e-journal of
Social and Legal Studies

Autoria, Complicity in the Total Crime and Attribution of Responsibility: Comparative Aspects (with the South American Courts) and International Criminal Justice

Dimitris Liakopoulos*

Abstract

The present work aims to deal with a reference to the categories of autocracy and complicity and to the development of matter in relation to processes of great historical-political relevance, in particular with regard to the considerable influence that Roxinian theory of the Organizations has exercised on South American jurisprudence and on the International Criminal Court. Precisely the debate arising from the application of the provision of art. 25 of the statute of Rome, in terms of individual responsibility, seems to be a good starting point for a discussion on the desirability of a concept of participation in crime worldwide, with a view to harmonization. We try to start from the results of the diachronic, synchronic comparison and the investigation on the supranational plan, in order to present a solution that can be both agile on the applicative level, expressing the elements of convergence between the various models of examination, and respectful of the fundamental principles governing criminal imputation.

Keywords: International criminal law, autoria, complicity, international responsibility, indirect perpetration, Roxin theory.

* Full Professor of European Union Law at the Fletcher School-Tufts University (MA in international law and MA of Arts in Law and diplomacy). Full Professor of International and European Criminal and Procedural Law at the De Haagse Hogenschool-The Hague. Attorney at Law a New York and Bruxelles. ORCID ID: 0000-0002-1048-6468. The present work is updated until November 2019. (email: prof.d.liakopoulo.984@gmail.com)

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Received: November 12, 2019 ***Accepted:*** December 1, 2019

Introduction

One of the biggest challenges in punishing human rights violations is to accurately determine responsibility and accurately weigh individual contributions[1]. This includes, in particular, the delicate task of defining appropriate accountability modalities for those participants who do not contribute materially to the commission of the crime[2].

[1]T. ISAACS, Collective moral responsibility and collective intention, in P. A. FRENCH, H. K. WETTSTEIN (a cura di), Shared intentions and collective responsibility, Oxford University Press, Oxford, 2006, pp. 59ss. D. LUBAN, State criminality and the ambition of international criminal law, in T. ISAACS, R. VERNON (a cura di), Accountability for collective wrongdoing, Cambridge University Press, Cambridge, 2011, pp. 61ss. H. VAN DER WIL, A. NOLLKAEMPER, M. DOLMAN, J. KLEFFNER, System criminality in international law, Cambridge University Press, Cambridge, 2009.

[2]The *mens rea* purpose test is not unique to the ICC. The provisions for complicity by aiding and abetting-which appear in the legal instruments of the East Timor Panels of Judges and the IHT955Article 15(2)(c) of the IHT Statute. A similar purpose test is applied in a number of domestic jurisdictions: Canada‘s Section 21(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 and New Zealand‘s Section 66(1) Crimes Act 1961; the Model Penal Code of the American Law Institute; Section 14(3)(c) of Regulation 2000/15. East Timor was annexed as a province to Indonesia from 1975 up until 1999 when the East Timorese population voted for their independence. Following a violent campaign allegedly perpetrated by pro-Indonesian militias against the Timorese population, East Timor gained its independence in 2002. UNTAET, the provisional authority established in East Timor in the aftermath of Indonesia‘s withdrawal, set up Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the East Timor District Courts to deal with the grave violations of international humanitarian law and human rights that were committed in East Timor during 1999 (see generally, United Nations Mission of Support in East Timor. Farrell‘s approach here seems to be in keeping with the brief observations made by the Pre-Trial Chamber in The Prosecutor v. Callixte Mbarushimana, and also the manner in which the Panels of Judges attributed accomplice liability in East Timor. See, Deputy Prosecutor General for Serious Crimes and the U.C. Berkeley War Crimes Studies Center American Law Institute, Model Penal Code: Official Draft and Explanatory Notes, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985); The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges) (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) (281), where the Chamber noted that: “(...) the jurisprudence of the ad hoc tribunals does not require

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The theory of self-exploitation of an apparatus of organized power has gained some success outside of its country of origin[3].

The question is that of the commission of crimes perpetrated by a plurality of subjects acting in competition with each other, incardinated in a structure with more or less-strictly hierarchical functioning[4]. The objective elements of the crime are put in place by fully responsible material executors[5]: for these reasons we understand the difficulties of adapting the dogmatic categories of domestic law, and the success recently granted by the jurisprudence to the theory of *Willensherrschaft kraft organisatorischer Machtapparate*[6].

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the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime (...)"; and for the UNTAET, see, Section 14(3)(c) of Regulation 2000/15. See in argument: V. F. JESSBERGER, J. GENEUSS, On the application of a theory of indirect perpetration in Al Bashir. German doctrine at The Hague?, in Journal of Internaitional Criminal Justice, 6, 2008, pp. 855ss. E. VAN SLIEDREGT, Individual criminal responsibility in international law, Oxford University Press, Oxford, 2012, pp. 8ss. H. KELSEN, Collective and individual responsibility in international law with particular regard to the punishment of war criminals, in California Law Review, 31, 1943, pp. 530ss.N.H.B, JØRGENSEN, State responsibility for aiding or assisting international crimes in the context of the arms trade treaty, in The American Journal of International Law, 108 (4), 2014, pp. 722-749. C. BRANDTS, Guilty landscapes: Collective guilt and international criminal law. Cosmopolitan justice and its discontents, ed. Routledge, London, 2010, pp. 53-68.

[3]F.S. BENAVIDAS VANEGAS, Autoria directa y aytoria mediata, responsabilidad del superior y empresa criminal conjunta en el derecho penal internacional, in Revista Academia & Derecho, 13 (7), 3017. K.AMBOS, Internationales Strafrecht, C.H. Beck, München, 2014, par. 4. D. LIAKOPOULOS, Die Hypothese des Rechts auf ein faires Verfahren internationalen Strafgericht, in International and European Union Legal Matters, 2012.

[4]G. WERLE, B. BURGHARDT, Indirect perpetration: A perfect fit for international prosecution of armchair killers?, in Journal of International Criminal Justice, 9, 2011, pp. 85ss. G. WERLE, Claus Roxìn on crimes as part of organized power structures, in Journal of International Criminal Justice, 9, 2011, pp. 19ss.

[5]I. MARCHUK, The fundamental concept of crime in international criminal law. A comparative analysis, ed. Springer, London, 2014, pp. 113ss.

[6]H. OLÁSOLO, The criminal responsibility of senior political and military leaders as principals to international crimes, Oxford University Press, Oxford, 2009, pp. 116ss. H.D. OROZCO LÓPEZ, Beteiligung an organisatorischen Machtapparaten:

It is quite striking to note that throughout the South American territory the category of the *Organizationsherrschaft*-conceived under German law, to regulate matters of domestic law-has been applied and even partially revised (as in the case of the aforementioned ruling against President *Fujimori)*[7].

The phenomenon probably has more than one cause. On the one hand, is the undeniable authority that the German doctrine also exerts-above all-in the Spanish-speaking countries, and it is known that this is often used *ad adiuvandum* in judicial arguments[8]. On the other hand, the processes that will be discussed are processes with great political value and enormous historical significance: as we have seen, it is precisely in these cases that Roxinian construction plays its essential role as a ductile and evaluative mechanism[9].

1. The Process In The Military Junta In Argentina

The domination of the organization in the jurisprudence of the South American national courts.

The German Federal Court, in which for the first time the road was open to the jurisprudential recognition of the Organizations in the

Eine Untersuchung zur Begründung und Verteilung strafrechtlicher Verantwortung, ed. Mohr Siebeck, Tübingen, 2018.

[7]K. AMBOS, The Fujimori judgment. A President's responsibility for crimes against humanity as indirect perpetrator by virtue of an organized power apparatus, in Journal of International Criminal Justice, 9, 2011, pp. 138ss. H. VAN DER WILT, On Functional perpetration in Dutch criminal law. Some reflections sparked off by the case against the Former Peruvian President Alberto Fujimori, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (6), 2009, pp. 616ss.

[8]V. J. CEREZO MIR, La influencia de Welzel y del finalismo, en general, en la Ciencia del Derecho penal española y en la de los países iberoamericanos, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (1), 2009, pp. 211ss. J. CEREZO MIR, La polémica en torno al concepto finalista de autor en la Ciencia del Derecho Penal española, ed. Technos, Madrd, 1982, pp. 635ss. A. GIL GIL, E. MACULAN, Intervenciòn delictia y derecho penal internacional: Reglas de atribuciòn de la responsabilidad en crìmenes internacionales, ed. Dykinson S.L., Madrid, 2014, pp. 582ss.

[9]C. ROXÍN, El dominio de organización como forma independiente de autoría mediata, in Revista Penal, 18, 2006, pp. 242-248.

country where this theory was conceived[10]. However, the fundamental stage that marks the very first express application of the Roxinian construction is the ruling by the Federal Court of Appeal of Buenos Aires against the Argentine military junta[11]. The chiefs of staff of the army, navy and aeronautics were the defendants, heads of the three military quarters that succeeded the government of the country, for crimes committed during the period of the dictatorship (so-called "National reorganization process", between 1976 and 1983). Not having personally and concretely kidnapped, tortured or killed, *Fiscalía* proposed to qualify the conduct of these subjects as an expression of auteur mediated by virtue of the exploitation of an apparatus of organized power, of the participation of persons[12]; however, as will be seen, in an isolated case the *Organisationsherrschaft* doctrine has been used even by the Brazilian judges: in a system, therefore, that knows a model of unitary participation, relying on the well-known Roxinian theory, but above all on the letter of art. 45 of the Argentinean penal code and art. 514 of the *Código de Justicia Militar*[13]. The defense, on the other hand, opposed a series of arguments against the prosecution: first of all, the implantation of the Argentine penal code would not be based on the dominion of the fact, but on the execution of the typical action,

[10]See: BGH, JZ 1995, 45. For further details see: G. WERLE, B. BURGHARDT, The German Federal Supreme Court (Bundesgerichtshof, BGH) on indirect perpetration. Introductory note, in Journal of International Criminal Justice, 9, 2011, pp. 207ss.

[11]Cámara Federal Nacional de Apelaciones en lo Criminal y Correccional de la Capital Buenos Aires, causa n° 13/84, Causa originariamente instruída por el Consejo Supremo de las Fuerzas Armadas en cumplimiento del Decreto 158/83 del Poder Ejecutivo Nacional, del 9.12.1985.

[12]C. GEGOUT, The International Criminal Court: Limits, potential and conditions for the promotion of justice and peace, in Third World Quarterly, 34 (5), 2013, pp. 812ss.

[13]Art. 45: "Los que tomasen parte en la ejecución del hecho o prestasen al autor o autores un auxilio o cooperación sin los cuales no habría podido cometerse, tendrán la pena establecida para el delito. En la misma pena incurrirán los que hubiesen determinado directamente a otro a cometerlo". Art. 514: "Cuando se haya cometido delito por la ejecución de una orden del servicio, el superior que la hubiere dado será el único responsable, y solo será considerado cómplice el inferior, cuando éste se hubiere excedido en el cumplimiento de dicha orden (...)".

following a theory of formal-objective mold. Assigning responsibility for autoria outside the boundaries outlined by the legal type[14], moreover, would violate the principle *nullum crimen, nulla poena sine lege*[15]. Again, one doubts the admissibility of the mediated self-defense in the case of a fully responsible executor: this circumstance would automatically cause the possibility that those who work at the top will possess full control of the fact; moreover, it seems that the theory of the organized apparatus of power, opposed by the doctrine for the numerous problems it creates during the application, arises with factual assumptions different from those of the present case. Finally, based on the theory of the accessibility of participation, one could not even argue that the defendants are instigators[16].

It is noted that the military code does not follow the formal-objective theory of participation: an assertion that would be corroborated precisely by the dictate of art. 514, which, in fact, sets an exception by virtue of the particular relationship of subordination and the very essence of the military hierarchy, based on obedience and discipline[17]. Furthermore, an articulated historical analysis is carried out on the drafting and interpretation of the art. 45 of the *Código penal*, arriving at two conclusions on the merits: the order would seem to include among the autocratic conduct also those of the primary and the determinator and the concept of determiner would include conduct

[14]M. KUNZ, Conceptualising from national corporate groups fro international criminal law, ed. Nomos, Baden-Baden, 2017.
[15]In particular see: F. VON LISZT, The rationale for the nullum crimen principle, in Journal of International Criminal Justice, 5, 2007, pp. 1005-1008. K. AMBOS, Nulla poena sine lege en Derecho penal internacional, in Revista de Ciencias Penales de Costa Rica, 26, 2009, pp. 36 ss. I.J. PAUST, Nullum crimen and related claims, in Denver Journal of International Law and Politics, 25, 1997, pp. 322ss. G.E. BARCO, Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine lege Prinzips im Völkerstrafrecht, Duncker & Humblot, Berlin, 2018. C. KRESS, Nulla poena nullum crimen sine lege, in Max Planck Encyclopedia of Public International Law, 2010, pp. 4ss. G.E. COTE BARCO, Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine-lege-Prinzips im Völkerstrafrecht, Duncker & Humblot, Berlin, 2018.
[16]Cámara Federal Nacional, 9.12.1985, pp. 257ss.
[17]Cámara Federal Nacional, 9.12.1985, pp. 259.

between instigation and mediated autoria[18].

The Federal Court of Appeal recognized the dominion of the defendants on the fact, since they undoubtedly had control of an entire complex apparatus preordained for the repression of dissent. After the coup, in fact, the commanders of the Juntas had full command of the security forces, placing themselves as absolute, unique, unrivaled authority within the country. Given the circumstances, whoever materially perpetrated the crime loses importance: in this case the control of the top is total, and even if a subordinate refuses to obey he would be immediately replaced by another subject able to comply with the directives. This implies that the prepared plan is in no way in the hands of the performer, who is nothing but a mere gear of an enormous mechanism[19].

The formula used here only refers to "the *Äsetzbares Rädchen im Getriebe des Machtapparates*"[20], hence the requirement of *Fungibilität roxiniana*[21]. The Court maintains that this is a matter of a dominion over an "undetermined will"[22]: one is sure of the verification of the fact, but anyone could concretely put it into effect[23].

[18]Cámara Federal Nacional, 9.12.1985, pp. 259.

[19]Cámara Federal Nacional, 9.12.1985, pp. 267: "(...) en este contexto, el ejecutor concreto de los hechos pierde relevancia. El dominio de quienes controlan el sistema sobre la consumación de los hechos que han ordenado es total, pues aunque hubiera algún subordinado que se resistiera a cumplir, sería automáticamente reemplazado por otro que sí lo haría, de lo que se deriva que el plan trazado no puede ser frustrado por la voluntad del ejecutor, quien sólo desempeña el rol de mero engranaje de una gigantesca maquinaria (...)".

[20]C. ROXÍN, Täterschaft und Tatherrschaft, ed. De Gruyter, Hamburg, 2001, pp. 245ss.

[21]Cámara Federal Nacional, 9.12.1985, par. 268: "(...) el dominio no es entonces sobre una voluntad concreta, sino sobre una “voluntad indeterminada”, cualquiera sea el ejecutor, el hecho igual se producirá (...)". As it does not matter who actually acts, so does not seem to have the precise identity of the victims: orders would generally refer to all "subversives".

[22]C. ROXÍN, Zuer neuesten Diskussion über die Organisationscherrschaft, in Goltdammer's Archiv für Strafrecht, 159 (7), 2012, pp. 398ss.

[23]Cámara Federal Nacional, 9.12.1985, pp. 268: "El dominio no es entonces sobre una voluntad concreta, sino sobre una “voluntad indeterminada”, cualquiera sea el ejecutor, el hecho igual se producirá".

The contribution of the defendants to the commission of crimes appears, as stated in the ruling, even more significant: the detention centers needed funding and organization, and it is unthinkable that the leaders of the military councils were not aware of their existence and activity. Finally, only the presence of the defendants in power could have guaranteed impunity for such conduct. The incredible prolonged coexistence of the "legal" system and the one applied in the fight against guerrilla was undoubtedly the result of the establishment of a stable apparatus to the top of which the commanders of the juntas were placed[24]. The classification operated by the *Cámara Federal* was rejected by the Supreme Court. The judges of the Court departed from a total rejection of the theory of domination of the fact, which would have had no connection with the law in force in Argentina.

The Court of Appeal would have thus interpreted the art. 45 of the penal code, in violation of the principle of legality[25]; moreover, art. 514 of del *Còdigo de Justicia Militar*[26] would not be applicable to

[24]Cámara Federal Nacional, 9.12.1985, pp. 268.

[25]B. VAN SCHAACK, The principle of legality in international criminal law, in Santa Clara Law Review, 51, 2011, pp. 104ss. M. CHERIF BASSIOUNI, Principles of legality in international and comparative criminal law, in M. CHERIF BASSIOUNI (ed.), International criminal law, vol. I: Sources, subjects and contents, The Martinus Nijhoff Publishers, The Hague, 2008, pp. 73-105. B. VAN SCHAACK, The principle of legality in international criminal law, op. cit., pp. 106ss. M. CHERIF BASSIOUNI, Principles of legality in international and comparative criminal law, in M. CHERIF BASSIOUNI (ed.), International criminal law, vol. I: Sources, subjects and contents, op. cit., pp. 92ss. K.S. GALLANT, The principle of legality in international and comparative criminal law, Cambridge University Press, Cambridge, 2009. A. BARZEGARZADEH, M. JALALI KARVEH, L. RAISI, Principle of legality and its relation with customary law in international criminal law, in Mediterranean Journal of Social Science, 6, 2015, pp. 400ss. E. KASHKOULIAN, M. REZA, The principle of legality of crimes of international criminal law perspectives, in International Journal of Science and Research, 5, 2016, pp. 42ss. N. BARBERO, La ¿relativa? aplicación del principio de legalidad en Derecho Penal Internacional, in Revista Nuevo Foro Penal, 13, 2017, pp. 124ss. R. LLEDÓ, El principio de legalidad en el derecho penal internacional, in Eunomia. Revista en Cultura de la Legadidad, 11, 2016, pp. 249ss.

[26]Art. 514: "Cuando se haya cometido delito por la ejecución de una orden del servicio, el superior que la hubiere dado será el único responsable, y solo será considerado cómplice el inferior, cuando éste se hubiere excedido en el

the concrete case[27]. The Court therefore preferred to frame the conduct of the accused as acts of necessary participation[28].

According to our opinion is the notion of execution that seems to be indispensable for any attempt at typing and defining the contribution to the competition, since it is around this that the figure of the author is essentially built: the execution identifies the immediate author, the co-author and therefore, in a residual way, the accomplice. Therefore, the insolvency figures, where typified, are formally linked to the materiality of the conduct. However, in the examined cases this does not seem satisfactory: the interpreter is often forced to make an extensive reading of the *actus reus*, useful to punish more severely the most responsible subjects, classifying them as authors on the typical plane: the principle of fair labeling is so apparently respected; in fact, an inversion of the judgment is produced, which justifies outcomes already determined after the fact on the basis of penalization dosimetry requirements.

2. The Condemnation Of The Colonels Contreras And Espinoza In Chile

The factual context of the present case seems to have many similarities with what has already been seen with regard to the *Staschynskij* judgment[29]. The two defendants covered the summits of

cumplimiento de dicha orden".

[27]According to the High Court: "(...) son aquellos conexos con el ámbito de la función, y no los externos perpetrados en tiempo de paz, que atacan la vida o la libertad de las personas". See in argument: E. MALARINO, El caso argentino, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, ed. Tèmis, Bogotà, 2009, pp. 39ss.

