos (n. 14) 863 *et seq.*; recently Meloni (n. 16) 634. It goes too far, however, to read into the should have known a ‘duty of knowledge’ standard and justify this strict standard with retributive and utilitarian arguments (J.S. Martinez, ‘Understanding mens rea in command responsibility: from Yamashita to Blaskic and beyond’ (2007) 5 JICJ 660 *et seq.*; convincingly against this standard see Bonafé (n. 12) 606–7.

<sup>57</sup> *Prosecutor v Bagilishema*, Judgment (Reasons), Appeals Chamber (3 July 2002) para. 35; concurring *Blaskić* Appeals Judgment (n. 9) para. 63.

crimes to be prevented by the supervisor. By contrast, the members of a JCE, at least of a JCE I understood as co-perpetration, normally belong to the same hierarchical level and operate in a *coordinated, horizontal way*.<sup>58</sup> In this sense, neither ‘any showing of superior responsibility’<sup>59</sup> nor the ‘position of a political leader’ is required.<sup>60</sup> As a rule, JCE requires ‘a minimum of coordination’ and this minimum is ‘represented as a horizontal expression of will’ which binds the participants together.<sup>61</sup> However, the amplitude and elasticity of the doctrine allows for informal networks and loose relationships and as such stretches well beyond command responsibility.<sup>62</sup> A third difference refers to the *mental object* of JCE and command responsibility. By JCE I, the participant shares the intent of the other participants, i.e. the common *mens rea* refers to the commission of specific crimes and to the ultimate objective or goal of the enterprise; in the other categories, especially JCE III, the participant must, at least, be aware of the common objective or purpose and of the (objective) foresee ability of the commission of certain crimes. In contrast, in the case of command responsibility, the main object of the offence is the superior’s failure to properly supervise and, consequently, his/her *mens rea* needs to extend to this failure but not (necessarily) to the crimes committed by the subordinates.

Despite these (and other) conceptual differences, the two doctrines are sometimes *simultaneously applied* in the case law.<sup>63</sup> A prerequisite for this simultaneous application is that the accused possesses a certain rank in the hierarchy of the criminal apparatus. In other words, the simultaneous application of both doctrines presupposes that *hierarchical differences* between members of a given criminal enterprise exist. Thus, the structural difference between JCE and command responsibility mentioned above – hierarchy versus coordination – loses importance. In fact, this difference is only valid with regard to JCE I, understood as a form of co-perpetration and as such typically characterized by a horizontal relationship between the co-perpetrators. In contrast, in cases of JCE II or III, a middle or high ranking superior may support or further a criminal enterprise and at the same time fail to control his criminal

<sup>58</sup> See on this structural difference, also Osiel (n. 24) (*Cornell International Law Journal*) 797 and Osiel (n. 24) (*Columbia Law Review*) 1769 *et seq.*

<sup>59</sup> *Prosecutor v Kvočka et al.*, IT-98-30/1, Judgment, Appeals Chamber (28 February 2005) para. 104.

<sup>60</sup> *Prosecutor v Babić*, IT-03-72, Sentencing Judgment, Trial Chamber (29 June 2004) para. 60.

<sup>61</sup> *Perreira*, Judgment, East Timor Special Panel for Serious Crimes (27 April 2005) 19–20, available at [www.jsmp.minihub.org/Court%20Monitoring/spscaseinformation2003.htm](http://www.jsmp.minihub.org/Court%20Monitoring/spscaseinformation2003.htm), accessed 2 July 2008.

<sup>62</sup> Osiel (n. 24) (*Columbia Law Review*) 1786 *et seq.*      <sup>63</sup> Ambos (n. 8) 162 *et seq.*

subordinates. This also shows that the antagonism between a positive act and an omission, indicated above, does only apply, strictly speaking, to single crimes but not to collective commissions. Collective JCE (II or III) is characterized by the interaction of various persons at different hierarchical levels.<sup>64</sup> The prosecution benefits from the *evidentiary advantages* of both doctrines: instead of proving a direct commission of crimes by the superior, it suffices to prove a crime base or pattern of commission and link the superior to it.<sup>65</sup> The structural similarity between JCE III and command responsibility becomes obvious with regard to the *mental state* necessary for conviction: both doctrines enable the Prosecution to downgrade the specific intent (in genocide) to a lower mental state, either foresee ability (JCE III) or negligence (command responsibility). The *Milošević* Trial Chamber extended this approach, developed by the *Brdanin* Appeals Chamber with regard to JCE III, to command responsibility.<sup>66</sup> Similarly, the *Krstić* Trial Chamber, with regard to command responsibility, only required that the accused ‘had been aware of the genocidal objectives’ of the main perpetrators.<sup>67</sup> This means that both a participant in a JCE III and a commander in the sense of Art. 7(3) ICTY Statute can be held responsible for genocide without having the specific genocidal intent themselves; mere knowledge of the *dolus specialis* of the actual *genocidaires* would be sufficient. This, again, shows that the common ground of JCE and command responsibility is the need or desire to overcome evidentiary problems,<sup>68</sup> in the case of genocide typically

<sup>64</sup> Similarly, V. Haan, ‘The development of the concept of JCE at the ICTY’ (2005) 5 ICLR 196, considering that most cases before the ICTY are of this nature.

<sup>65</sup> About the advantages of the Prosecution, see also K. Gustafson, ‘The requirement of an “express agreement” for joint criminal enterprise liability’ (2007) 5 JICJ 137: ‘ability to connect a defendant, who did not physically perpetrate certain crimes, to these crimes by encompassing the defendant and the perpetrators within a single common criminal group.’ The whole argument of this author is directed towards a successful prosecution and, consequently, conviction of the suspects, see also p. 158: ‘If the Trial Chamber’s conclusions ... are upheld, the prosecution is unlikely to be successful.’

<sup>66</sup> *Prosecutor v Brdanin*, Decision on Interlocutory Appeals, Appeals Chamber (19 March 2004) para. 6; *Prosecutor v Milošević*, IT-02-54, Decision on Motion for Judgment of Acquittal, Trial Chamber (16 June 2004) paras. 291, 292, 300. On this issue, see more detailed Ambos (n. 8) 175–6, 181.

<sup>67</sup> *Krstić* Trial Judgment (n. 47) para. 648; contrary the Appeals Chamber, IT-98-33-A (19 April 2004) para. 134: ‘Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff... This knowledge on his part alone cannot support an inference of genocidal intent.’ Thus, the Chamber (para. 135 *et seq.*) only convicted Krstić of aiding and abetting genocide for which awareness of the genocidal intent is sufficient (para 140: ‘knowing the intent behind the crime’).