[28]It has also been argued that, while accepting the Roxinian theory, the judges of the Court of Appeal actually treated the former commanders as necessary participants, making their punishment dependent on the fact committed by the immediate author. For example, in the case of presidential murder followed by torture, unwanted by the executor of the typical conduct, it was the commander who was indicated as the mediated author of the deliberate crime of the immediate author. See in argument also. E. MALARINO, El caso argentino, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., pp. 60ss.

[29]BGH, NJW 1963, 357: "(...) Staschynskij Auftraggeber haben bei der Anordnung beider Attentate deren wesentliche Merkmale (Opfer, Waffe, Gegenmittel, Art der

the Chilean secret police created in the first period of the dictatorship of *Augusto Pinochet Ugarte, the Dirección de Inteligencia Nacional* (DINA): since its creation, Colonel *Manuel Contreras* assumed the role of Director. The trial was established following the assassination of *Orlando Letelier del Solar*, a member of the Allende government and a staunch opponent of Pinochet[30]. According to the reconstruction made in the first instance judgment, which took place before the Chilean Supreme Court on 12 November 1993, it was Contreras himself who took the decision to kill *Letelier*. Having full control of DINA, which in effect became a militarized body in 1974, the Colonel appointed Espinoza to create the necessary conditions for the assassination. Finally, it was *Michael Townley,* CIA's secret agent and *Contreras* collaborator, who materially perpetrated the murder in Washington on September 21, 1976, after a long spy. The sentence thus describes an activity carried out on various levels, placed on a hierarchical scale; in particular, it is emphasized that both colonels operated in agreement, leaving to *Townley* only the completion of the last phase of the criminal plan[31]. Nonetheless, the situation of

Anwendung, Tatzeiten, Tatorte, Reisen) vorher festgelegt". See, F. C. SCHROEDER, Der Täter hinter dem Täter, Ein Beitrag zur Lehre von der mittelbaren Täterschaft, Duncker & Humblot, Berlin, 1965, pp. 168 and 245ss. The german doctrine would have created, in the wake of these cases, the concept of "organizer", which would correspond to the mode of participation charged with greater value in terms of danger, in a completely independent manner from the alternative between Täterschaft and Teilnah. G. SPENDEL, Der "Täter hinter dem Täter",- eine notwendige Rechtsfigur?, in Festschrift für Richard Lange zum 70. Geburtstag, Duncker & Humblot, Berlin, 1976, pp. 161ss, which stated that: "(...) Die beiden dogmatisch verfehlten Entscheidungen sind offensichtlich vom “Ergebnis”, d.h. vom Strafmaß her bestimmt (...)". B. WEISSER, Täterschaft in Europa, ed. Mohr siebeck, Tübingen, 2011. I. MOROZINIS, Dogmatik der Organisationsdelikte: Eine kritische Darstellung der täterschaftlichen Zurechnungslehre in legalen und illegalen Organisationsstrukturen aus strafrechtsdogmatischer und rechtstheoretischer Sicht sowie ein Beitrag zur Lehre vom Tatbestand, Duncker & Humblot, Berlin, 2010, pp. 116ss.

[30]F. MUÑOZ CONDE, H. OLÁSOLO, The application of the notion of indirect perpetration through organized structures of power in Latin America and Spain, in Journal of International Criminal Justice, 9, 2011, pp. 120ss.

[31]The court Supreme has stated that: "(...) obrando en mutuo concierto, despacharon a Townley hacia Estados Unidos con la misión de dar muerte a Letelier en cumplimiento de la última etapa del plan, que cumprendió anteriormente una

subordination of the US agent at the top of the DINA is founded; a point, this, which assumes particular importance in the light of the subsequent classification in the context of the mediation of the conduct of the colonels[32]. In this way the Court underlines the coercive effect of the order received by the material author, and thus excludes that the senior officers of the secret police may simply be instigators; the context is typical of self-mediated exploitation of an organized apparatus of power, since the vertices are able to use their power to give orders and guarantee their implementation, also through the interchangeability of the performers: thus, the resistance and the opposition of the subordinate has no impact on the realization of the offense[33].

Likewise, the relationship of proximity between the two hierarchs is briefly reconstructed, which were therefore treated in the same way as "mediated co-authors", based on the Roxinian theory. The Supreme Court does not refer to any concept derived from international criminal law[34]: its arguments rely exclusively on the

operación de seguimiento y vigilancia del ex ministro (...)". In argument see. J. L. GUZMÁN DALBORA, El caso chileno, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penale internacional, op. cit., 74ss.

[32]Townley "estaba en una situación de sometimiento a la jefatura de la DINA, por su carácter de agente de facto de ella y la circunstancia de que él y su familia vivían al amparo y bajo el control de ese servicio de inteligencia (...), a lo cual se suma su asimilación psicológica al aparato militar de la DINA y su consiguiente concepto de lealtad hacia ésta (...)". V.J. L. GUZMÁN DALBORA, El caso chileno, K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penale internacional, op. cit., pp. 75ss.

[33]F. MUÑOZ CONDE, H. OLÁSOLO, The application of the notion of indirect perpetration through organized structures of power, op. cit., 121: "(...) the notion of instigation would have required an act of persuasion without the coercive nature of the order to kill (...)".

[34]"(...) the heart of international criminal law remains collective in nature (...)", according to the author: G.P. FLETCHER, The storrs lectures. Liberals and romantics at war: The problem of collective guilt, in Yale Law Journal, 111, pp. 2002ss. According to the author: “(...) there is no term fraught with greater ambiguity that that venerable phrase that haunts Anglo-American criminal law: mens rea". The confusion over the meaning of the term continues to exist in modern criminal law, which is fuelled by the perpetual theoretical debates on the nature of various mens rea standards and the principle of culpability (...)". P. GAETA, The

dictate of the Chilean penal code of 1874[35]. It is not found in art. 15 mentioning the possibility of admitting an author mediated by the fact; on the other hand, the exploitation of the concept of coercion would be strictly excluded, since the executor is fully responsible[36]. As has been authoritatively supported, here as in other cases the forcing of the

history and the evolution of the notion of international crimes, in R. BELLELLI (a cura di), International criminal justice. Law and practice from the Rome statute to its review, Ashgate Publishing, Farnham, 2010, pp. 169-180. A. CASSESE, P. GAETA, Cassese's international criminal law, Oxford University Press, Oxford, 2013, pp. 37ss. For the Makrokriminalität see also: Art 6 Abs. 1 Statute of the Special Court for Sierra Leone, SCSL-Agreement v. 16.1.2002 (SCSL-Statut); Art. 29 Abs. 1 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, ECCC-Agreement v. 6.6.2003 (ECCC-Statute). H. JÄGER, Makrokriminalität. Studien zur Kriminologie kollektiver Gewalt, ed. Suhrkamp, Berlin, 1989. W. JOECKS, K. MIEBACH (Hrsg.), Münchener Kommentar zum Strafgesetz-buch, C.H. Bech, München, 2017. S.U. BURKHARDT, Vergewaltigung als Verbrechen gegen die Menschlichkeit Sexualisierte Gewalt, Makrokriminalität und Völkerstrafrecht, LIT Verlag, Berlin, 2005. U. MURMANN, Problems of causation with regard to (potential) actions of multiple protagonist, in Journal of International Criminal Justice, 12, 2014, pp. 284ss. W. JOECKS, K. MIEBACH (Hrsg.), Münchener Kommentar zum Strafgesetz-buch, op. cit., O. TRIFFTERER, K. AMBOS (a cura di), The Rome Statute of the International Criminal Court. A Commentary, C.H.Beck-Hart-Nomos, München, Oxford, Baden-Baden, 2016. S. BOCK, Zurechnung im Völkerechtstrafrecht, in Zeitschrft für Internationale Strafrechtdogmatik, 7-8, 2017, pp. 414ss. C.F. STUCKENBERG, Vorstudien zu Vorsatz und Irrtum im Völkerstrafrecht: Versuch einer Elementarstrafrecht für eine übernationale Vorsatzdogmatik, ed. De Gruyter Recht, Berlin, 2011, pp. 6ss. K. KONLE, Makrokriminalität im Rahmen der jugoslawischen Sezessionskriege, Herbert Utz Verlag, 2010, pp. 49ss. C. GLOBKE, Die Auslieferung an den Internationalen Strafgerichtshof, Mohr Siebeck, Tübingen, 2009

[35]According to the art. 15: "Se consideran autores: (1) Los que toman parte en la ejecución del hecho, sea de una manera inmediata y directa, sea impidiendo o procurando impedir que se evite. (2) Los que fuerzan o inducen directamente a otro a ejecutarlo. (3) Los que, concertados para su ejecución, facilitan los medios con que se lleva a efecto el hecho o lo presencian sin tomar parte inmediata en él". It should finally be specified that the art. 14 defines perpetrators of crime, accomplices and facilitators; art. 16 we provide a definition of an accomplice (substantially derived residually from the provisions of Article 15). There is no distinction between the participants in terms of the commensurate sentence.

[36]J. L. GUZMÁN DALBORA, El caso chileno, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., pp. 78ss.

normative data was probably excessive: since neither *Contreras* nor *Espinoza* realized any act of execution, it would perhaps be more correct to qualify them as participants, and respectively as instigators and as accomplice. This did not preclude the Court from committing the same punishment to the immediate perpetrator, who, despite being a "gear wheel", is the one who actually carries out the criminal action[37].

Historical analysis has shown that the distinction between autoria and complicity, far from representing a logical necessity, arises mainly from a procedural question, and this helps to explain the centrality of execution in the definitive procedure and of normative technique. This becomes a problem when it comes to combining the category of autoria *stricto sensu*, linked to the material execution of the conduct, with a more severe sanctioning treatment: the concept of autoria must necessarily expand, including conduits that gradually move away from the *actus reus*[38], and take on a symbolic meaning.

[37]According to the position of: J. L. GUZMÁN DALBORA, El caso chileno, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., pp. 83ss, "(...) deja incólume el juicio jurídico que merece el autor, pero también el juicio moral e histórico congruente a esas "ruedecillas" que, sin embargo, son las que jalan el gatillo, hacen explotar bombas y siegan vidas humanas (...)".

[38]For the *actus reus* see from the next cases from the Special Tribunal for Lebanon: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/T/CJ, Trial Chamber judgment, 15 July 2016 (Akhbar, Trial Chamber judgment) the Court: "(...) stressed that in order to see the differences in the assessment of corporate criminal liability across nations, there is a need to look beyond the systems of common law nations. By finding that the notion of corporate criminal liability is of such divergent nature in the international domain of domestic practices that there is a lack of consensus on it, the Court re-affirmed the Defence's argument stating that the corporate accused not have been expected to know that its acts would result in a violation of international law (...) held that the *mens rea* can only be fulfilled if the natural accused has knowingly and wilfully interfered with the administration of justice and that the act has been committed merely knowingly and wilfully in order to show culpability (...) the Amicus had to prove that the accused "(1) deliberately published information on purported confidential witnesses, and (2) in doing so, they knew that their conduct was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, provided by, witnesses or potential witnesses (...) actual knowledge that the disclosure poses a threat to the public's confidence in the Tribunals work can be inferred from various

While at times the equal penalty for certain competitors is expected and the difference for others, the judge often has the task of adjusting the sentence to the activity concretely carried out by each competitor. On the whole, although the need to differentiate competitors is particularly felt, their different punishability is assessed in practice more than in relation to abstract forms of participation. Having focused attention on these abstract forms postulating that "performance" entails a greater responsibility than the other forms of competition, ended up by contrasting the "author" with the "participant".

3. The Uruguay Case

The rulings of the Uruguayan courts on the repeated violations of human rights perpetrated by the heads of the government or the armed forces seem to be able to meet under a minimum common denominator: it transpires, in fact, a certain confusion regarding the criteria of imputation for autoria. The first sentence that should be remembered here was that pronounced in condemnation of *Juan María Bordaberry Arocena,* recognized co-author of ten murders of murder pluri aggravated in material competition, pursuant to art. 61 subparagraph 4 of the Uruguayan penal code[39]. The *Juzgado Letrado*

circumstances (...) if only wilful blindness is established, that alone suffices knowledge which gives reason to impute criminal liability (...). See also: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/S/CJ, Reasons for Sentencing judgment, 5 September 2016, para. 2. (Akhbar, Sentencing judgment) the STL established: "(...) the *actus reus* and *mens rea* of corporate entities and found a corporate body criminally liable for contempt of court (...) references made to the case-law of this Court might seem misleading as the corporate body did not commit atrocity crimes. However, this case has been carefully chosen to stress that domestic practices lay the necessary foundation for the development of international criminal law to include corporate criminal liability (...)". See also in argument: C.P. EBY, Aid "specifically directed" to facilitate war crimes. The ICTY's anomalous actus reus standard for aiding and abetting, in Chicago Journal of International Law, 115, 2014.

[39]In Uruguay the distinction is made between authors, co-authors and accomplices. In art. 60 there is a bipartition between the immediate author and the mediated author (which is only the person who determines persons who are not responsible or not punishable to commit the crime); art. 61: "(...) se consideran coautores: (1) Los que fuera del caso comprendido en el inciso 2° del artículo anterior, determinan a otros a cometer el delito. (2) Los funcionarios públicos que, obligados a impedir,

en lo Penal (JLP) makes no reference to the domination of an organized apparatus of power; indeed, the Tribunal specifies that the dictator did not have effective control over the repressive operations that the Uruguayan Armed Forces implemented between 1973 and 1976. However, the arguments for founding coauthoria closely resemble those already used by other courts for the classification of conducted in the framework of the *Organizationsrsherrschaft. Bordaberry's* indictment as a co-author is based on an isolated act (the signature of Decree 464/973, with which Parliament was dissolved and a dictatorial regime was established which lasted for three years, from 1973 to 1976); with this act, the dictator would have granted impunity to the repeated violations carried out by the Armed Forces, although in the sentence it is specified that he did not have the dominion of the apparatus[40]. *Bordaberry's* responsibility was essentially assessed as a violation of a duty, derived from his status as maximum hierarch; yet, the judges do not rely on the violation of a specific obligation, but on subparagraph 4 of art. 61, consequently framing his conduct in the area of coauthoria, for having made an essential contribution to the crime[41].

While not citing the Roxinian theory, the JLP pointed out that this essential contribution showed that *Bordaberry* had at least a shared control with the other co-authors on the commission of the crime[42]. Basically, to prove the coauthoria already affirmed in the first instance judgment (that is, at least the participation of *Bordaberry* in the phase preceding the beginning of the execution of the crimes), the apical position covered by the subject is leveraged, without however

esclarecer o penar el delito, hubiesen, antes de la ejecución y para decidirla, prometido encubrirlo. (3) Los que cooperan directamente, en el período de la consumación. (4) Los que cooperan a la realización, sea en la faz preparatoria, sea en la faz ejecutiva, por un acto sin el cual el delito no se hubiera podido cometer (...)".

[40]F. MUÑOZ CONDE, H. OLÁSOLO, The application of the notion of indirect perpetration through organized structures of power, op. cit., pp. 133.

[41]S.H. CARRASOLO, Implementation of war crimes in Latin America: An assment of the impact of the Rome statute of the International Criminal Court, in International Criminal Law Review, 10, 2010, pp. 463ss.

[42]F. MUÑOZ CONDE, H. OLÁSOLO, The application of the notion of indirect perpetration through organized structures of power, op. cit., pp. 134ss.

reaching give it a real "responsibility of the superior" ex art. 61 subparagraph 2[43].

An equally interesting case is that of General *Miguel Dalmao* and Colonel *José Nelson Chialanza,* for whom in November 2010 the trial and detention was ordered because of the murder of the militant *Nibia Sabalsagaray*. Here it is confirmed that *Dalmao* and *Chialanza* had dominion over the apparatus of military intelligence services (S2), and that therefore they had total control over the actions of their subordinates; this construction at first sight based on the *Willensherrschaft kraft organisatorischer Machtapparate*[44] is accompanied by an imputation based on the responsibility of the superior[45], without however giving an account of how the guarantee position was constructed. The two officers are called co-authors of the crime, partly adhering to the point of view of the indirect perpetration, therefore considering them authors of the commissioning fact; in part, referring to the doctrine of the responsibility of the superior (therefore, we speak here of the realization of a commission crime by omission)[46]. The solution is not convincing: the guarantee position is

[43]J.L. GONZÁLES GONZÁLES, P. GALAIN PALERMO, Uruguay, in K. AMBOS, E. MALARINO (a cura di), Jurisprudencia latinoamericana sobre derecho penal internacional. Con informes adicionales de España e Italia, Editorial Temis, Bogotà, 2008, pp. 316ss.

[44]L. SCHULZ, Perspektiven der Normativierung des objektiven Tatbestands (Erfolg, Handlung, Kausalität) am Beispiel der strafrechtlichen Produkthaftung, in K. LÜDERSSEN (a cura di), Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse, ed. Nomos, Baden-Baden, 1998, pp. 94ss.

[45]R. ESTUPIÑAN SILVA, Principios que rigen la responsabilidad internacional penal por crìmenes internacionales, in Anuario Mexicano de Derecho Internacional, 2012, pp. 136ss.

[46]P.J. STEPHENS, Collective criminality and individual responsibility: The constraints of interpretation, in Fordham International Law Journal, 2014, pp. 508ss. V. VIJ, Individual criminal responsibility under aiding and abetting after the specific direction requirement in the Taylor and Perišć cases, in Die Friedens-Warte, 2013, pp. 160ss. J. CCOURTNEY, C. KAOUTZANIS, Proactive gatekeepers: The jurisprudence of the ICC's pre-trial Chambers, in Chicago Journal of International Law, 2015, pp. 525ss. B. GOY, Individual criminal responsibility before the International Criminal Court: A Comparison with the ad hoc Tribunals, in International Criminal Law Review, 2012, pp. 34ss. P. GRÉCIANO, Justice pènale internationale, ed. Mare & Martin, Paris, 2016. L. GROVER, Interpreting crimes in the Rome statute of the International Criminal Court, Oxford University Press,

not founded, nor is evidence of the asserted domination over the fact of the defendants; moreover, the reference to art. 28 of the Statute of the International Criminal Court (StICC) on the imputation of a common crime such as homicide.

4. The *Machuca* Case: The Criteria For Imputation Of Responsibility In Colombia

The ruling concerns the terrorist attack of 18 October 1998 on the oil infrastructure near the village of *Machuca*, by the National Liberation Army. Explosion of the explosive caused a fire of considerable proportions, as well as the wounding and death of more than a hundred people[47]. Since it was not possible to identify the subjects who physically positioned the bomb, the *Fiscalía General* made a charge against homicide, personal injury, terrorism and revolt against the three leaders of the *Cimarrón* company, belonging to the *José Antonio Galán Front,* and seven members of the National Directorate of the ELN: the prosecution adjudicated such subjects as "co-authors determiners"[48]. The classification is certainly unusual and was not endorsed by the *Juzgado Segundo Penal*, who opted for the solution of the coauthoria[49]. Also and above all on the basis of the claims made by some prominent members of the association, it was considered clear that the members of the ELN were solely responsible for the attack; in particular, responsibility for the killings and injuries

Oxford, 2016. O. KUCHER, A. PETRENKO, International criminal responsibility after Katanga: Old challenges, new solutions, in Russian Law Journal, 3, 2015, pp. 144ss.

[47]F. MUÑOZ CONDE, H. OLÁSOLO, The application of the notion of indirect perpetration through organized structures of power, op. cit., pp. 122ss. W. F. VÁSQUEZ RAMÍREZ, La autoría mediata a través de aparatos organizados de poder. Tratamiento por parte de la Corte Suprema de Justicia y críticas a su aplicación en el sistema penal colombiano, in Diálogos de Derecho y Política, 6 (2), 2012, pp. 14ss.

[48]C. LÓPEZ DÍAZ, El caso colombiano, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., pp. 158ss.

[49]Sentence of Juzgado Segundo Penal del Circuito Especializado de Antioquia del 25.05.2004. C. LÓPEZ DÍAZ, El caso colombiano, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., pp. 159ss.

was attributed as a possible malice. Nevertheless, the Court of First Instance, with a certainly equivocal formulation, inserted in the motivation the notion of determination, defining the subject from which the idea or resolution of punishable conduct arises, and which generally does not directly or materially the action bring into being, almost to want to comfort with a further argument (for the truth not relevant) the outcome of the sentence[50]. Later, moreover, the rigidly hierarchical structure of the ELN and its strict obedience rules were accounted for; although this may recall the conditions for the application of the theory of the *Organisationsherrschaft,* in reality the judges of the first instance made no explicit mention of them, opting finally for the solution of the coauthoria[51]. It is interesting to note that the decision to assign a responsibility as a co-author to the members of the COCE (Central Command of the ELN) and the managers of the *Cimarrón* company seems to be based essentially on a division of competences within the organization.

The defense appealed the ruling of the first degree, and in the second instance came to new conclusions. The *Sala de Decisión Penal* of the Superior Court of Antioquia partially acquitted the accused, keeping only the conviction for the crime of revolt. In fact, the existence of the eventual malice was denied, above all based on the consideration that in the village of *Machuca* many *guerrilleros* sympathizers lived; moreover, the state of poverty in which the population was not indifferent equated to that envisaged by the author for the first; obligatorily decreased for the second.

To qualify the conduct as negligent automatically excluded that the defendants could be condemned as determiners; the judges developed a rigid argument based on the necessarily personal

[50]C. LÓPEZ DÍAZ, El caso colombiano, op. cit., pp. 160ss.

[51]According to the sentence: "(...) la organización ELN tiene su propia estructura, y (...) existe una jerarquía u organigrama, en el que de manera precisa se indican las funciones de los que dirigen, y de quienes obedecen. (...) Las órdenes por tanto devienen de los jefes o líderes del grupo y quienes están por debajo en mando son llamados a obedecer so pena de incurrir en sanciones dentro de la misma agrupación, disciplina que a decir de ellos mismos, es rígida (...)". C. LÓPEZ DÍAZ, El caso colombiano, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., pp. 160ss.

character of criminal responsibility[52]. The rigidly hierarchical structure of the organization would have acted as a picklock for not going too far into the probative difficulties that the case presented; however, on appeal the solution does not seem to present any less contradictions, since in the whole sentence it is stated that there was indeed an order from the "dome" of the ELN, and then deny any legal consequence to that mandate.

In the extraordinary appeal to the Supreme Court for violation of the substantive law, the *Procuraduría General* stressed the inconsistencies on appeal, and especially the absolution based on the fact that the defendants could not be defined as determiners, when in reality the sentence of first instance he condemned them as co-authors. According to this reconstruction, in spite of the terminological confusion in which both the *Fiscalía* and the judge of first instance incited (which designated the defendants sometimes as "authors", sometimes as "determiners", "coauthor determiners" or "coauthors"), it seems undeniable that the responsibility for the conduct must fall on the defendants, *"(...) en su inequívoca condición de autores mediatos que utilizaron a otros como instrumentos or ejecutores fungibles (...)*"[53].

The appeal aimed, therefore, at a qualification of the conduct in the context of self-mediated exploitation of an organized power apparatus. The Supreme Court upheld the appeal, criticizing what was decided in the second instance, clearly in direct violation of

[52]According to the Supreme Court: (sentence n. 23825 of 7.03.2007, Sala de Casación Penal de la Corte Suprema de Justicia, Nicolás Rodríguez Bautista y otros, 9): "Sencilla y claramente se quiere es significar que como la responsabilidad penal es individual y la imputación juridica debe invariablemente proyectarse a señalar la acción particularizada del delincuente, en la forma puntual y específica que impone como garantía el derecho penal democrático, aquí entonces no se podía venir a decir, con la facilidad como se hizo, que como la orden criminal debío haber venido de la "cúpula", todos sus integrantes tienen que ser entonces responsables como determinadores de los delitos (...)".

[53]C. LÓPEZ DÍAZ, El caso colombiano, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., 164.

substantive law[54]; however, he did not even agree with the appeal, since the material executors were, undoubtedly, fully responsible subjects: there would therefore be no *"sujeto de atrás",* given that those who placed the explosive did so for their ideological and political convictions, without being exploited or deceived by anyone[55]. So, in the last instance, the defendants were convicted for "improper coauthoria", a result that leaves us perplexed: to admit a distinction between proper and improper coauthoria appears, in fact, not well founded at dogmatic level. It has been noted that the top-down structure of the ELN seems little compatible with the common conception of the criminal plane[56]; the figure of the "improper coauthoria", thus delineated, would appear dangerously close to an extensive concept of author, accepted to avoid the impunity of some subjects whose conduct does not present the objective and subjective presuppositions of coauthoria[57].

5. The trial of *Abimael Guzmán Reynoso*: The first application of the Organization in Peru

Following the so-called *Lucanamarca* massacre, which took place in 1983, in Peru a trial was started against *Abimael Guzmán*, founder and leader of the terrorist group *Sendero Luminoso*, and some

[54]"(...) Es así que (...) el Tribunal Superior de Antioquia incurrió en violación directa de la ley sustancial, porque no discute que el Ejército de Liberación Nacional ELN tiene entre sus políticas la de atacar (...)".

[55]"(...) Se estima preciso aclarar que en este caso no existe autoría mediata, ni hay "sujeto de atrás" (...), porque los subversivos que colocaron los explosivos en el tubo no fueron meros instrumentos del Comando Central del ELN, sino que a su vez, ellos-los que acudieron a perpetrar materialmente la detonación-desarrollaron el rol que les correspondía en su propio delito, por su voluntad consciente dirigida con conocimiento e inteligencia al logro de los fines compatibles con su propia ideología; lo hicieron por convicción política propia; sin ser "utilizados", sin ser instrumentalizados y sin engaños (...)". CSJ, n. 23825, cit., 73.

[56]It is true that the coauthoria was not governed by the old code of 1980, in force at the time of the facts; however, the common agreement is a presupposition commonly accepted by the doctrine and has found expression in the new art. 29, which: "(...) Son coautores los que, mediando un acuerdo común, actúan con división de trabajo criminal atendiendo la importancia del aporte (...)".

[57]C. LÓPEZ DÍAZ, El caso colombiano, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente, op. cit., pp. 180ss.

of his close collaborators. At the dome of the association the crimes of terrorism, aggravated terrorism, affiliation to terrorist organization, incitement and apology of terrorism and qualified homicide were charged; the Court condemned *Guzmán Reynoso* for the first time explicitly applying the Roxinian theory of the *Organizationsherrschaf*t[58]. *Guzmán,* placed at the top of the organization, ordered the execution of the massacre himself; moreover, he was the architect of the general political and ideological line inspired by the movement, which was largely focused on military action[59]. The dominant role of the accused was thus accentuated, made possible by the covered apical position, by the strongly centralized structure, by the rigid discipline of the apparatus and by the rigorous control he exercised on the activity of the other members. The Court then concluded with the attribution of responsibility to *Guzmán* as a mediated author: the fact that the members of the terrorist group that physically carried out the criminal conduct were criminally liable appeared to be irrelevant[60].

The application of the self-mediated by virtue of the exploitation of an apparatus of organized power is justified by the Court through the observation that the traditional forms of autoria and participation do not fit the cases in which a subject directs and controls a criminal association[61].

The defense's arguments were rejected, with the aim of excluding the solution of the *Organizationsherrschaft* in so far as it is

[58]Sala Penal Nacional, Expediente acumulado n. 560-03 del 13.10.2006, case Abimael Guzmán Reynoso

[59]"(...) Guzmán Reynoso no sólo aprobaba los planes militares u ordenaba la ejecución de concretos atentados, sino que también planificaba dónde, cómo, a quién y de que manera se podían realizar determinados atentados (...)". Sala Penal Nacional, Exp. n. 560-03, pp. 70.

[60]Sala Penal Nacional, Exp. n. 560-03, pp. 165 e ss.

[61]The Court, of course, refers to the penal code in force at the time of the facts. It is recalled that the current Peruvian penal code knows a differentiated system of forms of participation: in art. 23 autogas, auteur mediated and coauthoria are: "(...) el que realiza por sí o por medio de otro el hecho punible y los que lo cometan conjuntamente (...)"; art. 24 is defined as instigation, punished as autoria; finally, in art. 25 distinguishes between primary and secondary accomplice: only the latter can enjoy a mitigated penalty.

not applicable to non-state organizations; for the truth, as already seen, according to Roxin's original vision, this figure would fit any type of apparatus that meets the necessary requirements, among which the *Rechtsgelöstheit*[62] would seem relevant to its use in the concrete case[63]. Roxin decides to merge the figure of the Täter hinter dem Täter with his theory of domination over the fact, thus allowing to sanction *Hintermann* as an author, and not as a mere participant; above all, the distinction is not based on a particular subjective attitude of the *mittelbarer Täter,* as possibly occurred according to the previous subjective theories, but on the same automatic mechanism of functioning of the power apparatus. The Penal Room develops rather in detail the reasoning on the existence of the conditions for the application of the Roxinian theory. The concrete functioning of the terrorist group is reported, in order to define it as a real apparatus of organized power[64]; furthermore, the requirement of fungibility is based on the possibility of replacing the member who does not intend to carry out the plan, a circumstance which would ensure its overall execution[65]. Finally, a further proof of the goodness of the solution of

[62]Digest of Terrorist Cases, documento dell'UNODC, New York, 2010, 11.

[63]According to the defence, the theory: "(...) no es aplicable a las organizaciones no estatales, pues en ellas no hay el deber de obediencia y la transferencia de responsabilidad al superior (...)". According to Roxìn, one of the fundamental assumptions is that the organization operates on the margins of law, since if it operated within the legal system, the normative force of the laws would retain greater weight than the illicit orders given within the group, see also in argument: I. MEINI, El caso peruano, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., pp. 134ss.

[64]"(...) Sin duda alguna, ha quedado debidamente comprobado que el Partido Comunista del Perú, conocido públicamente como Sendero Luminoso, es una organización clandestina que practicó el secreto tanto del colectivo como de sus integrantes, sean estos militantes, cuadros o dirigentes, jerárquicamente estructurada y fuertemente cohesionados sus miembros mediante su llamada base de unidad partidaria, con una clara distribución de funciones, pudiéndose identificar claramente los niveles de decisión, la programación de sus actividades ilícitas y el control de la organización, todo lo cual nos permite inferir que se trata de un verdadero aparato organizado de poder (...)". Sala Penal Nacional, Exp. n. 560-03, 162.

[65]"(...) La fungibilidad o más propiamente la intercambiabilidad de los ejecutores se funda en que la negativa del ejecutor de llevar a cabo el plan no impide que éste efectivamente se realice, ya que si él no cumple la orden, según el organigrama del

the mediated self-defense would be, in the opinion of the judges of first instance, not only in German doctrine and in the elaborations of Peruvian jurists, but in letter a) of the third paragraph of art. 25 of the StICC[66], which expressly admits this indictment also in case of exploitation of fully responsible material executors[67]. In the second instance, the Supreme Court of Justice pronounced itself after the appeal for nullity proposed by the defense, confirming the outcome of the previous ruling[68].

The sentence confirms the existence of all the conditions of the organized apparatus analyzed at first instance. In particular, the compatibility of the self-mediated theory with the current code at the time of the facts and the centralized and top-down structure of the association[69]; is emphasized; the notion of fungibility, in the first instance ambiguous and controversial, is linked to the verticality of the association, arguing that signing the "card of subjection to President *Gonzalo*" (pseudonym of *Guzmán*) meant unconditionally submitting to the will of the leader and renouncing in some way civil identity. Under such circumstances, anyone could replace the subject who had not completed the planned operation[70]. The Supreme Court seemed to settle on the findings of the first degree and the dominant doctrine[71], naming again the three Roxinian assumptions for the

aparato de poder inmediatamente otro le suplirá, no resultando afectada la ejecución del plan global (...)", Sala Penal Nacional, Exp. n. 560-03, par. 161.

[66]H. OLÁSOLO, Artigo 25 (1)-(3) (a): Responsabilidade individual e autoria, ed. Belo Horizonte, Konrad Adenauer Stiftung, Brazil, 2016, pp. 448ss.

[67]Sala Penal Nacional, Exp. n. 560-03, par. 167.

[68]It should also be noted that the judge Villa Stein expressed a partially conflicting position, adhering to the solution of the coauthoria: on the one hand because the organization consisted of a plurality of cells, each with its own autonomous competence in the execution of the dome directives; on the other, because every member of the apparatus seemed to possess an encroachment. In the same spirit also: D.C. CARO CORIA, Perú, in K. AMBOS, E. MALARINO (a cura di), Jurisprudencia latinoamericana sobre derecho penal internacional, op. cit., pp. 302ss.

[69]The Court speaks: "(...) rígido centralismo donde las órdenes o directivas de la dirección nacional, Comité Central, simplemente se acataban en base a una férrea disciplina partidaria (...)": Corte Suprema de Justicia de la República, Recurso de nulidad nº 5385-2006, of 14.12.2007.

[70]Corte Suprema de Justicia de la República, nº 5385-2006, par. 28.

[71]Corte Suprema de Justicia de la República, nº 5385-2006, par. 28.

application of the *Organizationsherrschaft* without further arguments, and confirmed the condemnation to *Guzmán Reynoso* as a mediated author for the exploitation of an organized apparatus of power[72].

6. The Trial Against The Peruvian President *Alberto Fujimori*

Another important condemnation in Peru that the applicability of the Organizations was granted was that against the biggest adversary of subversive groups like *Sendero Luminoso* and the *Revolutionary Movimiento Tupac Amaru*: the president *Alberto Fujimori*[73]. He was elected in 1990; the increasingly violent methods of the military charged with the repression resulted in systematic violations of human rights[74], and led to the so-called self-coup, with which *Fujimori* dissolved the Chambers and the Supreme Court, imposing a decisively authoritarian turn to his regime, in 1992. One of his greatest successes was the capture of the terrorist leader *Abimael Guzmán Reynoso*; he was re-elected twice, in 1995 and 2000. In November 2000, following a series of corruption scandals, he took refuge in Japan, renouncing the presidential mandate with a document sent by fax[75]. With the advent of the transitional democratic

[72]I. MEINI, El caso peruano, in K. AMBOS (a cura di), Imputación de crímenes de los subordinados al dirigente en el derecho penal internacional, op. cit., pp. 140ss.
[73]C. CARO, Prosecuting International crimes in Peru, in International Criminal Law Review, 10, 2010, pp. 586ss.
[74]N. VAN DER HAVE, The prevention of gross human rights violations under international human rights law, ed. Springer, Berlin, 2018. C. JALLOH CHEVROR, A. MARONG, Promoting accountability under international law for gross human rights violations in Africa. Essays in honour of prosecutor hasan Bubacar Jallow, ed. Brill, The Hague, 2015. L.A. CAMARGOS, A responsabilidade penal internacional dos individuos: Estudo do caso Darfur, in Revista de Direito Brasileira, 2013, pp. 199ss. R. NOLLEZ-GOLDBACH, J. SAADA, La justice pènale internationale face aux crimes de masse, ed. Pedone, Paris, 2014. A. BOWERS, International Criminal Court, Wolf Legal Publishers, The Netherlands, 2011. S. WHARTON, The evolution of international criminal law: prosecuting "new" crimes before the Special Court for Sienna Leone, in International Criminal Law Review, 11, 2011, pp. 218ss. K.A. RODMAN, Justice is interventionist: The political sources of the judicial reach of the Special Court for Sierra Leone, in International Criminal Law Review, 13, 2013, pp. 65ss.
[75]J. M. BURT, Guilty as charged: The trial of former peruvian president Alberto Fujimori for human rights violations, in International Journal of Transitional Justice,

government of *Valentín Paniagua Corazao* the Commission for Truth and Reconciliation (CVR) was established, which in 2003 presented its final report to the then president Alejandro Toledo. In this report we find the first statement, albeit clearly devoid of punitive consequences, of *Fujimori's* involvement in the violations perpetrated during the regime[76]. The two fundamental objections to the dictator concerned the massacre of *Barrios Altos*[77], a popular neighborhood in the center of Lima where fifteen people died and four were injured, and that of *La Cantuta*, which resulted in the death of nine students and a university professor *Enrique Guzmán y Valle*. These actions were part of the anti-subversive policy: the repressive activity was carried out under the supervision of Fujimori; the *Dirección de Inteligencia del Ejército* (DINTE) and the *Servicio de Inteligencia Nacional* (SIN), ie the army and the secret services, took care of the logistics and the identification of the objectives to be hit. Finally, the material implementation of the directives was reserved for the paramilitary group *Colina*[78].

The first real actor in the trial was the Inter-American Court of Human Rights[79]; in 2001 this declared inadmissible the provisions of amnesty, prescription and the prediction of causes of exclusion of responsibility that prevented to investigate the alleged perpetrators of serious violations of human rights, and possibly to impose sanctions on them. This ruling allowed to overcome the obstacle of amnesty laws in the persecution of crimes; moreover, Peru, by virtue of its

3, 2009, pp. 386ss.

[76]J. M. BURT, Guilty as Charged: The trial of former peruvian president Alberto Fujimori for human rights violations, op. cit., pp. 392ss.

[77]E.L. LUTZ, C. REIGER, Prosecuting Heads of State, Cambridge University Press, 2009, pp. 100ss. A.L. SÁNCHEZ-MEJIA, Victim's rights in Flux: Criminal justice reform in Colombia, ed. Springer, Berlin, 2017. D. MOURA VICENTE, Towards a universal justice? Putting international Courts and jurisdictions into perspective, ed. Brill, The Martinus Nijhoff Publishers, Leiden, Boston, 2016, pp. 184ss.

[78]. K. AMBOS, Politische und rechtliche Hintergründe des Urteils gegen den ehem. Peruanischen Präsidenten Alberto Fujimori, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (4), 2009, pp. 553.

[79]See in particular: case Barrios Altos vs. Perú, (2001), Inter-Am.Ct.H.R. (Ser. C) No 72; Hermanas Serrano Cruz case (El Salvador) (2005), Inter-Am. Ct. H.R. (Ser. C) No. 120; Goiburï case (Paraguay) (2006), Inter-Am. Ct. H.R. (Ser. C) No. 153.

obligations towards the international community, found itself having to necessarily undertake the process in order to ascertain and eventually punish the violations committed[80]. After an initial period spent in Japan, *Fujimori* had taken refuge in Chile, and was arrested here following the international arrest warrant issued by Peru. At first instance, the Chilean Court had denied extradition due to lack of sufficient clues; the Second section of the Supreme Court, revoking the sentence appealed, instead granted it unanimously. Here begins to delineate with more precision the form of responsibility of *Fujimori*: in the assessment of the evidence, the Court already relies on the theory of Claus Roxìn and, while admitting that it was not possible to demonstrate a concrete participation of the accused in the crimes committed, recalls in the argumentative path the concrete possibility of attributing to the former president an authoritarian mediated by virtue of the domination of the apparatus of power3[81]. Following this outcome, the Special Criminal Section of the Supreme Court (in charge of judging senior civil servants for crimes committed in the performance of duties) developed the arguments in favor of an attribution of responsibility for self-mediated auteur. The lack of a juridically relevant hierarchy and the presence of an executor acting *volldeliktisch* makes it possible to see the criterion of fungibility of the immediate author under a different light, which would have here the

[80]See from the inter-american Court of Human Rights the case. Barrios Altos *vs.* Perú, 14.03.2001.