<sup>68</sup> In a similar vein, Danner and Martinez (n. 12) 152.

represented by the high threshold of a special, ulterior intent. Yet, such an approach, in the final result, means that a superior is, on the basis of JCE or command responsibility, no longer punished as a (co-)perpetrator but only as a mere aider or abettor, since only in this case could knowledge with regard to a specific intent crime – instead of specific intent on the part of the perpetrator himself – be considered sufficient.<sup>69</sup>

As to the future case law of the ICC, it is important to note that command responsibility is clearly provided for in Art. 28 ICC Statute while JCE is not explicitly contained in Art. 25 ICC Statute. As has been explained elsewhere,<sup>70</sup> while JCE I and II, understood as co-perpetration, may be contained in Art. 25(3)(a) ICC Statute,<sup>71</sup> the same cannot be said for JCE III with regard to Art. 25(3)(d) ICC Statute. Although it may be possible to include JCE III in Art. 25(3)(d)(i) given that the volitional element of this subparagraph ('aim of furthering the criminal activity') is not incompatible with the cognitive standard of foreseeability,<sup>72</sup> in any case the contribution to the collective crime must be 'intentional' (Art. 25(3)(d) clause 1) and this requires more than mere foreseeability;<sup>73</sup>

<sup>69</sup> See already K. Ambos, 'Some preliminary reflections on the *mens rea* requirements of the crimes of the ICC Statute and of the elements of crimes', in L. C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (Kluwer, The Hague 2003), pp. 23–4.

<sup>70</sup> Ambos (n. 8) 172–3.

<sup>71</sup> The ICC Pre-Trial Chamber apparently takes a different view, see Decision on the Confirmation of Charges, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04–01/06–803, Pre-Trial Chamber I (29 January 2007) para. 323: 'the concept of co-perpetration pursuant to Article 25(3)(a) of the Statute differs from that of co-perpetration based on the existence of a joint criminal enterprise.' The Chamber understands JCE as co-perpetration in a subjective sense focusing on the mental state with which the participant makes his contribution (para. 329).

<sup>72</sup> In this sense, J. D. Ohlin, 'Three conceptual problems with the doctrine of Joint Criminal Enterprise' (2007) 5 JICJ 85. van Sliedregt (n. 108) discusses whether JCE II could be included in Art. 25(d)(ii) with regard to the participants belonging to the medium level of the organization if they knew of the system of mistreatment.

<sup>73</sup> The counter-argument by A. Cassese, 'The proper limits of individual responsibility under the doctrine of joint criminal enterprise' (2007) 5 JICJ 132, based on an extensive interpretation of the term 'intentional' ('requiring that the intent be referred to the common criminal plan, and, as such, may also embrace acts performed by one of the participants outside that criminal plan') conflicts with the principle of legality, in particular with the prohibition of analogy provided for in Art. 22(2) ICC Statute. Even more obvious is a violation of the principle if one extends the term 'knowledge' in Art. 25(3)(d)(ii) to 'foresight and voluntary taking of a risk'. The apparent contradiction between 'intention' and 'foreseeability' can only be resolved if one distinguishes between the object of reference of the intention required in Art. 25(3)(d): while the concrete contribution of the participant to the collective crime may be intentional, he or she is not acting intentionally with regard to the excessive acts of the members of the group or JCE but these would only be 'foreseeable' to her.



in addition, given the similarity between the responsibility based on JCE III and ‘conspiracy’, the inclusion of the former in Art. 25(3)(d) could hardly be reconciled with the will of the ICC Statute’s drafter who wanted to exclude conspiracy liability from the Statute.

#### IV. The doctrine of *Organisationsherrschaft* as an alternative form of attribution

Apart from JCE and command responsibility, the theory of *control/domination of the act by virtue of a hierarchical organization (Organisationsherrschaft)*,<sup>74</sup> pursues the same objective of linking superiors to crimes committed on their behalf.<sup>75</sup> The notion underpinning this approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being away from the scene of the crime, control or mastermind its commission because they decide whether and sometimes even how the offence will be committed.<sup>76</sup> Accordingly, the ‘man in the background’ dominates the direct perpetrators by means of an organizational apparatus of hierarchical power. Thus, the theory is based on a concept of *control or domination of the act (Tatherrschaft)*,<sup>77</sup> recently

<sup>74</sup> See the fundamental work of C. Roxin, *Täterschaft und Tatherrschaft* (8th edn, De Gruyter, Berlin 2006), pp. 242–52, 704–17; see also Ambos (n. 26) 590 *et seq.* (*Allgemeine Teil*), 216 *et seq.* (*Parte General*) with references on the recent (critical) discussion; see also Ambos, *Internationales Strafrecht* (2nd edn, Beck, Munich 2008) § 7 mn 29 *et seq.*; H. Radtke, *Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht* (2006) GA 350 *et seq.*; J. Schlösser, *Organisationsherrschaft durch Tun und Unterlassen* (2006) GA 161 *et seq.*; J. Wessels and W. Beulke, *Strafrecht Allgemeiner Teil* (37th edn, Müller, Heidelberg 2007) 193 *et seq.* For a good explanation in English, see Osiel (n. 24) (*Columbia Law Review*) 1829 *et seq.*

<sup>75</sup> See also E. van Sliedregt, ‘Joint criminal enterprise as a pathway to convicting individuals for genocide’ (2007) 5 JICJ 207, acknowledging that ‘indirect perpetration would offer an escape from the restraints that a purpose-based approach to genocidal intent and principles of derivative liability would impose on prosecution the mastermind’. About the Dutch concept of ‘functional perpetration’ as another alternative of imputation, see H. van der Wilt, ‘Joint criminal enterprise: possibilities and limitations’ (2007) 5 JICJ 102 *et seq.*

<sup>76</sup> Cf. *Prosecutor v Lubanga* (n. 71) para. 330.