[81]The second section of Supreme court of Cile stated that: "(...) hay indicios claros de que Alberto Fujimori Fujimori, habría tenido, después del autogolpe, la concentración de todos los poderes del Estado y el mando superior de las Fuerzas Armadas y Servicios de Inteligencia, propició la creación de un organismo especial dentro de las Fuerzas Armadas para realizar operaciones en contra de personas sospechosas de subversión o de enemigos ideológicos del régimen; estando el requerido en antecedentes de la existencia y finalidad del "Grupo Colina" y de las acciones que se llevaban a cabo por el mismo grupo, lo que se demuestra por lo premios, ascensos y condecoraciones otorgadas por Fujimori a los integrantes de este grupo y porque muchas personas lo vieron dar órdenes a Montesinos, quien a su vez las entregaba al mencionado Grupo Colina, con lo que habría tenido una participación de autor mediato (...)". P. GARCÍA CAVERO, La autoría mediata por dominio de la voluntad en aparados de poder organizados: El caso de Alberto Fujimori Fujimori, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (4), 2009, pp. 596ss.

role of mere irrelevant naturalistic data. Nonetheless, it should be noted that in the state systems with strong ideological connotations, even those who hold the highest offices can be replaced, and therefore be fungible.

The pronunciation is widely motivated, accurately frames the historical context and carefully analyzes the existence of the dominion over the fact by *Fujimori*; it is probably the most important and well-thought-out jurisprudential solution in the context of the implementation of the *Organizationsherrschaft*[82]. The Roxinian assumptions of the organized apparatus of power are examined one by one. First the two objective elements are founded: the "*poder de mando*" and the "*apartamiento del derecho*"; then, the two subjective requisites of "*fungibilidad*" and "*predisposición a la realización del hecho ilícito*"[83]. The power of command is expressed in two forms: on the one hand, what is achieved at the strategic level with regard to the intermediate level; on the other hand, that which is exercised at an intermediate level towards the material executors. In any case, the relationship will always be vertical. On the basis of this structure, clearly, only the head of the strategic level has the total domination of the apparatus. The sentence recalls the well-known consideration on the increase of responsibility as one ascends the hierarchy of the apparatus and then moves away from the place of commission of the crime, referring to the Roxinian work, as well as to the Eichmann[84], processes, *Sendero Luminoso* and condemning the military junta in Argentina.

Regarding the second objective requirement (*apartamiento del*

[82]See in argument: I. MEINI, La autoría mediata por dominio de la organización en el caso Fujimori. Comentario a la sentencia de fecha 7.4.2009 (Exp. a.v. 19-2001) emitida por la Sala Penal especial de la Corte Suprema, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (6), 2009, pp. 604ss.

[83]R. PARIONA ARANA, La autoría mediata por organización en la Sentencia contra Fujimori, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (6), 2009, pp. 614ss.E. MACULAN, A. LIÑÁN LAFUENTE, Relaciones concursales, in A. GIL GIL, E. MACULAN (a cura di), Derecho penal internacional, ed. Dykinson, Madrid, 2016, pp. 312ss.

[84]W.A. SCHABAS, The contribution of the Eichmann trial to international law, in Leiden Journal of International Law, 26, 2013, pp. 668ss.

derecho), it is underlined that "right" does not mean national law, but rather a combination of this with international law[85], which assumes a preponderant role[86]. If this were not the case, the apparatus of power at *Fujimori's* disposal could not be considered operating outside the law; instead it is a clear example, probably the most serious, of the Roxinian construction, as an organization able to annul, and distort at will the internal legal system, in order to perpetrate systematic violations of human rights in the framework of a "system alternative legislation", only apparently legitimate. The analysis of subjective requirements is interesting. The debate between Roxin and Schroeder regarding *Fungibilität* and "unconditional resolution of the material executor to commit the fact" has already been tackled (*unbedingt Tatbereitschaft der Ausführenden*)[87]. Here an assumption does not exclude the other: both contribute to found the mediated auteur of the accused. Regarding the interchangeability of the performer, two perspectives must be distinguished. The fungibility can first be seen from a negative angle, which implies the immediate substitutability of the agent who refuses to commit the crime: if according to the automatic functioning of the apparatus there is always a performer able to take the place of the one that does not perpetrate the action, this means that the desistence of the individual can never affect the actual realization of the event. Moreover, there would be a kind of positive fungibility looking at the question from the point of view of those who hold the domain: he, in fact, has a greater guarantee of the success of his crime, since he is able to count on a large number of executors who can evaluate based on skills and abilities, choosing the best option[88]. This first subjective assumption has attracted criticism from part of the doctrine, which has maintained that the very

[85]G. WERLE, F. JESSBERGER, Principles of international criminal law, Oxford University Press, Oxford, 2014, pp. 35ss.
[86]K. AMBOS, The Fujimori judgment. A rresident's responsibility for crimes against humanity as indirect perpetrator by virtue of an organized power apparatus, op. cit., pp. 154ss.
[87]F.C. SCHROEDER, Tatbereitschaft gegen Fungibilität, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (5), 2009, pp. 559ss.H. OLÁSOLO, Ensayos de derecho penal y procesal internacional, ed. Diké, Bogotà. 2011.
[88]F. C. SCHROEDER, Der Täter hinter dem Täter, Ein Beitrag zur Lehre von der mittelbaren Täterschaft, op. cit.

definition of fungibility is in contrast with the principle of responsibility for one's own doing, being nothing more than an expectation concerning the unlawful act of a third[89]; moreover, some point out that interchangeability would be nothing more than a mere naturalistic datum that normally accompanies situations of autistic mediated through the exploitation of an organized apparatus of power[90].

The last requirement, not foreseen by Roxin in the first formulations of his theory and identified for the first time by Schroeder in his *Habilitationsschrift,* is the predisposition to the realization of the illicit fact[91]. The fact that the executor possesses this subjective requirement is closely linked to his adherence to the organized structure. Moreover, on the basis of this mechanism, which the Court defines as "*psicología colectiva*", the greater the predisposition of the immediate author, the less will be the exercise of the power of command that the mediated author[92] needs. It should be noted that the *erhöhte Tatgeneigtheit des Tatvollstreckers* was recently admitted by Roxin as one of the characteristics of the *Organizationsherrschaft*[93]; the judges of the first instance give an account of it, and admit the existence of the latter presupposition in the concrete case[94].

[89]I. MEINI, La autoría mediata por dominio de la organización, op. cit., pp. 607.

[90]R. PARIONA ARANA, La autoría mediata por organización el la Sentencia contra Fujimori, op. cit., pp. 614.

[91]According to supreme Court "(...) En términos concretos, esta categoría alude a una predisposición psicológica del ejecutor a la realización de la orden que implica la comisión del hecho ilícito (...)".

[92]C. ROXÍN, Organisationsherrschaft und Tatentschlossenheit, in Zeitscrhrift für Internationale Rechtsdogmatik, 10 (1), 2006, pp. 296ss. K. AMBOS, Sobre la "organización" en el dominio de la organización, in InDret: Revista para el Anàlisis del Derecho, 2, 2011, pp. 7ss.: The disposition to the fact of the immediate author can be defined as "organisationstypische Tatgeneigtheit", a concept that emphasizes the predominance of the whole apparatus on the will of the individual.

[93]C. ROXÍN, Bemerkungen zum Fujimori-Urteil des Obersten Gerichtshofs in Peru, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (5), 2009, pp. 567ss. C. ROXÍN, Organisationsherrschaft und Tatentschlossenheit, op. cit., pp. 298ss.

[94]P. GARCÍA CAVERO, La autoría mediata por dominio de la voluntad, op. cit., pp. 602ss.

Lastly, the sentence recalls the provisions of the Rome Statute on the subject of the responsibility of the superior and auteur mediated by virtue of organized power apparatus, highlighting that the application of the Roxinian theory is perfectly in line with the latest jurisprudential tendencies in international perspective.

The Sala penal especial condemned *Alberto Fujimori* to twenty-five years of imprisonment and a huge compensation for the victims of the crimes[95], with a very broad reflection that could be summarized as follows: "*En todos los delitos sub judice the condición fungible de los ejecutores así como on disposición al hecho y on no relación directa ni horizontal with el acusado, posibilitan afirmar the posición de autor mediated de éste como central body with poder jerárquico de domain sobre el aparato de poder, cuyo automatism conocía y podía controlar a través de sus mandos intermedios (...)*"[96]. The ruling of the second degree, confirming all the findings that emerged in the first instance and fully accepting the proposed dogmatic system, admitted in turn the responsibility of *Fujimori* for self-mediated by virtue of domination of the fact by means of an apparatus of organized power[97]. The condemnation of the former Peruvian president was not accepted in a unanimous sense by the doctrine: alternative qualifications were proposed, such as instigation, necessary complicity and coauthoria. The ascriptive paradigm of instigation seems problematic because of the lack of a direct relationship between instigator and instigated: it would be necessary to admit a chain instigation from the automatic functioning that follows the chain of command inside the apparatus[98]. Moreover, the instigation, as already noted above, does not appear to be charged with the negative value that connotes the conduct of autoria[99]. A similar

[95]D. LIAKOPOULOS, U. ZAGER, Victim-perpetrator and individual criminal responsibility in international criminal law, in International and European Union Legal Matters, 2014.
[96]C.F. DE CASADEVANTE ROMANI, International law of victims, ed. Springer, Berlin, 2012. T. BONACKER, C. SAFFERLING, Victims of international crimes: An interdisciplinary discourse, T.M.C. Asser Press, The Hague, 2013.
[97]Corte Suprema, Exp. n. 19-2001-09- a.v. of 30.12.2009.
[98]A. GIL GIL, El caso español, op. cit., pp. 122ss.
[99]R. D. HERZBERG, Das Fujimori-Urteil: Zur Beteiligung des Befehlsgebers an der Verbrechen seines Machtapparates, in Zeitschrift für Internatonale

consideration can be made for the paradigm of the necessary complicity, provided for in the Peruvian code in art. 25: in terms of sanctions at *Fujimori*, however, the penalty envisaged for the author could have been imposed, but the figure of the necessary cooperator does not seem to fully fit the relevance of the bankruptcy contribution granted by the dictator[100].

Jakobs, a supporter of an attribution of responsibility by way of coauthoria, also in this case-as in the hypotheses, already dealt with, by the German BGH's application of the *Organisationsherrschaft*-emphasizes the contradiction inherent in considering a material executor to be fully authored responsible, both as a fungible gear wheel[101]. However, it has already been seen that this conclusion can also lend itself to criticism if it is stated that a joint plan or a shared material execution is necessary to have coauthoria[102].

7. The Curious Case "*Mensalão*"

The long and complex affair known as "*scandal Mensalão*" (or "monthly check") took place in Brazil during the first phase of the Government of President Lula, ending up in the spotlight as the biggest corruption trial in Brazilian history, in which prominent politicians, members of the Government and Parliament were involved[103]. The highly elaborate indictment wound mainly around the large corrupt scheme created and perpetuated by the political class, in order to secure electoral support. To acquire the money necessary for the purchase of votes, it was necessary that the political class, in turn, ensure certain benefits to the business class, whose advantages were

Strafrechtsdogmatik, 13 (6), 2009, pp. 580ss.

[100]Legislative decree n. 635 of 3 april 1991. M.D. BURBER, T. HÖRNLE, The Oxford handbook of criminal law, Oxford University Press, 2014. J. ALMEVIST, C. ESPOSITO, The role of courts in transitional justice. Voices from Latin America and Spain, ed. Routledge, London & New York, 2013, pp. 177ss. V. BOSTER, An introduction to transnational criminal law, Oxford University Press, Oxford, 2012, pp. 24ss.

[101]G. JAKOBS, Zur Täterschaft des Angeklagten Alberto Fujimori Fujimori, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (6), 2009, pp. 576ss.

[102]G. KÜPPER, Zur Abgrenzung der Täterschaftsformen, in Goltdammer's Archiv für Strafrecht, 145, 1998, pp. 52ss

[103]AP/470 STF (Ação Penal 470 do Supremo Tribunal Federal).

guaranteed by public and private institutions, controlled directly or indirectly by the Federal Government[104]. One of the most controversial issues before the Supreme Tribunal Federal was undoubtedly that relating to the rules of partnership applicable to the individual subjects operating in such a complex framework. It is essential to state that the Brazilian discipline on the competition of people is very similar to the Italian one. In Article. 29 of the *Código penal* is established that whoever, in any way, competes in the crime is punished with the penalty for this foreseen; in par. 1 there is a mitigation comparable to the Italian art. 114 of criminal code on the contribution of least importance (*participação de menor importância*). This is complemented by the provision pursuant to art. 13, codicistic translation of the formula of the *condicio sine qua non*[105]. Well, the highly-criticized ruling in question comes to qualify as political and entrepreneurial leaders accused by applying a combination of the welzelian theory of domination over the fact and the Roxinian *Organismationsherrschaft*. It is not the first time that the Brazilian Supreme Court refers to the German doctrine[106]; nevertheless, precisely because of the significance of the pronunciation and the extraordinary dimensions of the argumentative apparatus, the scarce commitment dedicated to a more careful analysis of the different declinations of the lordship over the fact and, above all, the compatibility of the theories recalled with the discipline is particularly noticeable. First of all, as already mentioned, no distinction is made

[104]K. AMBOS, E. ROMERO DE VASCONCELOS, Introduction to the special issue on the Brasilian Mensalão case, in Zeitschrift für Internationale Strafrechtsdogmatik, 18 (1), 2014, pp. 259ss.

[105]L. GRECO, A. LEITE, Die "Rezeption" der Tat-und Organisationsherrschaft im brasilianischen Wirtschaftsstrafrecht. Anmerkungen zur Beteiligungsdogmatik im Urteil des brasilianischen Obersten Bundesgerichts über den Korruptionsskandal in der Bundesregierung ("Mensalão-Fall", Ação Penal Nr. 470, Supremo Tribunal Federal), in Zeitscrhrift für Internationale Strafreghtsdogmatik, 18 (1), 2014, pp. 287. K. DETZER, Die Problematik der Einheitstäterlösung. Eine Untersuchung im Lichte der Reform des StGB und des OWiG unter Berücksichtigung des italienischen und österreichischen Strafrechts,Universität Nüremberg, Erlangen, 1972, pp. 63ss.

[106]P. R. ALFLEN, Domínio do fato como critério de delimitação da autoria e a Ação Penal N. 470 do STF, in Zeitschrift für Internationale Strafrechtsdogmatik, 18 (1), 2014, pp. 278ss.

between the expression *Tatherrschaft* and *Organisationsherrschaft*[107]. The concepts are recalled in a vague and imprecise manner, without taking into account the substantial differences between them (for example-and the question, of course, is central-it is unrelated to Welzel's vision the possibility of recognizing an author behind a fully responsible author). Moreover, in a completely opposite to what has already been seen for the *Fujimori* ruling, not even a mention is made to the applicability requirements of the theory-not even to the controversial requirement of the *Rechtsgelöstheit,* which in this case obviously can not be considered to exist[108].

The requirement of fungibility is treated in a rather original way: in this regard, reference is not made to the material executor, but to the specular essentiality of the role of the apical subject. The Supremo Tribunal transposes a superfluous concept, completely foreign to the Brazilian system. The *Organisationsherrschaft* is born and continues to exist as *Abgrenzungskriterium* in the German differentiated model, but in this case it establishes tout court the responsibility of some subjects who, otherwise, would risk to be acquitted due to the probable difficulties encountered during the verification of the causality of the causal contribution of the summit. Therefore, the Court relies entirely on the possibility of configuring the domain on the fact, exempting itself from the task of a timely examination of the subjective element (considered to be subsistent that the accused could not not know); likewise, the nature of the alleged offenses remains obscure: in fact, from the argumentation, nothing seems to be clear about the commissive or omissive form of the conduct[109].

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[107]T. ROTSCH, Einheitstäterschaft statt Tathersschaft: zur Abkehr von einem differenzierenden Beteiligunsfamensystem in einer normativ-funktionalen Strafrechlehre, ed. Morh Siebeck, Tübingen, 2009. M. WIETFELD, Tathersschaft im Rahmen der Steurhinterziehung, C.F. Müller, Köln, 2016, pp. 172ss.

[108]L. GRECO, A. LEITE, Die "Rezeption" der Tat-und Organisationsherrschaft im brasilianischen Wirtschaftsstrafrecht, op. cit., pp. 288ss.

[109]L. GRECO, A. LEITE, Die "Rezeption" der Tat-und Organisationsherrschaft im brasilianischen Wirtschaftsstrafrecht, op. cit., pp. 289ss. L. GRECO, Organisationsherrschaft und Selbstverantwortungsprinzip, in Zeitschrift für Internationale Strafrechtsdogmatik, 15 (1), 2011, pp. 9ss.), it does not fail to

The *Positionsherrschaft* coined by the Brazilian judges, in addition to being completely incompatible with the national discipline on the competition of persons and-even before-with the principles governing the attribution of criminal responsibility[110], is an incorrect and confused re-presentation of the theory of domination over the fact of German mold. The scientific authority given by the reference to the Roxinian doctrine seems to allow the Court, on the one hand, to diverge from the need to provide more precise and convincing arguments that justify the results of the pronunciation; on the other, to arrive at "exemplary" sentences, once again in a process of enormous media value, Brazilian judges could have referred directly to the jurisprudence of the *Mauerschützen-Fall*, or to that part of the doctrine which rejects the illegality of the organization as a fundamental requirement for the integration of the category[111].

8. The Indirect Perpetration Through Organized Structures Of Power As A Criterion Of Imputation Upheld By The International Criminal Court

That of the correct attribution of individual responsibility[112] has always been one of the central issues facing supranational criminal jurisdictions. The theme has evolved; to an approach often defined as "unitary" (although in the peculiar declination inspired by the Anglo-Saxon conspiracy)[113], it has been gradually replacing, in more recent

underline the proximity between Geschäftsherrenhaftung and Organisationsherrschaft, finding the line of discrimination precisely in the nature (respectively) omissive and commissive.

[110]P. R. ALFLEN, Domínio do fato como critério de delimitação da autoria e a Ação penal N. 470 do STF, op. cit., pp. 283ss.

[111]L. GRECO, A. LEITE, Die "Rezeption" der Tat-und Organisationsherrschaft im brasilianischen Wirtschaftsstrafrecht, op. cit., pp. 292ss.

[112]D. LIAKOPOULOS, Responsabilità internazionale penale individuale e statale, in Rivista Strumentario Avvocati. Rivista di Diritto e Procedura Penale, 4(2), 2009.

[113]J.R. AMENGE OKOTH, The crime of conspiracy in international criminal law, ed. Springer, 2014. C. RUDOLPH, Power and principle: The politics of international criminal Courts, Cornell University Press, 2017. F. TUERKEIMER, Reflections on Nuremberg, in Loyola Los Angeles International & Comparative Law Review, 2017, pp. 26ss. O. UGUMANIM BASSEY, D. EKPE, Africa and the International Criminal Court: A Case of imperialism by another name, in International Journal of Development and Sustainability 2015. N. BAILLIET, C.M. HAYASHI (eds.), The

times, the adherence to an attribution model that closely resembles the Roxinian theory.

The detailed formulation of the forecasts dedicated to individual responsibility certainly plays a major role in the phenomenon just mentioned: the system outlined by the Statute certainly appears closer to the continental tradition[114]. Articles 6-8 of the StICC[115] contain descriptions in a mono-subjective form of

legitimacy and effectiveness of International Criminal Tribunals, Cambridge University Press, 2016. R. MERKEL, The law of the Nuremberg trial: Valid, dubious, outdated, in G. METTRAUX (a cura di), Perspectives on the Nuremberg Trial, Oxford University Press, Oxford, 2008, pp. 555-576.

[114]See the dissenting opinion of judge Fulford (Prosecutor v. Thomas Lubanga Dyilo, Separate Opinion of Judge Adrian Fulford, 6 e ss.). G. FLETCHER, The grammar of criminal law: American, comparative, and international, Oxford University Press, Oxford, 2007, pp. 332ss.

[115]L. MAY, Crimes against humanity. A normative account, Cambridge University Press, Cambridge, 2005, pp. 80-95. The author resorts to the principle of offensiveness in order to delimit the area of intervention of the criminal instrument, proposing the following formulation: serious harm to the international community occurs whenever victims become targets of criminal conduct because belonging to a particular group and not because of some individual characteristics, or in all cases where crimes are committed by a state or another collective entity (so called group-based harm approach). A. APONTE, Persecución penal de los crímenes internacionales, ed. Ibáñez, Bogotà, 2010, pp. 23ss. D.J. LBAN, Una teoría de los crímenes contra la humanidad, Ezequiel Malarino y Marisa Vásquez (trad.), Bogotá, Temis, 2011.M.JACKSON, A conspiracy to commit genocide. Anti-fertility research in apartheid's chemical and biological weapons programme, in Journal of International Criminal Justice, 13, 2015, pp. 933-950. P. BEHRENS, R. HENNAM, Elements of genocide, ed. Routledge, London & New York, 2013, pp. 194ss. Y. BEIGBEDER, International Criminal Tribunals, ed. Palgrave, London, 2011. R.S. SÁNCHEZ REVERTE, Referencia al crimen de genocidio aprocimation genocide crime, in Revista de estudios juridicos, 16, 2016. M.J. KELLY, The debate or genocide in Darfur, Sudan, in University of California, Davis Journal of International Law & Policy, 19, 2012, pp. 208ss. C. LINGAAS, Imagined identities: Defining the racial group in the crime of genocide, in Genocide Studies and Prevention: An International Journal, 2016, pp. 80ss. R. MAISSON, Justice pènale internationale, ed. PUF, Paris, 2017. D.S. BETTWY, The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?, in Notre Dame Journal of International and Comparative Law, 2011, pp. 102ss. M. HALLING, Push the envelope: Watch it bend: Removing the policy requirement and extending crimes against humanity, in Leiden Journal of International Law, 23, 2010, pp. 828ss. C. ROBERTS, On the

punishable conduct; is in art. 25 subparagraph 3 lett. a-e that the phenomenon of the competition of people is regulated. The Statute-according to the most widespread opinion, which looks exclusively at the typification of conduct-would welcome a differentiated system of forms of participation, describing the conduct of autoria, instigation and complicity, in order to allow a more careful consideration of the weight of criminal contribution lent by each; as regards the sanctioning treatment, however, no distinction is made between authors and accomplices on the typical plan[116]. This led to a strong doubting of the differentiated nature of the model proposed in the Statute: in fact, in a differentiated model understood in a "pure" sense,

definition of crimes against humanity and other widespread or systematic human rights violations, in University of Pennsylvania Journal of Law and Social Change, 20, 2017, pp. 4ss. H.D. BOSLY, D. VANDERMEERSCH, Gènocide, crimes contre l'humanitè et crimes de guerre face à la justice, ed. Bruylant, Bruxelles, 2012.J.M. DÍAZ SOTO, Una aproximaciòn al concepto de crìmenes contre la humanidad, in Revista Derecho Penal y Crinologia, n. 95, 2015, pp. 123ss.K. AMBOS, Treatise on international criminal law, op. cit, pp. 86ss. For the codification of the statute of ICC, see: T.L.H. MCCORMACK, Crimes against humanity, in D. MCGOLDRICK, P. ROWE, E. DONNELLY (a cura di), The Permanent International Criminal Court. Legal and policy issues, Hart Publishing, Oxford and Portland, Oregon, 2004, pp. 192ss. R. DUBLER SC, M. KALYK, Crimes against humanity in the 21st century, ed. Brill, The Hague, 2018. L.M. KELLER, The continuing peace and with justice debate. Recent events in Uganda and the ICC, in The University of the Pacific Law Review, 48, 2017, pp. 265ss.ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), op. cit., par. 135 e 138. S. CHESTERMAN, An altogether different order, defining the elements of crimes against humanity, in Duke Journal of Comparative and International Law, 10, 2002, pp. 332ss. G. HEINE, H. VEST, Murder/wilful killing, in G.K. MCDONALD, O. SWAAK-GOLDMAN (a cura di), Substantive and procedural aspects of international criminal law. Volume I: Commentary, Kluwer law Intrnational, The Hague, 2000, pp. 175ss. In the same spirit see also from the giurisprudence from the Special Panels for Serious Crimes in Timor Est: SPSC, Prosecutor v. Marques (Los Palos), Judgment, 09/2000, 11 December 2001, par. 649 and SPSC, Prosecutor v. Agostinho Cloe, Judgment, 4/2003, 16 November 2004, par. 15.C. LINGAAS, The crime against humanity of apartheid in a post apartheid world, in Oslo Law Review, n. 2, 2015.H. VAN DER WILT, War crimes and the requirement of a nexus with an armed conflict, in Journal of International Criminal Justice, 10, 2012, pp. 1116ss. G. METTRAUX, Nexus with armed conflict, in A. CASSESE ET AL. (a cura di), Oxford Companion to International Criminal Justice, Oxford University Press, Oxford, 2009, pp. 435ss.

[116]W.A. SCHABAS, The International Criminal Court. A commentary on the Rome Statute, Oxford University Press, Oxford, 2010, pp. 421ss.

the qualification of the type of contribution is accompanied by the provision of a distinction on the sanctioning plan[117]. The simple list of bankruptcy proceedings, as outlined in art. 25, more than a solution oriented to the adoption of a differentiated model-and to respect for the principle of personality of criminal responsibility-appears as an option that takes its cue from the different principle, although fundamental, of legality and taxativity[118]. In particular, herein concerns the provisions of letter a) of subparagraph 3 of art. 25: A subject is liable for a violation under the jurisdiction of the International Criminal Court (ICC) if he commits the crime "whether as an individual, or by another, through another person, regardless of whether that person is criminally responsible"[119].

Therefore, the hypotheses of immediate self-esteem, coauthoria and mediated autoria are taken into consideration; in the latter case, what is most noticeable is the clarification concerning the responsibility of the material executor. It seems relatively simple to understand the rationale that inspired this choice: the imputation by self-mediated in the case of a fully responsible instrument is in fact particularly suitable in those hierarchical apparatuses of political or military power, formal or fact, that often come into play in the commission of international crimes[120]. However, the model of indirect perpetration may raise-and has indeed raised - not a few interpretive difficulties, especially taking into account the difficult delimitation between self-mediated and coauthoria (or between mediated and instigation), as well as the relationship between the perpetrator behind

[117]K. HAMDORF, Beteiligungsmodelle im Strafrecht, ein Vergleich von Teilnahme- und Einheitstätersystemen in Skandinavien, Österreich und Deutschland, Max Planck Institut, Freiburg im Breisgau, 2002, pp. 25ss.

[118]V. MILITELLO, The personal nature of individual criminal responsibility and the ICC Statute, in Journal of International Criminal Justice, 5, 2007, pp. 948ss. F. MANTOVANI, The general principles of international criminal law: The viewpoint of a national criminal lawyer, in Journal of International Criminal Justice, 1, 2003, pp. 35ss.

[119]The problem of the applicability of the authored media in the case of an author immediate full responsibility has long occupied the German doctrine, in the absence of one prediction similar to par. 25 StGB.

[120]E. VAN SLIEDREGT, The curious case of international criminal liability, in Journal of International Criminal Justice, 10, 2012, pp. 1174ss.

the responsibility perpetrator and command responsibility[121].

In order to have a complete picture of the issue, it seems appropriate to refer to the prevailing bankruptcy model until the entry of the Roxinian doctrine in the international criminal justice scenario, making a brief digression on the use of the theory of the Joint Criminal Enterprise (JCE)[122] and its relations with the conspiracy of

[121]K.M. CLARKE, Refining the perpetrator culapibility history and international criminal law's impunity gap, in The International Journal of Human Rights, 19, 2015, pp. 594ss.

[122]Prosecutor v. Krnojelac, Judgment, Case No. IT-97-25-A, A. Ch., 17 September 2003, paras. 30, 73; Prosecutor v. Krstic, Judgment, Case No. IT-98-33-A, A. Ch., 19 April 2004, parr. 266-269; Prosecutor v. Kvocka et al., Judgment, Case No. IT-98-30/1-A, A. Ch., 28 February 2005, parr. 79-91.Similarly, in the case of Renzaho, Judges Güney and Pocar opined that the Trial Chamber's finding that the accused was aware of a "likely outcome" meets the standard of awareness of a substantial likelihood, Tharcisse Renzaho v. The Prosecutor (ICTR-97-31-A), Judgment, Appeals Chamber, 1 April 2011, partially dissenting opinion of Judge Güney, parr. 3-4; partially dissenting opinion of judge Pocar, parr. 5-6, 10. The Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09-121-Corr-Red), Corrigendum of the "Decision on the Confirmation of Charges", Pre-Trial Chamber I, 7 March 2011, para. 156. François Karera v. The Prosecutor (ICTR-01-74-A), Judgment, Appeals Chamber, 2 February 2009, para. 211; Ferdinand Nahimana et al. v. The Prosecutor (ICTR-99-52-A), Judgment, Appeals Chamber, 28 November 2007, para. 481; Renzaho Appeal Judgment, par. 315; partially dissenting opinion of judge Güney. See also Blaškić Appeal Judgment, par. 471. Ephrem Setako v. The Prosecutor (ICTR-04-81-A), Judgment, Appeals Chamber, 28 September 2011, par. 240; Jean de Dieu Kamuhanda v. The Prosecutor (ICTR-99-54A-A), Judgment, Appeals Chamber, 19 September 2005, par. 75. The Prosecutor v. Clément Kayishema & Obéd Ruzindana (ICTR-95-1-T), Judgment and Sentence, Trial Chamber II, 21 May 1999, par. 200. Prosecutor v. Alex Tamba Brima et al. (SCSL-04-16-T), Judgment, Trial Chamber II, 20 June 2007, par. 776; confirmed on appeal: Prosecutor v. Alex Tamba Brima et al. (SCSL-2004-16-A), Judgment, Appeals Chamber, 22 February 2008, para. 243. In the same spirit the case from ICTY: The Prosecutor v. Laurent Semanza (ICTR-97-20-T), Judgment and Sentence, Trial Chamber III, 15 May 2003, para. 385; Orić Trial Judgment, par. 280; for the distinction between the two concepts see: The Prosecutor v. Sylvestre Gacumbitsi (ICTR-2001-64-T), judgment, Trial Chamber III, par. 286 and Semanza Trial Judgment, par. 384. Prosecutor v. Radoslav Brđanin (IT-99-36-A), Decision on Interlocutory Appeal, Appeals Chamber, 19 March 2004, par. 10. According to the Appeals Chamber of the Special Tribunal for Lebanon (STL), the better approach under international criminal law is not to allow convictions under Joint Criminal Enterprise (JCE) III for specific intent crimes: Interlocutory Decision

Anglo-Saxon origin.

9. Joint Criminal Enterprise And Conspiracy In The Jurisprudence Of The Ad Hoc Tribunals

The solution to the coauthoria was the way taken by the jurisprudence of the *ad hoc* Tribunals. In the Statute of the International Tribunal for the Former Yugoslavia (ICTY) the discipline of participation is less detailed than that foreseen in the StCPI. As has already been noted, the problem of the applicability of the mediated authoritative in the case of a fully responsible immediate author has long occupied the German doctrine, in the absence of a prediction similar to par. 25 StGB: "who planned, instigated, ordered, committed, or in the planning, in order to be in charge of the crime". There is therefore no sanctioning distinction between participants. In areas such as this, a conviction as an author maintains a (symbolic) connotation of not little importance[123]. It is understandable that the *Nebentäterschaft* concerns mainly cases of negligent cooperation (or, *rectius*, of the concurrence of independent fault cases); The distinction

on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I), Appeals Chamber, 16 February 2011, par. 249. The STL Appeals Chamber argued that: "(...) applying JCE III to specific intent crimes would lead to the "serious legal anomaly" that a person is convicted as a co-perpetrator of a specific intent crime without possessing the specific intent (...)", par. 248. See in argument also: B. GOY, Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals, op. cit., pp. 5ss. A. AZZOLINI BIANCAZ, La construcciòn de la responsabilidad construcciòn de la responsabilidad penal individual en el àmbito internacional, in Alegatos Revista, 2018. H. ALONSO, Current trends on modes of liability for genocide, crimes against humanity and war crimes, in C. STAHN, L. VAN DEN HERIK (eds.), Future perspectives on international criminal justice, T.M.C. Asser Press, 2010, pp. 522-524. S. MANACORDA, C. MELONI, Indirect perpetration versus Joint Criminal Enterprise: Concurring approaches in the practice of international criminal law?, in Journal of International Criminal Justice, 2011, pp. 165ss. A. CASSESE, The nexus requirement for war crimes, in Journal of International Criminal Justice, 10, 2012. B. DON TAYLOR III, Crimes against humanity in the Former Yugoslavia, in R. BELLELLI (a cura di), International criminal justice. Law and practice from the Rome Statute to its review, ed. Ashgate Publishing, Farnham, 2010, pp. 285-294.

[123]ICTY, Prosecutor v. Vasilievi ć, IT-98-32-A, Chamber of Appeals, 25 February 2004.

between this case and that of mediated autoria, which falls entirely within the field of malicious crimes, is more problematic. This is the question of the exploitation of the criminal purpose of others (*Ausnutzung eines fremden Tatentschlusses*), especially in the case where the material executor acts on the basis of an error in person. The traditional orientation is that of the *condicio sine qua non*: the evaluation of the contribution would take place here based on the ordinary rules of application of the causal paradigm; the criticism to which this approach struggles to cope is decidedly that concerning the diabolical *probatio* of the moral competition. According to our opinion, the impression is that, *mutatis mutandis*, the courts try to circumvent the probative and dogmatic obstacle by recognizing the use of an automatic functioning mechanism in the conduct of autoria. In other and more precise terms: the mediated author is not only those who have arranged the organized apparatus of power, but who has consciously exploited its operation, obtaining the realization of the illicit event automatically.

It is for this reason that the jurisprudence of the *ad hoc* Tribunals was aimed at expanding the scope of the term "commit", also bringing the conduct of those who, although not providing any material contribution, had participated in the implementation of the crime by sharing the common criminal purpose to the point that it can not be qualified as a mere co-participant[124]. The expression of this requirement is commonly referred to in the *Tadić* judgment[125], and the consequent elaboration of the theory is inevitably linked to the name

[124]A. CASSESE, International criminal law, Oxford University Press, Oxford, 2011, pp. 164ss, to which reference should be made for an overview of the complex problems related to the application of the JCE and its three different forms of manifestation (basic, systemic and extended), as outlined by the Court of Appeals in the Tadić case. On the extension of the concept of commission beyond the material execution in some rulings of the ICTR (Gacumbitsi and Seromba). F. ZORZI GIUSTINIANI, Stretching the boundaries of commission liability. The ICTR appeal judgment in Seromba, in Journal of International Criminal Justice, 6, 2008, pp. 795ss.

[125]ICTY, Prosecutor v. Tadić, IT-94-1-A, Chamber of Appeals, 15 July 1999, par. 82: "(...) all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice (...)".

of A. Cassese, judge in that trial[126]. By simplifying, one could say that to assign individual responsibility under JCE[127] three requirements are needed: the plurality of subjects involved in the commission of the crime; the existence of a common criminal plan, project or purpose; the significant participation of an individual in the common plan[128]. The subjective connotation of the JCE and its focus on the collective dimension of the illicit have led to recognize some similarity with the Anglo-Saxon conspiracy[129]. The JCE is often defined as an example

[126]A. CASSESE, The proper limits of individual responsibility under the doctrine of Joint Criminal Enterprise, in Journal of International Criminal Justice, 5, 2007, pp. 110ss. Prosecutor v. Radoslav Brđanin (Judgment) ICTY-99-36-A (3 April 2007) parr. 409-414; Prosecutor v. Milan Martìc (Judgment) ICTY-95-11-A (8 October 2008) par. 82; Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu (Judgment) ICTY-03-66-A (27 September 2007) par. 120; Prosecutor v. Momcilo Krajisnik (Judgment) ICTY-00-39-T (27 September 2006) par. 883. See, L.D. YANEV, Theories of co-perpetration in international criminal law, ed. Brill, Bruxelles, 2018. J. OHLIN, Second order linking principles: Combining horizontal and vertical modes of liability: International law and practice, in Leiden Journal of International Law, 2013. M. CUPIDO, Common purpose liability versus joint perpetration: A practical view on the ICC's hierarchy of liability theories, in Leiden Journal of International Law, 2016, pp. 898ss. N. JAIN, Perpetrators and accessories in internatonal criminal law. Individual modes of responsibility for collective crimes, Hart Publishing, Oxford & Portland, Oregon, 2014.

[127]M.A. DRUMBL, Collective violence and individual punishment: The criminality of mass atrocity, in Northwestern University Law Review, 99, 2005, pp. 577-595. D. GOLASH, The justification of punishment in the international context, in L. MAY, Z. HOSKINS (a cura di), International criminal law and philosophy, Cambridge University Press, Cambridge, 2010, pp. 201-223. G.T. BLEWITT, The importance of a retributive approach to justice, in D.A. BLUMENTHAL, T.L.H. MCCORMACK (a cura di), The legacy of Nuremberg: Civilising influence or institutionalised vengeance?, The Martinus Nijhoff Publishers, The Hague, 2008, 39-46 K. AMBOS, Castigo sin soberano? La cuestión del ius puniendi en derecho penal internacional. Una primera contribución para una teoría del derecho penal internacional consistente, in Revista Persona y Derecho, 68, 2013, pp. 5-38. K. AMBOS, On the rationale of punishment at the domestic and international level, in M. HENZELIN, R. ROTH (a cura di), Le droit pénal à l'epreuve de l'internationalisation, ed. LGDJ, Paris, 2002, pp. 320ss. L.S. SUNGA, The emerging system of international criminal law, The Martinus Nijhoff Publishers, The Hague, 1997, pp. 324ss.

[128]V. A. CASSESE, International criminal law, op. cit., pp. 163ss.

[129]K. J. M. SMITH, A modern treatise on the law of criminal complicity, Oxford University Press, Oxford, 1991. In relation on conspiracy in Nurmberg trials see: G.

of a "unitary" model, in contrast to the discipline currently outlined in the Rome Statute; and the unitary model referred to at the supranational level is, without a doubt, complicity as understood in the common law systems[130]. It would be out of place to deal extensively with the theme of conspiracy and the competition of people, who naturally take on partially different connotations in the English system and in US law[131]. What interests us here is to note that the case of conspiracy essentially revolves around the concept of an agreement intended to commit a crime, which is punished as such; moreover, as regards the rules relating to the competition, no distinction is made between participants, although there are no lists of typical conduct of participation[132]. It is reiterated, when we speak of a unitary model of competition in the field of international criminal law these are the

GINSBURGS, V. N. KUDRIAVTSEV, The Nuremberg trial and international law, The Martinus Nijhoff Publishers, Dordrecht, 1990, pp. 238ss. And for the ICTR, see: N. JØRGENSEN, A reappraisal of the abandoned Nuremberg concept of criminal organizations in the context of justice in Rwanda, in Criminal Law Forum, 12, 2001, pp. 386ss. W. J. WAGNER, Conspiracy in civil law Countries, in Journal of Criminal Law and Criminology, 41, 1951.