<sup>77</sup> M. D. Dubber, ‘Criminalizing complicity’ (2007) 5 JICJ 982 translates it as ‘dominion over the act’. His criticism of this concept, partly based on a comparison with the common law concept of ‘presence’ (Dubber, 983, 1001), however, does not sufficiently account for the fact that C. Roxin himself considers it only as an ‘open notion’ (Roxin (n. 74) 122 *et seq.*, 282 *et seq.*) and thus merely a normative starting point to develop the forms of perpetration more concretely (cf. Ambos (n. 26) 546 *et seq.*).

recognized by the ICC Pre-Trial Chamber.<sup>78</sup> It is a form of perpetration by means and as such recognized in Art. 25(3)(a) 3rd alternative ('through another person').<sup>79</sup> It has been applied in various national proceedings (Eichmann,<sup>80</sup> Argentinean Generals,<sup>81</sup> East German border killings<sup>82</sup>)<sup>83</sup> and may be identified in the Nuremberg *Justice* case.<sup>84</sup> At the ICC, the Katanga Pre-Trial Chamber now develops this control over the crime approach even further.<sup>84a</sup> In fact, unlike JCE, it finds a legal basis in the term 'committed' in Art. 7(1) ICTY Statute, since 'commission' in this sense means that a person 'participated, physically or otherwise directly or *indirectly*, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or

<sup>78</sup> See *Prosecutor v Lubanga* (n. 71) para. 322, where the co-perpetration in the sense of Art. 25(3)(a) ICC Statute is characterized by the 'joint control over the crime as a result of the essential contribution' (para. 322), and based on the 'concept of control over the crime' (para. 338). But see also the recent criticism against the doctrine of *Tatherrschaft* in Germany: E.-J. Lampe, 'Tätersysteme: Spuren und Strukturen' (2007) 119 ZStW 475 *et seq.*; V. Haas, 'Kritik der Tatherrschaftslehre' (2007) 119 ZStW 523 *et seq.*

<sup>79</sup> Concurring G. Werle, *Principles of International Criminal Law* (TMC Asser Press, The Hague 2005), p. 124 with n. 196; G. Werle, 'Individual criminal responsibility in art 25 ICC Statute' (2007) 5 JICJ 963–4.

<sup>80</sup> Jerusalem District Court (12 December 1961) 36 ILR 236–37 para. 197.

<sup>81</sup> Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital (9 December 1985) 309-I/II Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación ('Fallos') 1601–2.

<sup>82</sup> BGHSt 40, 218 (Official collection of the Supreme Court judgments in criminal matters) 236 *et seq.* = BGH (1994) NJW 2703; for the subsequent case law see BGHSt 45, 270, 296; BGHSt 48, 331; BGHSt 49, 147; BGH, (2004) NSStZ 457, 458 and NSStZ 2008, 89.

<sup>83</sup> See also the case law in Chile (*Letelier/Mofitt*, *Juez de Instrucción Bañados* (12 November 1993) Fallos del Mes, año XXXV, noviembre 1993, edición suplementaria; CSJ, 30 May and 6 June 1995), Colombia (Corte Suprema de Justicia, Sala Penal, casación n° 23825 del 7 de marzo de 2007, *Magistrado Ponente Javier Zapata Ortiz*) and Peru (Sala Penal Nacional, caso *Abimael Guzmán Reinoso et al.*, sentencia del 13 de octubre de 2006, expediente acumulado 560-03). See also K. Ambos, 'Individual criminal responsibility in international criminal law: a jurisprudential analysis – from Nuremberg to the Hague', in G. K. McDonald and O. Swaak-Goldmann (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, vol. I, Commentary* (Kluwer, The Hague 2000), pp. 1–31. For a recent comparative analysis see K. Ambos (ed.), *Imputación de crímenes de los subordinados al dirigente* (Temis, Bogotá 2008) with reports on Argentina, Chile, Colombia, Germany, Peru and Spain.

<sup>84</sup> *US v Altstoetter et al. (Justice Trial)*, Judgment, US Military Tribunal sitting at Nuremberg (4 December 1947) in *Trials of War Criminals (US-GPO, 1947)* 985: 'conscious participation in a nationwide government-organized system of cruelty and injustice' (emphasis added).

<sup>84a</sup> *Prosecutor v Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, Case No. ICC-011 04-01107, 30 Sept. 2008, para. 480 *et seq.*

jointly with others'.<sup>85</sup> This includes, as indirect commission, perpetration by means<sup>86</sup> and as such *Organisationsherrschaft*. Clearly, the key issue of this doctrine is whether the mastermind is able to exercise effective *control* over the direct perpetrators by means of the organizational apparatus created and dominated by him. Yet, while the 'man in the background' will hardly be able to completely control the responsible perpetrators, this lack of control may be compensated by the control of the apparatus, which produces an unlimited number of potential willing executors. In other words, although direct perpetrators acting with full criminal responsibility cannot be considered mere 'interchangeable mediators of the act' (*fungible Tatmittler*) as such, the 'system' provides for a practically unlimited number of replacements and thereby for a high degree of flexibility as far as the personnel necessary to commit the crimes is concerned. While such a concept of control rests on the assumption that the apparatus functions hierarchically from top to bottom and one may question the applicability of this assumption to all kinds of criminal organizations,<sup>87</sup> a too naturalistic or mechanical perspective distorts the *normative basis* of this theory. Still, the doctrine requires further elaboration and I will therefore deal with two fundamental questions in this regard: the tension between the domination of the organization and the liberty of the immediate or direct perpetrator (below, section 1) and the delimitation of (indirect) perpetration through another person and co-perpetration along levels of hierarchy (below, section 2).

### 1. *Domination of the organization versus freedom of the immediate perpetrator*

According to the doctrine of *Organisationsherrschaft* the immediate perpetrators are nothing more than interchangeable cogs in the machine of the organizational apparatus of hierarchical power. Their interchangeability makes the apparent freedom of the immediate perpetrator a naturalistic date which from a normative perspective is of no importance. For it does not matter who executes the act but only that it is executed at all. For

<sup>85</sup> *Stakić* Trial Judgment, IT-97-24-T (31 July 2003) para. 439 (emphasis added).

<sup>86</sup> *Stakić* Trial Judgment (n. 85) para. 439 with n. 942, para. 741. See on *Stakić*, Haan (n. 64) 197; H. Olásolo and C. Pérez, 'The notion of control of the crime and its application by the ICTY in the Stakic case' (2004) 4 ICLR 475 *et seq.* (478-9).