[130]K. HAMDORF, The concept of a Joint Criminal Enterprise and domestic modes of liability for parties to a crime. A comparison of german and english law, in Journal of International Criminal Justice, 5, 2007, pp. 208ss. W. WILSON, A rational scheme of liability for participating in crime, in Criminal Law Review, 116, 2008, pp. 3ss.: "(...) it allows for the kind of sentencing flexibility which can punish the (non-perpetrating) instigators of crime as severely, or more severely, than their hired-hands, while also allowing the more typical accessory to be punished less severely than the perpetrator (...)"). H. VAN DER WILT, Joint Criminal Enterprise. Possibilities and limitations, in Journal of International Criminal Justice, 5, 2007, pp. 91ss.

[131]A. J. ASHWORTH, United Kingdom, and P. H. ROBINSON, United States, in K. J. HELLER, M. DUBBER (a cura di), The Handbook of comparative criminal law, Stanford University Press, Stanford, 2011, pp. 538ss. R. CARD, R. CROSS, P. A. JONES, Criminal law, Oxford University Press, Oxford, 2010, pp. 765ss.

[132]See the Section 8 of Accessories and Abettors Act of 1861, whoich is stated: "(...) whosoever shall aid, abet, counsel or procure the commission of any indictable offence (...) shall be liable to be tried, convicted and indicted as a principal offender (...)". T. HÖRNLE, Commentary to "complicity and causality", in Criminal Law and Philosophy, 1, 2007, pp. 146ss. M. MOORE, Causing, aiding, and the superfluity of accomplice liability, in University of Pennsylvania Law Review, 156, 2007, pp. 395ss. (452). G. WILLIAMS, Complicity, purpose and the Draft Code-1, in Criminal Law Review, 98, 1990, pp. 5.

categories of landing. Despite the profound structural differences between the family of common law and the continental tradition, the issues raised are recurrent and are similar: the necessary causality of the competition contribution[133]; the use of broader and more flexible criteria to determine the threshold of the minimum punishable contribution, such as the risk increase[134]. The strong analogy between the role of conspiracy and the extensive interpretation of the moral competition as a tool to incriminate the top of organizations. The indeterminacy of this dogmatic figure, in fact, played a non-secondary role in its application as a political-repressive function: the example is that of the indictment of the leaders of trade unions, or of the leaders of the communist party in the United States[135].

If the expansive force of the category of moral competition has allowed an extension of the criminality of the conduct of the top subjects, in the Anglo-Saxon system (and especially in the United States), it was the omnicomprehensiveness and the flexibility of the concept of criminal agreement to allow to the courts to arrive at the same repressive outcomes[136]. Not by chance, the well-known US definition of conspiracy as "darling of the modern prosecutor's nursery"[137] has been ironically taken to connote the repressive aspect of the doctrine of the JCE[138]; its application immediately appeared very useful to fill the punishment gap caused by the stringent standard of proof required for the integration of the command responsibility,

[133]V. J. GARDNER, Complicity and causality, in Criminal Law and Philosophy, 1, 2007, pp. 127ss. V.J. GARDNER, Response, moore on complicity and causation, in University of Pennsylvania Law Review, 157, 2008, pp. 432ss.

[134]C. KUTZ, Causeless complicity, in Criminal Law and Philosophy, 1, 2007, pp. 294ss.

[135]P. HENNING, Individual liability for conduct by criminal common purpose organizations in the United States, in Wayne Law Review, 44, 1998, pp. 1314ss.

[136]See the case: Dennis v. U.S. a Yates v. U.S.

[137]J. D. OHLIN, The co-perpetrator model of Joint Criminal Enterprise, in A.A.V.V., Annotated leading cases of international criminal Tribunals, ed. Intersentia, Antwerp, Oxford, 2008, pp. 739ss.

[138]J. D. OHLIN, The co-perpetrator model of Joint Criminal Enterprise, in A.A.V.V., Annotated leading cases of international criminal Tribunals, op. cit., M. E. BADAR, "Just convict everyone!"-Joint perpetration: From Tadić to Stakić and back again, in International Criminal Law Review, 4, 2006, pp. 293ss.

and by the high threshold of causal effectiveness necessary to recognize a responsibility as a competition[139]. In fact, in the *Tadić* case: the defendant had been acquitted by the Trial Chamber as regards the most serious indictment, having not been proved beyond reasonable doubt that the subject had actually taken part in the murder of five men of Islamic religion in the Bosnian village of *Jaskići. Tadić's* responsibility was admitted on the basis of the sharing that he personally took part in carrying out the murders[140]. Thus, the three forms of JCE began to emerge on this occasion at the ICTY. These are distinguished mainly by the different subjective attitude that characterizes the individual conduct: in the so-called JCE I (liability for a common purpose) is required that all participants in the joint venture share the same criminal intent[141]; instead, for the integration of the third form, or the "weaker"[142] and criticized, the existence of the

[139]The JCE-doctrine has been introduced by the Appeals Chamber of the ICTY in Prosecutor v. Tadić, Judgment, Case No. ICTY-94-1-A, 15 July 1999, parr. 185-229 as customary international law and has subsequently been applied in numerous cases, including ICTY, Prosecutor v. Krajišnik, Judgment, Case No. ICTY-00-39/40, 27 September 2006; Id, Prosecutor v. Brđanin, Judgment, Case No. ICTY-99-36-A, 3 April 2007 and Id, Prosecutor v. Popović et al., Judgment, Case No. ICTY-05-88-T, 10 June 2010. C. FARHANG, Point of no return: Joint Criminal Enterprise in Brđanin, in Leiden Journal of International Law, 23, 2010, pp. 138.

[140]A. MARSTON DANNER, J. S. MARTINEZ, Guilty associations: Joint Criminal Enterprise, command responsability, and the development of international criminal law, in California Law Review, 93, 2005, pp. 104ss.

[141]D. LIAKOPOULOS, Die Hybridität des Verfahrens der Internationalen ad hoc Strafgerichtshöfe und die Bezugnahme auf innerstaatliches Recht in der Rechtsprechun, in International and European Union legal Matters, 2012. G. TURAN, Responsibility to prosecute in an age of global governamentality: The International Criminal Court, in Cooperation and Conflict, 50, 2015. M. ODRIOZOLA GURRUTZAGA, Responsabilidad penal por crìmenes internacionales y coautoria medita, in Revista Electrònica de Ciencia Penal y Criminologia, 17, 2015, pp. 7ss.N. JAIN, Perpetrators and accessories in international criminal law. Individual modes of responsibility for collective crimes, op. cit., B. GOY, Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals, op. cit., pp. 5ss. A. AZZOLINI BIANCAZ, La construcciòn de la responsabilidad construcciòn de la responsabilidad penal individual en el àmbito internacional, op. cit.,

[142]D. ROBINSON, Defining “crimes against humanity” at the Rome Conference, in American Journal of International Law, 93, 1999, pp. 55ss. G. KEMP, Individual criminal liability for the international crime of aggression, Cambridge University

eventual malice is considered sufficient[143]. The intermediate or systemic form does not seem to differ greatly from the first. The difference lies in the peculiar objective manifestation of the common plane: generally, these are organized structures, preordained to the ill-treatment or killing of the internees[144].

The first indictment that makes explicit mention of the category will only take years later, condemning the Serb leader *Slobodan Milošević*[145]; however, in the same years, the ICTY showed

Press, Cambridge, 2017. G.J.A. KNOOPS, An introduction to the law of international criminal Tribunals: A comparative study, ed. Brill, The Hague, 2014, pp. 234ss. D. KONATÉ, La Cour Pènale Internationale: Entre nècessitè de justice et impèratif de pax, ed. L'Harmattan, Paris, 2018. The jurisprudence of the ad hoc Tribunals has denied the customary nature of this requirement: ICTY, Prosecutor v. Kupreškić et al., Trial Judgment, op. cit., par. 580. For some authors the connection requirement has the objective of circumscribing the jurisdiction of the Court to the only forms of persecution which present a high degree of objective danger: K. AMBOS, Treatise on international criminal law, op. cit., pp. 106ss. R. CRYER et al., An introduction to international criminal law and procedure, op. cit., pp. 260ss. T. EINARSEN, Prosecuting aggression through other universal core crimes at the International Criminal Court, in L. NADYA SADAT, Seeking accountability for the unlawful use of force, Cambridge University Press, Cambridge, 2018. M.J. VENTURA, M. GILLETT, The fog of war: Prosecuting illegal uses of force as crimes against humanity, op. cit., pp. 532ss.

[143]M. GILES, Complicity-the problems of Joint Enterprise, in Criminal Law Review, 98, 1990. A. KREIT, Vicarious criminal liability and the constitutional dimensions of Pinkerton, in American University Law Review, 57, 2008, pp. 585ss. M. NOFERI, Towards attenuation: A "new" due process limit on Pinkerton conspiracy liability, in American Journal of Criminal Law, 33, 2006, pp. 91ss. J. DRESSLER, Reassessing the theoretical underpinnings of accomplice liability: New solutions to an old problem, in Hastings Law Journal, 37, 1985, pp. 91ss. J. D. OHLIN, Group think: The law of conspiracy and collective reason, in Journal of Criminal Law and Criminology, 16, 2008, pp. 147ss. According to our opinion the third form of JCE can be considered integrated when one or more members of a JCE I or II commit crimes that fall outside the common plan. It is therefore understandable, as in this case, the attribution of the responsibility of the individual rotates entirely around the subjective element, which often risks slipping towards border figures, such as recklessness, or even guilt. This declination of the Joint Criminal Enterprise has been approached to the cd. Pinkerton rule of US matrix, built in a similar way. On the subject-in a moderately critical sense.

[144]A. CASSESE, International criminal law, op. cit., pp. 164ss.

[145]A. MARSTON DANNER, J. S. MARTINEZ, Guilty associations, op. cit., pp.

that it did not have a coherent orientation with regard to the subject in question, as we noted in the trial of *Milomir Stakić*[146], former president of the Council of National People's Defense and of the *Prijedor Municipality Crisis Unit*, north of the Serbian Republic. The Trial Chamber combined the Roxinian theory of domination over fact and coauthoria, in order to find a satisfactory interpretation of the term "commit" in art. 7 of the statute of ICTY. *Stakić* controlled the local civil bureaucracy, which provided logistical support for those who personally committed the alleged crimes: therefore, he could not even call himself mastermind of the vertical structure that included the material executors[147]. The ruling states that referring to the controversial and-in some respects-superfluous notion of JCE would lead to surreptitiously introducing a new crime: belonging to a criminal organization. On the contrary, the concept of "joint control over the act"[148], would be more consistent with what in most

107ss. C. KRESS, Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht, in Goltdammer's Archiv für Strafrecht, 153, 2006, pp. 306ss.

[146]Prosecutor v. Milomir Stakić, IT-97-24, 31 July 2003. A. CASSESE, International criminal law, Oxford University Press, Oxford, 2008, pp. 182ss. C.F. STUCKENBERG, Multiplicity of offences, concursus delictorum, in H. FISCHER, C. KRESS, S.R. LÜDER (a cura di), International and national prosecution of crimes under international law. Current developments, ed. Nomos, Berlin, 2001, pp. 588ss, which is noted that: "(...) the lex specialis rule can be said to be part of international criminal law (...)". See also: V. JEUTNER, Irresolvable norm conflicts in International Law. The concept of a legal dilemma, Oxford University Press, Oxford, 2017, pp. 57ss. A. LINDROOS, Addressing norm conflicts in a fragmented legal system: The doctrine of lex specialis, in Nordic Journal of International Law, 74, 2005, pp. 38ss. M. MILANOVIC, The lost origins of lex spesialis: Rethinking the relationship between human rights and international humanitarian law, in J.D. OHLIN (a cura di), Theoretical boundaries of armed conflict and human rights, Cambridge University Press, Cambridge, 2016, pp. 30ss. J. PAUWELYN, Conflict of norms in public international law, Cambridge University Press, Cambridge, 2003, pp. 385ss. G. CONWAY, Conflicts of competence norms in EU Law and the legal reasoning of the ECJ, in German Law Journal, 11, 2010, pp. 985ss. See also the case: ICTY, Prosecutor v. Kunarac et al., Appeals Judgment, TC, IT-96-23-T, 22 February 2001, par. 170-171.

[147]ICTY, Prosecutor v. Stakić, IT-97-24-T, pre-Trial Chamber, 31 July 2003. J. D. OHLIN, Second-order linking principles: Combining vertical and horizontal modes of liability, op. cit., pp. 784ss.

[148]L. YANEV, T. KOOIJMANS, Divided minds in the Lubanga trial judgment: A case against the Joint Control Theory, in International Criminal Law Review, 2013,

jurisdictions is meant as a "commission"[149]. Furthermore, the ICTY itself notes that, according to the application of the Roxinian theory of domination over the fact-expressly evoked-the accused could be condemned as a coauthor[150]. This perspective, according to the opinion of the Pre-trial Chamber, would give greater weight to the objective negative value of the contribution, preventing the undue subjectivization that inevitably meets the application of the doctrine of the JCE and the Appeals Chamber denied the possibility of ascribing a responsibility to title of mediated coauthoria, returning to the common criminal purpose model, considered more compliant with customary international law[151].

Thus, within the sphere of responsibility of the top management in international criminal law, the JCE played a fundamental role[152]: in particular, this was valid for the application of JCE I and III (basic and extended form), while the so-called systemic, or concentration camp form was mainly used to indict subjects

pp. 792ss. T. WEIGEND, Perpetration through an Organization. The unexpected career of a german legal concept, in Journal of International Criminal Justice, 2011, pp. 102ss. P. ELIADIS, Lubanga: new direction in reparations liability from the International Criminal Court, in PKI Global Justice Journal, 2018.

[149]ICTY, Prosecutor v. Stakić, op. cit., 123: "(...) the Trial Chamber is aware that the end result of its definition of coperpetration approaches that of the aforementioned Joint Criminal Enterprise and even overlaps in part. However, the Trial Chamber opines that this definition is closer to what most legal systems understand as "committing" and avoids the misleading impression that a new crime not foreseen in the Statute of this Tribunal has been introduced through the backdoor (...)". K. AMBOS, Joint Criminal Enterprise and command responsibility, in Journal of International Criminal Justice, 5, 2007, pp. 159ss.

[150]J. D. OHLIN, Searching for the Hintermann. In praise of subjective theories of imputation, in Journal of International Criminal Justice, 2014, pp. 328ss.

[151]ICTY, Prosecutor v. Stakić, IT-97-24-A, Chambers of Appeal, 22 March 2006, 24: "(...) this mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law (...)". S. DARCY, Collective responsibility and accountability under international law, ed. Brill, Leiden, 2007, pp. 247. G. FLETCHER, The theory of criminal liability and international criminal law, in Journal of International Criminal Justice, 10, 2012, pp. 1030ss.

[152]ICTY, Prosecutor v. Karadžić, IT-95-5/18-PT, 19 October 2009. For the indirect perpetration see: S. MANACORDA, C. MELONI, Indirect Perpetration versus Joint Criminal Enterprise. Concurring approaches in the practice of international criminal law?, op. cit., pp. 160ss.

classified as "middle managers"[153]. Numerous attempts have been made to bring the JCE back into compliance with the fundamental principles of criminal law-in particular, that of personal responsibility; for example, it has been argued that this model was exclusively suited to the imputation of the bankruptcy conduct of the group's top management, starting from the assumption that for these the guaranteeing assumptions underlying the principle in question would be less urgent[154]. The nature of JCE, its setting as a spurious combination of structurally different indictment, which tends to equate and equalize contributions and to excessively exalt the subjective attitude of the individual-often far from intentional delinquency, and more similar to the mere predictability of the jurisprudence event of this Tribunal, which is binding on the Trial Chambers. "Joint Criminal Enterprise" is a mode of liability which is "firmly established in customary international law"[155] and is routinely applied in the Tribunal's jurisprudence"[156]. Also, underlines the ICTY, "Joint

[153]V. E. VAN SLIEDREGT, Joint Criminal Enterprise as a pathway to convicting individuals for genocide, in Journal of International Criminal Justice, 5, 2007, pp. 188ss. K. AMBOS, Joint Criminal Enterprise and command responsibility, op. cit., pp. 180ss.

[154]A. MARSTON DANNER, J. S. MARTINEZ, Guilty associations: Joint Criminal Enterprise, command responsibility and the development of the international criminal law, op. cit., pp. 144ss.

[155]B.J. STEELE, E. HEINZE, Routledge handbook of ethics and international relations, ed. Routledge, London & New York, 2018.

[156]The aggregation principle grounds the criminal liability of corporations on the combined acts or omissions of individual agents where each act or omission is in itself insufficient. Mental states and conduct on the part of different individuals are joined together and considered as a whole. The underlying rationale is that a combination of personal transgressions or minor failures might reveal a gross breach of duty on the part of the company, or collective awareness that warrants the entity's responsibility for a criminal consequence. Some jurisdictions have been hesitant to extend the application of aggregation to crimes requiring proof of intent as opposed to only knowledge. Other legal systems have recognised the utility of the principle with regard to situations entailing recklessness and even gross negligence. For further details see: E. POSNER, A. PORAT, Aggregation and law, in J.M. Olin Program in Law and Economics Working Paper No. 587, 2012. M. FINDLAY, J. CHAH HUI YUNG, Principled international criminal justice: Lessons form tort law, ed. Routledge, London & New York, 2018. M. FINDLAY, R. HENHAM, Exploring the boundaries of international criminal justice, ed. Routledge, London & New York, 2016, pp. 83ss.

Autoria, Complicity In The Total Crime And Attribution Of Responsibility: Comparative Aspects (With The South American Courts) And International Criminal Justice

Criminal Enterprise is the mode of responsibility"[157], criminal (in the extended version), helps to explain the different turn taken by the debate within the ICC, also considering the different discipline outlined in the ICC. Article 25 of the Rome Statute Finally, the element of profound change introduced by the ICC-establishing treaty was duly noted. The other *ad hoc* Tribunals-from Nuremberg to The Hague-suffered from the congenital defect of the limitation of jurisdiction[158], and tended to rely on the previous judicial practice, also and above all for a question of legitimization, on the other hand, the universality and originality of the jurisdiction created by the Rome Statute[159] make it unique in the panorama so far known: the Court can follow the trends of the ICTY and the International Criminal Court for Rwanda (ICTR), but it is free not to do so, and the evolution of the doctrine on participation seems to confirm this tendency[160]. This emerges clearly in the comparison between what was asserted in *Stakić* and the opposing conclusions that the Court draws in the *Lubanga* case[161], regarding the acceptance of the doctrine of co-

[157]J. D. OHLIN, The co-perpetrator model of Joint Criminal Enterprise, in A.A.V.V., Annotated leading cases of international criminal Tribunals, op. cit.,

[158]A.A.V.V., Jurisdiccion universal. Sobre crimenes internacionales, ed. Comares, Granada, 2013.

[159]M. LANGER, The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes, in American Journal of International Law, 105, 2011, pp. 1, 42ss.

[160]H. OLÁSOLO, The criminal responsibility of senior political and military leaders as principals to international crimes, op. cit., pp. 334ss.