<sup>87</sup> Critical Osiel (n. 24) (*Columbia Law Review*) 1833 *et seq.*, 1861, arguing for an application of *Organisationsherrschaft* only to relax the effective control requirement of command responsibility.

the man in the background who gives the order to execute certain acts it is of no interest who complies with his orders but only that it is complied with at all. Thus, the former Chilean dictator *Pinochet* stated with regard to his giving orders to Manuel *Contreras*, the former Chilean chief of the secret police DINA:

there are many things I ordered him to do, but which things? I had to exercise power. But I could never say that I was actually running DINA. [They] were under the orders, under the supervision of all of the junta, the four members of the junta ... And I would like you to understand the following. The chief of the army always asks 'What are you going to do?' The question of 'How', 'how am I going to do it?' is a question for the chief of intelligence rather than the Chief of the Army. This is what civilians ... don't understand.<sup>88</sup>

Thus, it is irrelevant 'how' and 'by whom' the order will be executed if only the mastermind can be sure that it will be executed by someone somehow. The automatic functioning of the apparatus accounts for the domination of the immediate perpetration and, apparently, over the immediate perpetrators too. Their secondary perpetration remains morally indifferent.<sup>89</sup> Certainly, the whole idea of a domination or control of the act by virtue of a hierarchical organization stands and falls with criterion of interchangeability (*Fungibilität*). For if one assumes that the man in the background cannot rely any more on the automatic execution of his orders then his domination over the act would fail in the face of this insecurity and the freedom of the immediate perpetrator would prevail. A domination of his act could in such a situation only exist if the immediate perpetrator were coerced by the superior or involved in a mistake and therefore could be concretely dominated. On the other hand, the dependence of the *Organisationsherrschaft* on the interchangeability criterion of means that the domination is only lacking if one could disprove the interchangeable nature of the direct perpetrator in a concrete case. That is, first, an empirical problem, namely whether one could really assume that in all cases, in which the act was committed within an organized apparatus, the direct perpetrator was interchangeable. Given the high specialization within modern repression apparatus and special tasks assigned

<sup>88</sup> Pinochet's interview, *The Pinochet fact file*, Daily Telegraph, 19 July 1999.

<sup>89</sup> Cf. H.-G. Soeffner, 'Individuelle Macht und Ohnmacht in formalen Organisationen', in K. Amelung (ed.), *Individuelle Verantwortung und Beteiligungsverhältnisse bei Straftaten in bürokratischen Organisationen des Staates, der Wirtschaft und der Gesellschaft* (Pro-Universitate, Sinzheim 2000), p. 28. In formal organizations, acts committed by the perpetrator appear to him to be neither good nor bad.

to the ‘specialists’ it cannot be ruled out that a certain task can only be carried out by a specialist.<sup>90</sup> Nor can it be taken for granted that the apparatus possesses a sufficient number of specialists so that they are all easily and immediately replaceable. Thus the interchangeability criterion cannot pretend to have general validity; in fact, only one case to the contrary, i.e. a specialist is refusing to comply with an order and cannot be replaced, disproves the general validity of the principle.

In addition, the interchangeability of the immediate perpetrator can only explain domination in a general sense but not in the concrete situation of execution of the act. While the man in the background may well dominate the organization he does not directly dominate those who concretely have to execute the act. If, for example, a border guard or a whole border patrol at the East German border had refused to shoot at a refugee, there would not have been other guards immediately available to hinder *this* refugee from jumping over the wall. Indeed, his escape would have been successful and the concrete control of the executors of the orders of the organization’s command would have failed.<sup>91</sup> Or take the often-quoted case of the KGB secret agent *Stachynski* who, on orders from Moscow,

<sup>90</sup> One thinks of the practice of Chilean torture techniques, which are referred to several times in the Spanish investigatory documents in the criminal proceedings against Pinochet (cf. H. Ahlbrecht and K. Ambos (eds.), *Der Fall Pinochet(s): Auslieferung wegen Staatsverstärkter Kriminalität?* (Nomos-Verl.-Ges., Baden-Baden 1999), p. 54 *et seq.* and *passim*). The ‘specialist argument’ was already made earlier by F.-C. Schröder, *Der Täter hinter dem Täter. Ein Beitrag zu Lehre von der mittelbaren Täterschaft* (Duncker und Humblot, Berlin 1965), p. 168; see also G. Freund, *Strafrecht, Allgemeiner Teil. Personale Straftatlehre*. (Springer, Berlin 1998) § 10, mn 92.

<sup>91</sup> Cf. R. D. Herzberg, ‘Mittelbare Täterschaft und Anstiftung in formalen Organisationen,’ in Amelung (n. 89) 37 *et seq.*; for further critique, see U. Murmann, ‘Täterschaft und Weisungsmacht’ (1996) GA 273, to whom Herzberg expressly refers; J. Renzikowski, *Restriktiver Täterbegriff und fahrlässige Beteiligung* (Mohr Siebeck, Tübingen 1997), p. 89; T. Rotsch, ‘Die Rechtsfigur des Täters hinter dem Täter bei der Begehung von Straftaten im Rahmen organisatorischer Machtapparate und ihre Übertragbarkeit auf wirtschaftliche Organisationsstrukturen’ (1998) NStZ 493; T. Rotsch, ‘Unternehmen, Umwelt und Strafrecht – Ätiologie einer Misere. Teil 1’ (1999) *wistra* 327; T. Rotsch ‘Täterschaft kraft Organisationsherrschaft?’ (2000) 112 ZStW 526 *et seq.* (528), 536, 552, 561; S. K. Hoyer in *Systematischer Kommentar* (ed. 2000) § 25 mn. 90; J. Brammsen, ‘Unterlassungshaftung in formalen Organisationen’, in Amelung (n. 89) 142; B. M. Hilgers, *Verantwortlichkeit von Führungskräften in Unternehmen für Handlungen ihrer Mitarbeiter* (Edition Iuscrim, Freiburg 2000), p. 132 *et seq.*; G. Heine, ‘Täterschaft und Teilnahme in staatlichen Machtapparaten’ (2000) JZ 925; K. Rogall, ‘Bewältigung von Systemkriminalität’, in C. Roxin and G. Widmaier (eds.), *50 Jahre Bundesgerichtshof, Festgabe aus der Wissenschaft, Band IV, Strafrecht, Strafprozessrecht* (Beck, Munich 2000), p. 425 *et seq.*; for a concrete view, see also H. Plasencia and J. Ulises, *La autoría mediata en Derecho Penal* (Comares, Granada 1996), p. 275.

killed a soviet dissident in West Germany. If he had refused to carry out the execution order no replacement would have arrived immediately but at most later and maybe too late to still comply with the order. Thus, from this concrete perspective it is difficult to say that Stachynski was only a replaceable cog in the machinery of the Soviet totalitarian apparatus.<sup>92</sup> Similarly, imagine that a torturer, contrary to orders from the highest authorities, abstains from using torture. A domination of the concrete act of torture from the organization's top level could in this case only exist if the acts of torture could immediately be commenced or continued notwithstanding the disobedience of the original torturer. These examples could be continued indefinitely. While they are certainly not identical with regard to the consequences of the non-execution of the order – in the border case it cannot be restored any more, since the refugee has made it to the west, in the other cases the order may be executed later – they all make clear that the domination of the *concrete* act is predicated upon the *immediate* interchangeability of the direct perpetrators. They further show that interchangeability rarely exists in concrete cases, rather it may, from an empirical perspective, be rejected with sound arguments.

The problematic nature of the interchangeability criterion is even more clearly seen with regard to the responsibility of persons who do not directly belong to the top level of the organisation such as for example mid-ranking bureaucrats (*Schreibtischtäter*) as Adolf Eichmann. If these persons are really indispensable for the fulfilment of the whole criminal plan, one can hardly assume that *they* are interchangeable in relation to their superior. Thus, one faces here a double problem: on the one hand, the interchangeability of these persons is necessary too in order to justify their actual control by the organisation's top level by virtue of the doctrine of *Organisationsherrschaft*; on the other hand, this assumption of their interchangeability would contradict the possibility of their own organizational control over the immediate perpetrators and therefore their indirect responsibility on the basis of a perpetration by means. A similar argument can be made with regard to Höß, the commander of the Auschwitz concentration camp.<sup>93</sup> He too could decide on the life and death of thousands of persons, and had at his disposal his subordinate camp personnel. However, also in this case, much speaks for a precise

<sup>92</sup> Cf. also G. Jakobs, *Strafrecht, Allgemeiner Teil, Die Grundlagen und die Zurechnungslehre, Studienausgabe* (2nd edn, de Gruyter, Berlin 1993) 21/103, mn. 190; see also Herzberg (n. 91) 38.

<sup>93</sup> Cf. also Herzberg (n. 91) 38 *et seq.*

allocation of responsibilities or tasks within the camp and thus against the smooth interchangeability of the direct perpetrators in the concrete situation of commission. This case indicates a deficit of the doctrine *Organisationsherrschaft*, i.e. that it has so far not clearly distinguished between the areas of responsibility and the levels of hierarchy, that is, it has not satisfactorily settled up to which level of command one could really assume that there is a factual control over the organisation. We will return to this question below (section 2).

What results from all of this is the fact that the leadership of the criminal organization can only be sure that the apparatus as such (in one way or the other) carries on with its work and the next order gets carried out smoothly by the in-the-meantime replaced executor. Thus, the interchangeability is generally not possible simultaneously, but rather *subsequently*.<sup>94</sup> In Hernández Plasencia's words: 'the quality of injury caused by the conduct of the person in front is not controlled by the men in the background.'<sup>95</sup> The interchangeability criterion thus becomes – put in relative terms – a 'requirement of personal mobility': 'The control of the act by virtue of a hierarchical organisation is bound by the fact that the order for the commission of the criminal act is issued within a hierarchy, which in the case of a *timely* refusal would *normally* immediately have a replacement at its disposal.'<sup>96</sup> One could only argue that the man in front increases the chances of succeeding in accordance with an 'incomplete interchangeability', the *Organisationsherrschaft* thus becomes a control of the substitute or replacing cause (*Ersatzursachenherrschaft*).<sup>97</sup> Yet, in such a weakened form, the interchangeability criterion can no longer serve as foundation of the control or domination over the act by the men in the background issuing orders.

From all this it follows that the criterion of interchangeability proves, from an empirical point of view, unsuitable to convincingly explain the doctrine of *Organisationsherrschaft*. This doctrine can only be explained with a normative theory and such a theory has been presented by Uwe Murmann.<sup>98</sup> In the result, Murmann transfers the structure of offences

<sup>94</sup> Cf. Jakobs (n. 92) fn. 190; see also Herzberg (n. 91) 38.

<sup>95</sup> Plasencia (n. 91) 275 (translated by the author): 'la cualidad lesiva del comportamiento del sujeto de delante no es dominada por los sujetos de atrás.'

<sup>96</sup> See Herzberg (n. 91) 58 *et seq.* (translated from German).

<sup>97</sup> S. K. Hoyer (n. 91) § 25 mn. 90.

<sup>98</sup> Cf. U. Murmann, *Die Nebentäterschaft im Strafrecht: ein Beitrag zu einer personalen Tatherrschaftslehre* (Duncker & Humblot, Berlin 1993), p. 60 *et seq.*, 181 *et seq.*; U. Murmann, *Tatherrschaft und Weisungsmacht* (1996) GA 275 *et seq.*, 278 with reference to Jakobs (n. 92). Murmann's conception takes as a starting point Zaczyk's doctrine of



requiring a certain position of duty on the part of the perpetrator (*Pflichtdelikte*) to the doctrine of control over the act and invokes a material concept of freedom. Thus the state appears – as guarantor of basic rights with a resulting duty to protect – in a specific *position of responsibility* vis-à-vis its citizens and has a specific *power of violation* (*Verletzungsmacht*)<sup>99</sup> towards them. The state breaches its duty to protect by illegally ordering the mediator of the act to injure a particular person. The relationship of dependence between the citizens and the state is at the same time comparable with the guarantor position in crimes of omission. The guarantor is in this case equally liable since he breaches the particular duty to protect which results from his position as guarantor. In the case of illegal state orders, the – at least from a normative perspective – dependence of the citizen on the state establishes the *state's control over the act*. The state exercises this control by ordering the mediator of the act, a citizen, to injure the victim, another citizen. Thus, two legal relationships are concerned: the relationship of recognition between the state and the citizen, characterized by particular duties, as well as the general relationship of recognition among the citizens themselves. The state's control over the act, more precisely the control by the state's top level and most responsible, depicts itself as '*control over the quality of the relationship*',<sup>100</sup> namely the *relationship of recognition* between the state and its citizens.<sup>101</sup> In *this* relationship, thus, the special duty of the state vis-à-vis its citizens, deduced from the doctrine of the *Pflichtdelikte*, is crucial; while in the other relationship among the citizens themselves – *in concreto* between the perpetrator who executed the order and the victim – the violation caused by the direct invasion in the freedom of others (*fremde Freiheit*) is crucial. Thus, both legal relationships are violated. For if one tries to attribute the victim's injury to the leaders of the state organization, one cannot only

personal freedom (*Das Unrecht der versuchten Tat* (Duncker & Humblot, Berlin 1989), p. 128 *et seq.* (1939), p. 194 *et seq.*) This in turn is based on the conception of *Kant* and *Fichte*. Accordingly, its legal foundation lies in a mutual recognition of individuals as autonomous reasonable persons. This *relationship of recognition* which is at the same time a legal relationship is realized through mutual, practically correct behaviour and thus guarantees the freedom of all persons (pp. 165, 193 and 326). I have earlier rejected Murmann's view on the basis of a too factual-instrumental view of things (see K. Ambos, *Tatherrschaft durch Willensherrschaft kraft organisatorischer Machtapparate. Eine kritische Bestandsaufnahme und weiterführende Ansätze* (1998) GA 230 *et seq.*; also see in this respect Rotsch (n. 91) 493).