[161]ICC, Prosecutor v. Lubanga, Judgment on the Appeals against the "Decision Establishing the Principles and Procedures to Be Applied to Reparations" of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2, AC, 3 March 2015, par. 46. ICC, Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC, 4 March 2009, par. 128. ICC, Prosecutor v. Lubanga, ICC A. Ch., Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, parr. 66-81. ICC, Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, par. 508. ICC, Prosecutor v. Ruto et al., ICC PT. Ch. I, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the

ICC Statute, 23 January 2012, par. 289. Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016. The lack of legal framework among the majority of international Courts and Tribunals, corporate criminal liability is becoming more acceptable as a form of liability in international criminal law. Domestic law serves as legal basis for interpretation and application of criminal law when grave crimes have been commenced by corporate bodies and provide the courts with concise examples on how it is best applied in prace. Justice demands to hold legal entities liable for the commence of illicit acts regardless of the gravity of involvement; therefore, it is time for international criminal law to develop to the better. ICC, Prosecutor v. Mbarushimana, ICC A. Ch., Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011, entitled "Decision on the Confirmation of Charges", 30 May 2012, par. 43. See from the above citated cases: M.H. ARSANJANI, The Rome statute of the International Criminal Court, in American Journal of International Law, 93, 1999, pp. 22-43. G. BITTI, Article 21 of the statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC, in C. STAHN, G. SLUITER (eds.), The emerging practice of the International Criminal Court, The Martinus Nijhoff Publishers, Leiden, 2009, pp. 285-304. A.M. DE BROUWER, M. HEIKKILÄ, Victim issues: Participation, protection, reparation and assistance, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÁ (eds.), International criminal procedure: Principles and rules, Oxford University Press, Oxford, 2013, pp. 1299-1374. G. HOCHMAYR, Applicable law in practice and theory-Interpreting article 21 of the ICC statute, in Journal of International Criminal Justice, 12, 2014, pp. 655-679. M. MILANOVIĆ, Is the Rome statute binding on individuals? (And why we should care), in Journal of International Criminal Justice, 9, 2011, pp. 25-52. M. DEGUZMAN, Article 21-Applicable law", in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article, op. cit., pp. 701-712. V. NERLICH, The status of ICTY and ICTR precedent in proceedings before the ICC, in C. STAHN, G. SLUITER (eds.), The emerging practice of the International Criminal Court, The Martinus Nijhoff Publishers, Leiden, 2009, pp. 305-325. B. SCHLÜTTER, Developments in customary international law: Theory and the practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia, The Martinus Nijhoff Publishers, Leiden, 2010. O. TRIFFTERER, Can the "elements of crimes" narrow or broaden responsibility for criminal behaviour defined in the Rome statute?, in C. STAHN, G. SLUITER (eds.), The emerging practice of the International Criminal Court, op. cit., pp. 381-400. H. VON HEBEL, The decision to include elements of crimes in the Rome statute, in R.S. LEE et al. (eds.) The International Criminal Court: Elements of crimes and rules of procedure and evidence, Transnational Publishers, Ardsley, NY, 2001, pp. 4-8. A. ZAHAR, G. SLUITER, International criminal law-A critical introduction, Oxford University Press, Oxford, 2008.

perpetration in customary international law[162].

10. *Organisationsherrschaft* and International Criminal Court

On January 29, 2007, Pre-trial Chamber I confirmed the accusations against *Thomas Lubanga Dyilo.* The disputed crimes were those of the recruitment and employment of child soldiers[163], not yet

[162]A. GIL GIL, E. MACULAN, Current trends in the definition of "perpetrator" by the International Criminal Court: From the decision on the confirmation of charges in the Lubanga case to the Katanga judgment, in Leiden Journal of International Law, 28, 2015, pp. 352ss.

[163]L. GROVER, Child soldier victims of genocidal forcible transfer. Exonerating child soldiers charged with grave conflict-related international crimes, ed. Springer, Berlin, 2014. G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÁ, International criminal procedure. Rules and principles, Oxford University Press, Oxford, 2013, pp. 1576ss. J.L. RODRÍGUEZ-VILLASANTE Y PRIETO, La protecciòn del niño los conflictos armados por el derecho internacional humanitario los niños soldatos, in AFDUAM: Anuario de la Facultad de Derecho de la Universidad Autònoma de Madrid, 15, 2011, pp. 220ss.R. BELLELO (ed.), International criminal justice, Ashgate Publishing, Farnham, 2010, pp. 461ss.P.V. SAINZ-PARD, Is child recruitment as a war crime part of customary international law?, in The International Journal of Human Rights, 12, 2008, pp. 594ss. J. WILLIAMS, The international campaign to prohibit child soldiers: A critical evaluation, in The International Journal of Human Rights, 15, 2011, pp. 1072, 1075-1077. D. WEISSBRODT, J. HANSEN, N. NESBITT, The role of the Committee on the Rights of the Child in interpreting and developing international humanitarian law, in Harvard Human Rights Journal, 24, 2011, pp. 116ss. N. WAGNER, A critical assessment of using children to participate actively in hostilities in Lubanga: Child soldiers and direct participation, in Criminal Law Forum, 24, 2013, pp. 182ss. C. JENKS, Law as shield, law as sword: The ICC's Lubanga decision, child soldiers and the perverse mutualism of direct participation in hostilities, in University of Miami National Security and Armed Conflict Law Review, 3, 2013, pp. 106, 122ss. M. HAPPOLD, The protection of children against recruitment and participation in hostilities: International humanitarian law and human rights law as complementary legal frameworks, in Collegium, 44, 2014, pp. 99, 105ss. F. LEVEAU, Liability of child soldiers under international criminal law, Osgoode Hall Review of Law and Policy, 4, 2014, pp. 36-66. M.A. DRUMBL, Unlawful recruitment and use of children: From proscription to prevention: Reimagining child soldiers in international law and policy, Oxford University Press, Oxford, 2012, pp. 16ss. S. M. MIANO, Toward a child-oriented approach to reparations: Reflecting on the rights and needs of child victims of armed conflict, in The Fletcher Journal of Human Security, 28, 2013, pp. 30ss. J. HOLLING, Internationaler Strafgerichtshof und

fifteen years old, right within the FPLC[164]. The analysis of the requirements for establishing the (co) autoria of *Lubanga* in the disputed crimes, pursuant to art. 25 subparagraph 3 lett. a) of the Statute, was crucial and dealt with extensively, as there was no evidence that the defendant personally recruited child soldiers[165]. As already mentioned, the ICC detaches itself from the orientation previously formed within the jurisprudence of the *ad hoc* Tribunals, emphasizing the different legislative option of the Statute. It is therefore specified that coauthoria is recognized on the basis of the criterion of control over crime, exercised not by the individual, but by the whole team; furthermore, another essential requirement is the essential nature of the bankruptcy contribution for implementation[166]. In a brief but evocative passage, the intertwining of the domain over the apparatus and the common agreement is well underlined: "*The notion of coaction fondée sur le contrôle exercé conjointement sur le crime to pour origin le prince de la division des tâches essentielles en*

Verbrechens prävention, LIT Verlag, Münster, 2016, pp. 148ss.J. MCBRDE, Child soldiers at the International criminal Court, in J. MCBRIDE, The war crime of child soldier recruitment, T.M.C. Asser Press, The Hague, 2013. R. GRAF, The International Criminal Court and child soldiers: An appraisal of the Lubanga judgment, in International Criminal Justice, 10, 2012, pp. 948ss. Y. YUVARAJ, When does a child "participate actively in hostilities" under the Rome statute? Protecting children from use in hostilities after Lubanga, in Utrecht Journal of International and European Law, 32, 2011, pp. 84ss. G. WASCHENFORT, International law and child soldiers, Hart Publishing, Oxford and Portland, Oregon, 2015, pp. 5ss.S. YOGENDRAN, Did the International Criminal Court fail child victims in the Lubanga reparations order?, in Amsterdam Law Forum, 9, 2017, pp. 68ss. E. DURAJ, Protecting children rights under international criminal justice, in Academic Journal of Business, Administration, Law and Social Sciences, 1, 2015, pp. 94ss. L. STEINL, Child soldiers as agents of war and peace: A restorative transitional justice approach to accountability for crimes under international law, ed. Springer & T.M.C. Asser Press, Berlin, 2017, pp. 124ss.

[164]K. AMBOS, Das Erste Urteil des Internationalen Strafgerichtshofs (Prosecutor v. Lubanga). Eine kritische Analyse der Rechtsfragen, in Zeitschrift für Internationale Strafechtsdogmatik, 16, 2012, pp. 328ss.

[165]T. WEIGEND, Intent, mistake of law, and co-perpetration in the Lubanga decision on confirmation of charges, in Journal of International Criminal Justice, 6, 2008, pp. 478ss.

[166]ICC, Prosecutor v. Lubanga, ICC-01/04-01/06, pre Trial Chamber, I, 29 January 2007, par. 97.

vue de commission of a crime entre deux ou plusieurs personnes agissant de manière concertée Ainsi, bien qu'aucune de ces personnes ne détiennent le contrôle d'ensemble de l'infraction parce qu'elles dépendent toutes les unes des autres pour sa commission, elles partagent toutes le contrôle car chacune d'elles pourrait compromise the commission du crime si elle n'exécutait pas sa tâche (...)"[167].

The ICC does not seem to explicitly delineate a new and further form of *Organisationsherrschaft:* it has been argued that the combination of coauthoria and mediated auteur would appear here rather as a factual coincidence, which would not in any way prevent the subsumption of the case in the provision of art. 25 subparagraph 3 lett. a)[168]. Regarding the dogmatic and practical foundation of the theory of domination over the fact, it is still in *Lubanga* that the Court lays the foundations that will then be resumed in the sentence against *Katanga* and *Chui*. The Pre-trial Chamber takes up the classic argument of the German doctrine in which it is distinguished between subjective and objective theories, finally arriving at the intermediate solution of the *Organizationsherrschaft*[169].

The justification for the application of this theory is in its acceptance by numerous national legal systems-reversing all that affirmed to the ICTY in *Stakić*, as well as the consideration that this would be the only criterion to allow a clear distinction between author and participant[170], in particular: "(...) l*a notion de contrôle exercé sur le crime constitue une troisième approche de la distinction à opérer entre les auteurs principaux du crime et les complices, et contrairement à ce que prétend la Défense, elle est appliquée dans de*

[167]ICC, Prosecutor v. Lubanga, ICC-01/04-01/06, pre trial Chamber, op. cit.,

[168]T. WEIGEND, Perpetration through an organization. The unexpected career of a german legal concept, op. cit., pp. 110ss: "(...) co-perpetrators can contribute in various ways to the commission of the crime, and one contribution can be to provide a human "instrument" under the control of the co-perpetrator (...)".

[169]J. SCHLÖSSER, Mittelbare individuelle Verantwortlichkeit im Völkerstrafrecht, BWV Berliner Wissenshscafts Verlag, Berlin, 2004, pp. 59ss, which aims o replace the Organisationsherrschaft with the soziale Tatherrschaft.

[170]P. J. STEPHENS, Collective criminality and individual responsibility: The constraints of interpretation, op. cit., pp. 539ss

nombreux systèmes juridiques"[171] *(...) ayant écarté les approches objective et subjective de la distinction à opérer entre les auteurs principaux du crime et les complices, la Chambre est d'avis, au même titre que l'Accusation et à la différence de la jurisprudence des tribunaux ad hoc, que le Statut a consacré la troisième approche, qui est fondée sur la notion d'exercice d'un contrôle sur le crime*"[172]. The Trial Chamber confirmed in 2012 the sentence in *Lubanga*, and on this occasion President *Fulford* expressed his perplexities in a separate dissenting opinion[173]. It would be a concept entirely transplanted from a completely legal culture to the theory of control over the crime. different-the German one-in which the distinction between author and accessory is of central importance for the direct consequences on the sanctioning plan[174]. The plain reading of the art. 25 would not allow to find a hierarchy between forms of participation, but only a list of possible ways of assigning responsibility; moreover, always based on the clear normative dictate of the Statute, the argumentative acrobatics aimed at justifying the possibility of admitting that an individual could have committed a crime, despite being away from the *locus commissi delicti*, would prove useless, as this hypothesis is already fully contemplated in art. 25. Another fundamental criticism is that addressed to the concept of essential contribution: the acceptance of the theory of control over the fact would imply hypothetical and counterfactual reasoning, precisely to establish when participation can be considered essential.

The sentence in *Lubanga* was recently confirmed on appeal[175]. To the perplexities on the methodological level, related to the application of a theory developed in a national context to crimes under

[171]ICC, Prosecutor v. Lubanga, pre Trial Chamber, op. cit., par. 94.
[172]ICC, Prosecutor v. Lubanga, pre Trial Chamber, op. cit., par. 96. J. LETNAR ČERNIČ, Shaping the spiderweb: Towards the concept of joint commission through another person under the Rome Statute and jurisprudence of the International Criminal Court, in Criminal Law Forum, 22, 2011, pp. 548ss.
[173]ICC, Prosecutor v. Lubanga, 01/04-01/06, First instance Chamber, 14 March 2012, Separate Opinion of Judge Adrian Fulford.
[174]T. WEIGEND, Problems of attribution in international criminal law. A german perspective, in Journal of International Criminal Justice, 12, 2014, pp. 253ss.
[175]ICC, Prosecutor v. Lubanga, 01/04-01/06 A5, Chamber of Appeals, 1st December 2014.

international jurisdiction[176], it was replied that it would not be correct to state that the theory of control over the crime was merely transplanted into international criminal law. The ICC believes to apply art. 25 based on the ordinary meaning of the words; in carrying out the interpretative activity, this can certainly find a guide in the theories developed in other jurisdictions and jurisdictions, in order to arrive at a coherent and persuasive interpretation of the institutes. The ICC extensively examines the concept of domination over the organization, using it as a model of ascribing responsibility to the accused, even in the subsequent *Katanga* and *Chui* case. *Germain Katanga* and *Mathieu Ngudjolo Chui* were two Congolese soldiers, fighters in the opposing front to that of Lubanga that caused the death of many civilians, and atrocities were then committed and qualified as war crimes and against humanity[177]. The Pre-trial Chamber covers a rather

[176]M. LANGER, The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes, op. cit., pp. 1, 42ss.

[177]T. WEIGEND, Perpetration through an organization. The unexpected career of a german legal concept, op. cit., pp. 92ss. G. WERLE, B. BURGHARDT, Do crimes against humanity require the participation of a State or a "State-like" Organization?, in Journal of International Criminal Justice, 10, 2012, pp. 1151-1170. L.N. SADAT, Crimes against humanity in the modern age, in American Journal of International Law, 107, 2013, pp. 376ss. M. DELMAS-MARTY, Violence and massacres-Towards a criminal law of inhumanity?, in Journal of International Criminal Justice, 7, 2009, pp. 8ss. From the jurisprudence see also: ICC, Prosecutor v. Germain Katanga, Trial Judgment, op. cit., par. 1119 and the restrictive interpretation with the art. 22 of the statute of the ICC. In argument see also: C. KRESS, On the outer limits of crimes against humanity: The concept of organization within the policy requirement: Some reflections on the March 2010 ICC Kenya decision, in Leiden Journal of International Law, 23, 2010, pp. 863ss. See also: ICC, Prosecutor v. Ruto, Kosgey and Sang, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, P-TC II, ICC-01/09-01/11, 15 March 2011, par. 21-70. In our opinion it is necessary to consider the extension of the sphere of application of crimes against humanity resulting from the adoption of an extensive approach. If by organization we mean any entity capable of carrying out an extensive or systematic attack, it should be concluded that a whole series of non-State actors-such as those belonging to organized crime-can commit crimes against humanity. A restrictive reading of the concept of organization seems therefore preferable in order to prevent excessive dilation of the category of crimes against humanity. In a consistent sense. See, M. CHERIF BASSIOUNI, The legislative history of the International Criminal Court:

unusual path here, combining coauthoria and *Organisationsherrschaft*. It should be emphasized that, in this case, it is not a shared domain on the fact which could be that of several subjects at the apex of the same apparatus, but of two separate groups that each obey their leader, and who cooperate on the basis of an agreement between the two leaders[178]. According to the defense of *Katanga*-the position of this accused was then stranded, and the trial against him continued separately-art. 25 of the Statute would be provided for both self-mediated and coauthoria, but separately. In fact, the provision reads: "(...) jointly with another or through another person"; interpreting the disjunction "or" in its weak meaning, confirms the possibility of configuring a personal criminal responsibility on the shared realization of a crime through the work of one or more subjects, in accordance with the provisions of the Statute[179].

It has been observed that the ICC would leverage art. 25 subparagraph 3 lett. a) StCPI and the Roxinian theory of participation to describe a fourth possible manifestation of the notion of domination over the fact: this form of autoria could be defined as co-perpetration based on joint control of the crime[180]. The Prosecutor had proposed an alternative indictment, relying on ancillary participation (article 25 subparagraph 3 letter b) of the StCPI) or on the authorship pursuant to art. 25 subparagraph 3 lett. a). The Pre-trial Chamber immediately supported the qualification of (co) mediated auteur, without even examining the second alternative[181]. In addition to examining the classic requirements of the domain on the fact (in particular, rigid

Introduction, analysis and integrated text. Volume I, ed. Brill & The Martinus Nijhoff Publishers, New York, 2005, pp. 151ss. J. PÉREZ CABALLERO, El elemento político en los crímenes contra la humanidad, op. cit., pp. 195ss. N. LUBELL, Extraterritorial use of force against non-State actors, Oxford University Press, Oxford, 2010.

[178]T. WEIGEND, Perpetration through an organization. The unexpected career of a german legal concept, op. cit., pp. 111ss.

[179]ICC, Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07, pre Trial Chamber I, 30 September 2008, par. 165.

[180]H. OLÁSOLO, The criminal responsibility of senior political, and military leaders as principals to international crimes, op. cit., pp. 265ss.

[181]T. WEIGEND, Perpetration through an organization. The unexpected career of a german legal concept, op. cit., pp. 92ss.

hierarchical structure and power of command at the top), the ICC highlights the true focus of the issue, which puts a clear distinction between autocracy and participation, it is precisely the automatism with which the crime takes place, which is guaranteed by the execution of orders[182]. It should be noted that, while rejecting the suggestion made by Judge *Fulford* in his separate opinion, and apparently continuing on the same orientation already manifested in *Lubanga*, the ICC adopts a slightly different perspective. In fact, to distinguish the author from the accomplice, the circumstance that the conduct of the former is constitutive for the realization of the crime is considered central; the conduct of the accomplice would, instead, appear as merely ancillary[183].

The application of the Roxinian theory is not referred, as before, to the provisions of art. 21 of the StICC but justifies itself as a practical, operational rule, which makes it possible to delineate a distinction between principals and accessories[184]. There is an authoritative minority opinion by Judge *Van Den Wyngaert*[185], who, similarly to *Fulford*, disagrees with the referral of the statutory provision to the German doctrinal construction[186], denying the possibility of finding a hierarchy among the competition titles and any consequence of the sanctions an eventual qualification of the accused as an author or as an accomplice[187].

[182]ICC, Prosecutor v. Katanga and Ngudjolo Chui, op. cit., 175: "(...) The leader's ability to secure this automatic compliance with his orders is the basis for his principal-rather than accessorial-liability. The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed (...)".

[183]A. GIL GIL, E. MACULAN, Current trends in the definition of "Perpetrator", op. cit., pp. 365ss.

[184]ICC, Prosecutor v. Katanga, pre trial Chamber, 01/04-01/07, 21 November 2012, par. 1396.

[185]ICC, Prosecutor v. Katanga, 01/04-01/07, 7 March 2014, Minority Opinion of Judge Christine van den Wyngaert, parr. 150ss.

[186]Prosecutor v. Thomas Lubanga Dyilo, Separate Opinion of Judge Adrian Fulford, 6 e ss.). G. FLETCHER, The grammar of criminal law: American, comparative and international, op. cit., 336ss.