<sup>99</sup> In favour of *Macht* (power) instead of *Herrschaft* (domination, control) also Lampe (n. 78) 481 *et seq.*

<sup>100</sup> Murmann, *Nebentäterschaft* (n. 98) 181; Murmann (GA) (n. 98) 276.

<sup>101</sup> Murmann, (*Nebentäterschaft*) (n. 98) 168 *et seq.*

consider the relationship between the leaders and the mediator of the act, but one must also take into account the victim – by way of the general relationship of recognition among the citizens themselves. Thus, the special state's duty vis-à-vis its citizens – which compels it to protect them and prohibits it from harming them and which, at the same time, entails a particular power to violate (*Verletzungsmacht*) within this relationship – provides in all those cases a normative foundation of the control over the act where the notion of interchangeability must fail for empirical reasons. With this approach the *Organisationsherrschaftslehre* is not abandoned but reinforced by normative, value-based considerations.

The normative explanation set out does not, however, substitute, but complements the factual perspective. For as little as a mere factual perspective can contribute to explain convincingly the *Organisationsherrschaft* a mere normative perspective is unable to identify concrete situations of *Organisationsherrschaft*. This becomes clear with a practical case by case approach. Take, for example, the opening decision by the Spanish investigating judge *Baltasar Garzón* of 10 December 1998 in the investigation no. 19/97 against Augusto Pinochet:

Augusto Pinochet Ugarte is presumed to be the head of this terrifying organization, he, though he may not [with his own hands] have been involved in the actual execution of the acts, devised the plan and financed it with public funds ...

Augusto Pinochet's presumed involvement as an *instigator* is clear ...;

(a) The involvement is direct and is exercised through particular persons. As a head of state and President he had the possibility to immediately stop the chain of events, but he instead encouraged it by giving the relevant orders; sometimes he even exercised *absolute control* over the direct execution of acts through the leadership of the DINA;<sup>102</sup>

...

(g) [The involvement] is *followed by the execution* of the agreed crimes ...

Pinochet developed as *head* of the provisional criminal plan ... a number of necessary, indispensable and essential acts, without which the acts would not have been able to be committed and pursued; the execution of the acts was based on the previous arranged plan according to which all persons involved exercise particular 'roles and functions' and [therefore] in accordance with the 'scarce goods theory' were hardly replaceable. As a result all members of the Junta, the military officers involved, especially the secret service or those who directly executed orders coming from the high level of the hierarchy should be

<sup>102</sup> *Dirección de Inteligencia Nacional*, Chilean Secret Police.

characterized as *co-perpetrators*. Clearly, this characterization is also inevitable for Pinochet himself....<sup>103</sup>

Apart from the controversial legal evaluation which is apparently based on *Gimbernats* doctrine of the *scarce goods* (*bienes escasos*)<sup>104</sup> and which results – if one wants to resolve the contradiction of a coincidence between instigation and co-perpetration – in an instigation by various co-perpetrators, the quoted passage clearly indicates that an accurate legal evaluation must first of all be preceded by a factual analysis of the persons involved and their relationships. The facts of the case, once established, form the basis of the legal evaluation and this – universally accepted – self-evident truth is a decisive argument in favour of a predominantly factual perspective, which eventually may be complemented and reinforced by a normative, value-based reasoning. With regard to Pinochet's criminal liability, on the basis of the available facts, arguments amounting to an indirect perpetration based on the doctrine of *Organisationsherrschaft* can certainly be found: Pinochet is presumed not only to have given criminal orders, but sometimes even to have – 'with absolute control' over the act – controlled the direct execution of these orders; the agreed crimes were executed without a second thought; Pinochet was the 'head' of the criminal plan.

All this also demonstrates that the control of the act (*Tatherrschaft*) is not only, contrary to *Jakobs*,<sup>105</sup> a legal or normative phenomenon but above all a factual one. This is also demonstrated by the fact that the criterion of interchangeability is problematic in particular from an empirical perspective. For this very reason the normative explanation or foundation of the *Organisationsherrschaft* set out here is indispensable.

## 2. *Delimitating (indirect) perpetration through another person and co-perpetration along levels of hierarchy*

The doctrine has not really looked into the issue of up to what level of hierarchy one can assume the existence of the man in the background's

<sup>103</sup> In Ahlbrecht and Ambos (n. 90) 136 *et seq.* (retranslation from German; footnotes omitted and emphases added).

<sup>104</sup> Cf. E. Gimbernats, *Autor y complice en Derecho Penal* (Universidad Madrid, 1966), p. 151 *et seq.*, p. 194 *et seq.*; E. Gimbernats, 'Gedanken zum Täterbegriff und zur Teilnahmelehre' (1968) ZStW 930–1.

<sup>105</sup> G. Jakobs, 'Mittelbare Täterschaft der Mitglieder des Nationalen Verteidigungsrats' (1995) NSZ 27.

control of the act by virtue of a hierarchical organization.<sup>106</sup> The German case law applies Roxin's theory also to defendants who do not belong to the leadership of the organization.<sup>107</sup> The courts repeat over and over again the well-known formula according to which the control of the act exists if the man in the background 'through the structures of the organization makes use of certain basic conditions which make sure that his contribution produces a certain change of events'.<sup>108</sup> According to this case law, even a West German citizen who, by denouncing a former East German citizen's plan to escape caused his illegal arrest, could be sentenced for indirect responsibility for wrongful deprivation of personal liberty, 'especially if the perpetrator consciously uses an illegally acting state apparatus in pursuit of his own goals'.<sup>109</sup> This begs the question how an ordinary citizen could ever be able to control a (foreign) state apparatus. The *Organisationsherrschaft* does not even depend on the defendant's membership in the respective organization.<sup>110</sup> Yet, one can hardly claim that a judge, security agent or police officer who may all have concretely executed the illegal arrest are mere replaceable cogs in the machinery of the respective (foreign) state apparatus.

The Eichmann case is also worthwhile mentioning in this context. Roxin considered Eichmann as an indirect perpetrator, arguing that he was not only a mere executor of orders but at the same time a superior with regard to the persons assigned to him as subordinates, 'so that the criteria which render his men in the background indirect perpetrators also apply to him'.<sup>111</sup> However, while Eichmann's responsibility as a perpetrator is beyond doubt,<sup>112</sup> the type of perpetration is by no means clear. As is known, the Jerusalem district court itself sentenced Eichmann as a

<sup>106</sup> For critique, see Jakobs (n. 92) 21/103 n. 190. See also H. Vest, 'Humanitätsverbrechen – Herausforderung für das Individualstrafrecht' (2001) ZStW 493 *et seq.*; H. Vest, *Genozid durch organisatorische Machtapparate* (Nomos, Baden-Baden 2002), p. 230 *et seq.* and *passim*.

<sup>107</sup> Ambos (n. 26) 243.

<sup>108</sup> BGHSt 40, 218 (236: 'durch Organisationsstrukturen bestimmte Rahmenbedingungen ausnutzt, innerhalb derer sein Tatbeitrag regelhafte Abläufe auslöst').

<sup>109</sup> BGHSt 42, 275 (278).

<sup>110</sup> Cf. in this respect the accurate critique from J. Arnold, 'Rechtsbeugung von Richtern und Staatsanwälten der DDR im "Fall Robert Havemann"?' (1999) NJ 289–90 with regard to Havemann Judgment of the BGH (10 December 1998) by which the doctrine of *Organisationsherrschaft* was implicitly introduced in the cases of the perversion of (the course of) justice.

<sup>111</sup> Roxin (n. 74) (249) 246 *et seq.* (246) [translation from German] C. Roxin, *Straftaten im Rahmen organisatorischer Machtapparate*, (1963) GA 201 *et seq.*

<sup>112</sup> Ambos (n. 26) 549, 554.

co-perpetrator.<sup>113</sup> I expressed some doubts as to Eichmann's responsibility on the basis of the *Organisationsherrschaft* in an earlier paper,<sup>114</sup> but it still seems correct to me that, with the Eichmann case, the possibility of an *Organisationsherrschaft* at different hierarchical stages has been recognized and that this control itself grows and accumulates with increasing power of decision-making and the availability of personnel resources.<sup>115</sup> Against the background of the expansion of the doctrine of *Organisationsherrschaft* in the German case law, it seems more than ever necessary, however, to distinguish clearly between the leadership level in a criminal organization and the level below the leadership of medium, albeit important participants in the criminal enterprise. On closer examination, one can hardly deny the fact that absolute control *through* and/or *over* an organizational apparatus of hierarchical power can only be exercised at the leadership level, i.e. at the level of the formally constituted National Defense Council, *junta* or merely as a government.<sup>116</sup> In addition, this institution or organ represents the state in a particular way and as such bears the overall responsibility for possible violations of the fundamental rights of the citizen. All other power is derived from this highest authority and thus in its exercise attributable to the state leadership. Only its power and authority can neither be blocked nor disturbed in any way from above. In contrast, such a 'disturbance' is possible in the case of a high- or mid-level civil servant like Eichmann: his orders to transport the Jews to the concentration camps could at any moment have been reversed or cancelled by his superiors. Equally, his authority of issuing orders to the direct perpetrators could have been overturned by his superiors, for ultimately the direct perpetrators had to respond not to Eichmann or his level of responsibility but to the NS-leadership. A similar argument can be made with regard to the abovementioned SS-Commander Höß.<sup>117</sup> He too was neither – 'downwards' – the sole person responsible for the events nor – 'upwards' – completely independent. The lack of control of participants who do not belong to the leadership level, although they have a considerable power of decision-making and therefore belong to the higher level, can also be seen in the following statement of the already mentioned Manuel Contreras, who was the head of the secret police DINA and a direct subordinate of Augusto Pinochet:

<sup>113</sup> Cf. Ambos (n. 26) 185: 'his responsibility is that of a principle offender, who acted together with others in committing the entire crime.'

<sup>114</sup> Ambos (n. 26) 236 *et seq.*    <sup>115</sup> Ambos (n. 26) 237, 238.

<sup>116</sup> See H. Vest, *Humanitätsverbrechen – Herausforderung für das Individualstrafrecht?* (2001) 13 ZStW 493 *et seq.*

<sup>117</sup> Cf. n. 93 above and corresponding text.

the exercise of full command (*mando pleno*) in a military institution does not mean being independent, since all commanders have a higher commander on whom they depend, to whom they constantly have to give account on the execution of their task and orders received. In my particular case, this [higher commander] was the President of the Republic and this is why I say that I did not have command over myself and that every task I executed always had to have come from the President of the Republic.<sup>118</sup>

From all this it follows that the doctrine of *Organisationsherrschaft* can only convincingly be applied to men in the background, whose orders and instructions cannot without any further ado be revoked or cancelled, i.e. those who, in this sense, can rule and control without any interference (from above). This is only the case for the leadership level of the formally established government and, in exceptional cases, also for the top hierarchy of the military and police forces. Obviously, their ability to exercise *Organisationsherrschaft* is furthermore to be assumed when they are ruling themselves or belong to the government. In contrast, perpetrators who do not belong to the leadership but only to the mid-level of the organization exercise at the most control with regard to *their* subordinates *within* the apparatus.<sup>119</sup> Thus they do not exercise control over the whole apparatus but rather, at the most, over *a part* of it. In any case, this partial control justifies considering them as indirect perpetrators with regard to the events which took place under their control. At the same time, their dependence on the leadership of the organization militates against a responsibility as indirect perpetrators for the overall chain of events and for a responsibility as *co-perpetrators* on the basis of the functional division of labour. Without such a division of labor the 'final solution' (*Endlösung*) of the Nazis could not have been achieved. Equally, the extermination machinery of a concentration camp such as Auschwitz, personally arranged and supervised by camp commander Höß, could not have functioned so efficiently. The common arguments against co-perpetration within the framework of formal organizations, eloquently presented by Roxin,<sup>120</sup> do not lead to another result. First, as to the joint decision or common plan to carry out the acts it suffices to assume an informal consensus or agreement of the persons

<sup>118</sup> Quoted from the abovementioned Spanish decision to formally opening the investigation statement in the Pinochet proceedings (n. 90) 124.

<sup>119</sup> Cf. also Vest (n. 116) 493 *et seq.*

<sup>120</sup> C. Roxin, *Probleme von Täterschaft und Teilnahme bei der organisierten Kriminalität*, in E. Samson *et al.* (eds.), *Festschrift für Gerald Grünwald zum 70. Geburtstag* (Nomos-Verl.-Ges., Baden-Baden 1999), p. 552 *et seq.*; also G. Küpper, *Zur Abgrenzung der Täterschaftsformen* (1998) GA 524.

involved.<sup>121</sup> While *Roxin* is right, in that the superior giving orders and the subordinate executing these orders do within the framework of an organizational criminal apparatus, as a rule, neither know each other nor take a joint decision, this is not the decisive issue. For an informal agreement it suffices that the direct perpetrator makes clear through his belonging to the criminal organization that he agrees with the superior as to the organization's policies. This agreement manifests itself implicitly by the execution of the act.<sup>122</sup>

The commission by co-perpetration is, as explained elsewhere,<sup>123</sup> not to be strictly interpreted as excluding any *acts of preparation*. Even the gang leader, to take a classical example from ordinary criminality, 'does not dirty his hands but makes use of executors'.<sup>124</sup> A functional control over the act means nothing else than a division of labour of the persons involved. This division in such a case consists of the mastermind's ordering, preparing and planning of the act and the subordinates executing it. Both contributions are indispensable for the commission of the crime, superior and subordinate control the act equally.<sup>125</sup> Furthermore, it is important to consider the fact that it lies in the logic of a functional control over an act that by an increase in the number of persons involved the individual contributions to the act lose importance without necessarily leading to a predominance by the other persons involved.

Last but not least, the argument of a *structural difference* between the *vertical* indirect perpetration and the *horizontal* co-perpetration is equally not decisive. While it cannot be denied that this difference exists in principle,<sup>126</sup> it is only of a structural nature and as such does not permit a reliable delimitation in the borderline cases of macro criminality discussed here. In fact, it is valid in our context as an argument for indirect perpetration only in those cases in which the vertical relationship between the man in the background and the mediator of the act is not overlapped or disturbed by the existence of a further relationship of dependence of the man in the background. The gist of the question of the

<sup>121</sup> Cf. Ambos (n. 26) 558.

<sup>122</sup> Also see Plasencia (n. 91) 266: 'El acuerdo comun ... puede producirse a través de actos *concluyentes*' (emphasis added).

<sup>123</sup> Cf. Ambos (n. 26) 565 *et seq.* <sup>124</sup> Roxin (n. 120) 553.

<sup>125</sup> Against C. Roxin's strict view, see also F. J. Muñoz Conde, 'Problemas de autoría y participación en la criminalidad organizada', in J. C. Ferré and E. Anarte (eds.), *Delincuencia organizada* (Universidad de Huelva, Huelva 1999), p. 155 *et seq.*, who for this reason advocates for indirect perpetration of non-state organisations (see also Ferré and Anarte, (2000) 6 *Revista Penal* 113; Festschrift Roxin [2001], p. 622 *et seq.*).

<sup>126</sup> Cf. Ambos (n. 26) 567, 569.



delimitation between indirect perpetration and co-perpetration in case of mid- and low-level members of the hierarchy is whether one is rather ready to accept a deficiency in control by the superior or a deficit in the equal ranking or footing of the participants. Given that control or domination is the solely decisive criterion for indirect perpetration, deficiencies or doubts cannot be accepted; in contrast the criterion of an equal ranking and timing of the co-perpetrators must not be interpreted too strictly. Indeed, the classical case of the gang leader makes it clear that a hierarchical relationship between the persons involved may also exist in the case of co-perpetration.<sup>127</sup>

## V. Conclusion

The analysis shows that there are three forms or possibilities to impute or attribute international crimes to the top level perpetrators. One of them, *command responsibility*, is explicitly recognized in the statutes of the International Criminal Tribunals, in particular and most detailed by Art. 28 of the ICC Statute. The other two, *joint criminal enterprise* and *Organisationsherrschaft*, can be grounded, at least in their basic form (JCE I) or doctrinal foundation (control of the act), on positive international criminal law (e.g. Art. 25(3)(a) ICC Statute) and have been recognized more (JCE) or less (*Organisationsherrschaft*) by comparative and international case law. As to the – internationally emerging – doctrine of *Organisationsherrschaft*, in essence, it comes down to the question of the liberty of the direct perpetrator operating in a hierarchical organization vis-à-vis the top executive(s) of this organization. In any case, only very few persons command the control necessary to replace immediately one (failing) executor by another, namely only those who belong to the leadership of the criminal organization or who at least control a part of the organization and are, therefore, able to dominate the unfolding of the criminal plan undisturbed by other members of the organization. Although these persons are generally far away from the actual execution of the criminal acts and are therefore normally considered indirect perpetrators or even accessories,<sup>128</sup> they are in fact, from

<sup>127</sup> See also Plasencia (n. 91) 267.

<sup>128</sup> See e.g. Osiel (n. 24) (*Cornell International Law Journal*) 807 who, however, apparently fails to grasp the different forms of participation provided for by the differentiated concept of perpetration according to which *Organisationsherrschaft* is more than mere accessories. Further, it is misleading to state that prosecutions in Latin America ((n. 24) 808) ‘rely heavily on ... superior responsibility’. The truth is that most prosecutions invoke

a normative perspective, the main perpetrators while the executors are merely accessories or accomplices in the implementation of the criminal, collective enterprise.<sup>129</sup>

Thus, ultimately, the doctrine of *Organisationsherrschaft* confirms what has been identified as the underlying rationales of JCE and also command responsibility. First, the traditional system of individual attribution of responsibility, as applied for ordinary criminality characterized by the individual commission of single crimes, must be adapted to the needs of ICL aiming at the development of a *mixed system of individual-collective responsibility* in which the criminal enterprise or organization as a whole serves as the entity upon which attribution of criminal responsibility is based. The doctrine has called this a *Zurechnungsprinzip Gesamttat*,<sup>130</sup> i.e. a principle or theory of attribution according to which the 'global act' (the criminal enterprise) constitutes the central object of attribution. In a way, such a doctrine brings together all the theories discussed in this paper and proves the central point of the JCE doctrine, i.e. to take the *criminal enterprise as the starting point of attribution* in international criminal law. Secondly, all the doctrines discussed here have the common aim of attributing the individual crimes committed within the framework of the system, organization or enterprise to its *leadership*, to its 'masterminds', leaving the destiny of low-level executors and mid-level officials in the hands of the national criminal justice systems. Last, but not least, the criminal responsibility of leaders presupposes a kind of (*normative*) *control* over the acts imputed to them and a mental state linking them to these acts, thereby complying with the principle of *culpability*.

Roxin's theory, especially the *Organisationsherrschaftslehre*, since it can be based on the general rules of perpetration by means (*autoria mediata*) which are unlike the command responsibility doctrine well recognized in civil law systems (as in Latin American). Finally, the fine distinctions between modes of participation discussed in a differentiated system of perpetration as the German or Spanish one demonstrate that 'simplicity' is not, as suggested by Osiel (n. 24) (Columbia Law Review) 1753, the preferred option for criminal law doctrine, at least not for that of the core civil law countries.

<sup>129</sup> Cf. Vest (n. 116) 220, 249.

<sup>130</sup> On this new concept of attribution for collective criminality, see the fundamental work of F. Dencker, *Kausalität und Gesamttat* (Duncker & Humblot, Berlin 1996), pp. 125 *et seq.*, 152 *et seq.*, 229, 253 *et seq.* and *passim*. The concept was further elaborated by Vest (n. 116) 214 *et seq.*, 236 *et seq.*, 303, 304 *et seq.*, 359 *et seq.*