[187]ICC, Prosecutor v. Katanga, 01/04-01/07, 7 March 2014, Minority Opinion of Judge Christine van den Wyngaert, op. cit., H. VEST, Problems of participation-

Equally important is the case of Sudan President *Omar Hassan Ahmad Al Bashir*. In the wake of previous *Lubanga* and *Katanga* decisions, for the first time Prosecutor *Luis Moreno Ocampo* bases the imputation exclusively on the concept of domination over the fact; for the first time, moreover, an arrest warrant is issued against a head of state still in office[188]. The Prosecutor issued the first arrest warrant on July 14, 2008 and Pre-trial Chamber acknowledged the existence of sufficient grounds to attribute the responsibility to the alleged crimes[189]. The ICC mentions the possibility of an imputation as an author or, alternatively, of a mediated co-author: "*Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect corpetrator (...)*"[190]. Furthermore, emphasis is placed on the role of *Al Bashir* as president *de jure and de facto* of Sudan and head of the armed forces; position that would allow him to play an essential role in the coordination of the criminal design and its implementation[191]. To this must be added the strict control exercised by the defendant on all the ramifications of the apparatus, from the military and police forces to the pro-government militia of the *Janjawid;* circumstance able to guarantee the almost automatic realization of the planned criminal events[192]. It is still unlikely that the Sudanese government will execute the arrest warrant; Sudan is not a signatory of StICC and

Unitarian, differentiated approach, or something else?, in Journal of International Criminal Justice, 12, 2014, pp. 299ss. A. HERZIG, Die Tatherrschaftslehre in der Rechtsprechung des Internationalen Strafgerichtshofs, in Zeitschrift für Internationale Strafrechtsdogmatik, 17 (1), 2013, pp. 190ss.

[188]V. F. JESSBERGER, J. GENEUSS, On the application of a theory of indirect perpetration, op. cit., pp. 853ss. B. BURGHARDT, J. GENEUSS, Der Präsident und sein Gericht. Die Entscheidung des Internationalen Strafgerichtshofs über den Erlass eines Haftbefehls gegen Al Bashir, in Zeitschrift für Internationale Strafrechtsdogmatik, 13 (1), 2009, pp. 126ss. H. VAN DER WILT, The continuous quest for proper modes of criminal responsibility, in Journal of International Criminal Justice, 7, 2009, pp. 307ss.

[189]ICC, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, pre Trial Chamber I, 4 March 2009, par. 3, and for the evidence of a crime of genocide see: ICC, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, pre Trial ChamberI, 12 July 2010, par. 8.

[190]ICC, Warrant of Arrest for Al Bashir, op. cit., par. 7.

[191]ICC, Warrant of Arrest for Al Bashir, op. cit., par. 7.

[192]ICC, Warrant of Arrest for Al Bashir, op. cit., par. 7.

tends to challenge its jurisdiction; moreover, *Al Bashir* is still in charge: it has been objected that a fulfillment of the mandate could add instability in a country that already presents serious problems of internal conflict[193]. As in other similar cases, here too it has been noted that an imputation based on art. 28 StCPI does not seem to be shareable: this instrument would, in fact, base a less significant responsibility, less incisive than the commission, instead subject to a sentence pursuant to art. 25 subparagraph 3 lett. a) StCPI[194].

11. Reflections On Command Responsibility

In terms of responsibility of the top management, a brief mention deserves the discipline of the command responsibility. With regard to the provisions of the Rome Statute, pursuant to art. 28 the hierarchical superior is responsible for the crimes committed by his subordinates when the realization is the result of his omission[195]; when

[193]B. BURGHARDT, J. GENEUSS, Der Präsident und sein Gericht. Die Entscheidung des Internationalen Strafgerichtshofs über den Erlass eines Haftbefehls gegen Al Bashir, op. cit., pp. 140ss.

[194]F. JESSBERGER, J. GENEUSS, On the application of a theory of indirect perpetration, op. cit., pp. 865ss.

[195]C. CHERNOR JALLOH, What makes crimes against humanity crimes against humanity?, in American University International Law Review, 28, 2013, pp. 408ss. R.S. CLARK, Crimes against humanity and the Rome Statute of the International Criminal Court, in M. POLITI, G. NESI (a cura di), The Rome Statute of the International Criminal Court: A challenge to impunity, Ashgate Publishing, Aldershot, 2001. P. HWANG, Defining crimes against humanity in the Rome Statute of the International Criminal Court, in Fordham International Law Journal, 22, 1998, pp. 502 ss. For the policy element see: J. PÉREZ CABALLERO, El elemento político en los crímenes contra la humanidad. La expansíon de la figura al crimen organizado transnacional y el caso de las organizaciones de narcotraficantes mexicanas en el sexenio 2006-2012, Dykinson, Madrid, 2015, pp. 72ss. W.A. SCHABAS, State policy as an element of international crimes, in Journal of Criminal Law and Criminology, 98, 2008, pp. 953-982. G. METTRAUX, Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, in Harvard International Law Journal, 43, 2002, pp. 237-316. In national implementation of the Statute some countries-above all those that have used an adjustment model based on the technique of the legislative reference-have maintained the requirement of the policy element: among these we want to mention the case of Malta (art. 2 of the International Criminal Court Act, n. 24, 13 December 2003) and the Sud Africa (part. 2 of the Implementation of the Rome Statute of the International Criminal Court Act, n.

he has violated his duty to prevent and/or sanction the conduct of his subordinates[196]. The objective conditions for the applicability of this criterion of allocation, therefore, are the existence of an effective hierarchical relationship between the competitors and the guarantee position held by the superior[197]. The hypothesis of responsibility would potentially overlap with that of self-mediated exploitation of an apparatus of organized power[198]. Firstly, we wondered if the art. 28 contained a kind of general clause, aimed at placing a position of guarantee for the hierarchical superior for the crimes committed by the subordinates. The provision would allow to impute to this the crimes materially committed by subordinates-as a concurrent competition-through the incriminating function of art. 25 of the statute. The provision of the possibility of incriminating the superior who has not sanctioned the subordinate after the commission of the crime, however, appears a decisive argument in favor of those who interpret the provision in the sense of recognizing an autonomous situation: the non-punishment of the subordinate, in fact, placing itself *post patratum crimen*, it is undoubtedly located outside the competition

27/2002). See, M. DU PLESSIS, South Africa's implementation of the ICC Statute. An african example, in Journal of International Criminal Justice, 5, 2007, pp. 460-479. G. KEMP, The Implementation of the Rome Statute in Africa, in G. WERLE, L. FERNANDEZ, M. VORMBAUM (a cura di), Africa and the International Criminal Court, ed. Springer, The Hague, 2014. D. LIAKOPOULOS, International Criminal Court: Impunity status and the situation in Kenya, in International and European Union Legal Matters, 2014. On the other hand, other systems have not resorted to the policy element in the national definition of crimes against humanity: among these, Germany (sez. 7 VStGB), Republic of Belgium (art. 136-ter of criminal code, introduced from the law n. 32/2003) and the Georgia (art. 408 of criminal code).

[196]C. MELONI, Command responsibility. Mode of liability for the crimes of subordinates or separate offence of the superior?, in Journal of International Criminal Justice, 2007, pp. 619ss. F. BOWES SAYRE, Criminal responsibility for the acts of another, in Harvard Law Review, 43, 1930, pp. 689ss.

[197]V.T. WEIGEND, Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht, in Zeitschrift für die gesamte Strafrechtswissenshaft, 16, 2004, pp. 1012ss.

[198]S. ELDAR, Holding organized crime leaders accountable for the crimes of their subordinates, in Criminal Law and Philosophy, 6, 2012, pp. 223ss. S. DARCY, Collective responsibility and accountability under international law, op. cit., pp. 349ss.

area[199]. Furthermore, if you want to avoid bending art. 28 to forms of objective responsibility, it appears essential to interpret it as a hypothesis of responsibility (omissive) for own fact, for the crime committed by subordinates: only in this way would you avoid indicting the superior for the mere hierarchical position covered, regardless of the effectiveness of the his contribution on the causal or psychic level. Therefore, the concepts outlined in articles 25 subparagraph 3 lett. a) and 28 appear to be mostly complementary. The responsibility for indirect perpetration is of a commissive type, while with the command responsibility it is in effect an omissive responsibility; the contribution classified as self-mediated, of course, has a more meaningful significance in the crime economy perpetrated in competition, and would therefore seem to consist of a more incisive contribution[200].

It is very difficult to draw a firm line on the development of the theme of partnership in the field of international criminal justice. The doctrine has crumbled into a myriad of different positions. The cultural and legal background of each interpreter can not but significantly affect the way in which the subject is treated; finally, it is almost superfluous to note that the cases judged by the International Tribunals refer to extremely complex historical and social contexts far from the halls of justice in which they are analyzed and decided[201]. Almost enthusiastic opinions on the model applied by the Court[202]

[199]H. VEST, Genozid durch organisatorische Machtapparate. An der Grenze von individueller und kollektiver Verantwortlichkeit, ed. Nomos, Baden-Baden, 2002, pp. 298ss, (the author speaks for Führungsherrschaft).

[200]G. KIRK MCDONALD, O. SWAAK-GOLDMAN, Substantive and procedural aspects of international criminal law. The experience of international and National Courts, volume I, ed. Kluwer International Law, Dordrecht, Den Haag, 2000, pp. 21. V. NERLICH, Superior responsibility under article 28 ICC statute. For what exactly is the superior held responsible?, in Journal of International Criminal Justice, 5, 2007, pp. 665ss.

[201]M. OSIEL, The banality of good: Aligning incentives against mass atrocity, in Columbia Law Review, 105, 2005, pp. 1751ss, which rightly notes that the requirement of rigid hierarchical structure often has to be resolved into a legal fiction, being more often informal and difficult to locate networks.

[202]V. N. JAIN, Perpetrators and accessories in international criminal law: Individual modes of responsibility for collective crimes, op. cit., pp. 150ss. V.N. JAIN, The

contrast real proposals to revise the Statute in the sense of accepting a unitary model[203]; more often, however, commentators tend to report the jurisprudential solutions in the footsteps of the principles of legality and personal responsibility, also suggesting the use of "mixed" criteria[204], which give equal prominence to the objective and subjective element of participation[205]. But the firm line remains the support without substantial reservations on the use of the Organizations for international crimes, although it recognizes that this, as applied by the ICC, is far removed from the starting assumptions of domestic law (the reference is to German law), but also to the English one)[206].

12. Concluding Remarks

Establishing in this way a conduct of autoria, in particular in a system based on the differentiation of bankruptcy contributions, is tantamount to basing the title of responsibility on a concept that is completely open, flexible, and therefore uncertain. From the earliest formulations of the theory Roxin himself, moreover, valued the concrete and therefore adaptable character of the notion of *Tatherrschaft*[207], which allowed the conduct of autoria to be colored each time with different meanings. The comparison with the German legal system, therefore, reveals two fundamental profiles with

control theory of perpetration in international criminal law, in Chicago Journal of International Law, 12, 2011, pp. 157ss.

[203]J. STEWART, The end of "modes of liability" for international crimes, in Leiden Journal of International Law, 25, 2012, pp. 165ss.

[204]R. SCHÜNEMANN, Strafverfahrensrecht, ed. C.H. Beck, Münich, 2012, pp. 439ss. C. SCHUON, International criminal procedure: A clash of legal cultures, T.M.C. Asser Press, The Hague, 2010. J. SCHUETZE-REYMANN, International criminal justice on trial. The ICTY and ICTR case referral practice to national Courts and its possible relevance for the ICC, ed. Duncker & Humblot, Berlin, 2016.

[205]J. D. OHLIN, Searching for the Hintermann. In praise of subjective theories of imputation, op. cit., pp. 337ss., which combines the doctrine of JCE and that of control over the crime in a sort of "subjective-functional" approach, baptized: Joint Intentions Theory.

[206]L. ALIŃÁNI, M. OLLÉ SESÉ, Estudios sobre derecho penal internacional, ed. Marcial Pons, Madrid, 2018.

[207]W. SCHILD, Täterschaft als Tathersschaft, ed. De Gruyter, Berlin, New York, 2012.

particular clarity: the adoption of a "pure" differentiated model does not seem to be accompanied by a corresponding recovery in terms of guarantees and the provision of a milder disciplinary treatment for the accomplice already on the typical plane it is a source of countless practical problems. The path chosen by doctrine and jurisprudence has been that of an extensive interpretation, in a normative sense, of the *actus reus*[208], which has uncontrollably expanded the notion of

[208]The ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind proposes to impose criminal responsibility for genocide, crimes against humanity and war crimes (as well as other crimes) on an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing themeans for its commission". The ICTY deemed the ILC Draft Code an "authoritative international instrument" In the Einsatzgruppen case (Trial of Otto Ohlendorf and Others (Einsatzgruppen), 4 Trials of War Criminals Before the Nurenberg Military Tribunals Under Control Council Law No. 10, 572 (William S. Hein & Co., Inc. 1997) (1949) quoted in Furundzija, case No. IT-95-17/1-T, par. 218), the American military court also used a knowledge test, in contrast to the aforementioned purpose test, to convict defendant Fendler; the court determined that the defendant knew that executions were taking place. The ICTY Trial Chamber in Furundzija adopted a knowledge test: "(...) the mens rea required is the knowledge that these acts assist in the commission of the offence (...)". The ILC code also adopted the knowledge test. Under the ILC code, a person can only be found guilty of aiding and abetting, or otherwise assisting if they know that their help will facilitate a crime. The ILC Code is consistent with the subsequent findings of the Appeals Chamber of the ad hoc tribunals. The mens rea of aiding and abetting is knowledge that the acts performed by an individual assist the commission of the specific crime by the principal perpetrator. Under this code, the aider and abettor need not share the mens rea element of the principal; but instead, must be aware of the essential elements of the crime that was ultimately committed by the principal. In crimes of specific intent, such as genocide, the aider and abettor must know of the principal perpetrator's specific intent. In particular in the case of genocide, the aider and abettors must know that the people whom they are helping intend to destroy a particular national, ethnic, religious or ethnic group. For the nmes rea see from the Special Tribunal for Lebanon the next cases: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/T/CJ, Trial Chamber judgment, 15 July 2016 (Akhbar, Trial Chamber judgment) the Court: "(...) stressed that in order to see the differences in the assessment of corporate criminal liability across nations, there is a need to look beyond the systems of common law nations. By finding that the notion of corporate criminal liability is of such divergent nature in the international domain of domestic practices that there is a lack of consensus on it, the Court re-affirmed the Defence's argument stating that the corporate accused not have been expected to know that its acts would result in a violation of international

autoria, especially in the field of systemic (illicit and illicit) criminality, almost completely bypassing the normative dictation. This is also evidenced by the brief reference to the Dutch experience[209], which has experienced a "*normativeization*" of the even more accentuated self, despite a generalized competition of a general part even more detailed than that provided by the *Strafgesetzbuch.* In reality, the general rules on participation are in articles 47 and 48 of the Penal Code (*Wetboek van strafrecht*). In article 47 it is established that those who commit the act (*plegen*), also through others (*doen plegen*) or jointly with others (*medeplegen*)[210] are punished as authors.

law (...) held that the mens rea can only be fulfilled if the natural accused has knowingly and wilfully interfered with the administration of justice and that the act has been committed merely knowingly and wilfully in order to show culpability (...) the Amicus had to prove that the accused "(1) deliberately published information on purported confidential witnesses, and (2) in doing so, they knew that their conduct was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, provided by, witnesses or potential witnesses (...) actual knowledge that the disclosure poses a threat to the public's confidence in the Tribunals work can be inferred from various circumstances (...) if only wilful blindness is established, that alone suffices knowledge whichgives reason to impute criminal liability (...). See also: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/S/CJ, Reasons for Sentencing judgment, 5 September 2016, para. 2. (Akhbar, Sentencing judgment) the STL established: "(...) the actus reus and mens rea of corporate entities and found a corporate body criminally liable for contempt of court (...) references made to the case-law of this Court might seem misleading as the corporate body did not commit atrocity crimes. However, this case has been carefully chosen to stress that domestic practices lay the necessary foundation for the development of international criminal law to include corporate criminal liability (...)". See in argument: M.E. BADAR, The concept of mens rea in international criminal law: The case for a unified approach, Hart Publishing, Oxford & Portland, Oregon, 2013, pp. 126ss. According to the above author: "(...) a number of theories have emerged in criminal law to distinguish between dolus eventualis and advertent negligence, among others, consent or approval theory (die Billigungs-oder Einwilligungtheorie), indifference theory (die Gleichgültigkeitstheorie), possibility theory (die Vorstellungs- oder Möglichkeitstheorie), probability theory (die Wahrscheinlichkeitstheorie), combination theory (Kombinationstheorien) etc. The non-exhaustive list of theories is illustrative of the plethora of approaches in the criminal law theory (...)".

[209]J. KEILER, Actus reus and participation in european criminal law, ed. Intersentia, Antwerpen, Oxford, 2013.

[210]J. DE HULLU, Materieel strafrecht. Over algemene leerstukken van

Autoria, Complicity In The Total Crime And Attribution Of Responsibility: Comparative Aspects (With The South American Courts) And International Criminal Justice

These are combined with those who maliciously determine or instigate someone to commit the fact by means of gifts, promises, abuse of authority, violence, threat or deception, or by providing the opportunity, means or information. In article. 48, on the other hand, a responsibility for complicity is delineated for those who maliciously contribute to the commission of a crime, or provide the opportunity, means or information necessary for this purpose. Finally, in art. 49 it is envisaged that the sentence will be reduced by one third in the event of conviction by way of complicity. The Dutch discipline-although undoubtedly characterized by a greater precision in the description of the conduits-shares, therefore, with the German one, the distinction on the typical plane between autoria and complicity, which results in a mandatory distinction on the level of the sanctioning treatment. The concept of autoria so far outlined gives an image of a rather "passive" agent, describing mostly an omissive attitude, the *Hoge Raad* (Court of Cassation) has had the opportunity to extend the *functioneel daderschap* (or "functional autoria") also to the outside of economic crime, admitting the possibility of charging as an auteur not an economic or tax offense, but a murder hypothesis[211]. In this way, the omission of the *functioneel daderschap* comes to constitute only the extreme limit of expansion of the concept; the foundational characteristic of the author.

The extensive reference to the Organizations by the South American Courts in terms of serious violations of human rights[212] seems to be only partially explainable with the undeniable authority that the German doctrine exercises in the Spanish-speaking countries: it is known that this is often used to *adiuvandum* in judicial arguments. On the other hand, the processes in question concerned systemic crime with great political value and enormous historical

strafrechtelijke aansprakelijkheid naar Nederlands recht, ed. Vitgereij Kluwer BV, Deventer, 2012, pp. 477ss.

[211]V. H. DE DOELDER, Criminal liability of corporations: A dutch update, in A.A.V.V., Strafrecht und Wirtschaftsstrafrecht. Dogmatik, Rechtsvergleich, Rechtstatsachen. Festschrift für Klaus Tiedemann zum 70. Geburtstag, ed. Heymann München, Köln, 2008, pp. 568ss.

[212]M.H. ZAKERHOSSEIN, Situation selection regime at the International Criminal Court, ed. Intersentia, Antwerp, Oxford, 2018.

significance: as we have seen, it is precisely in these cases that Roxinian construction plays its essential role as a mechanism. ductile and evaluative[213].

The experience of international criminal law-in particular the jurisprudence of the *ad hoc* criminal Tribunal and the ICC-show that, even if there is a provision containing detailed lists of bankruptcy conduct, the formation and background of each jurist tends to exert centrifugal thrusts which make it very difficult to find common ground for dialogue. As outlined, no model of national discipline seems perfect: on the other hand, most of the legislative technical options mentioned in the course of this work receive fierce criticism in the order of membership. However, inevitably, in comparison with different systems, there is a proud tendency to hedge on one's own positions[214]. The German jurists are reluctant to abandon the guarantees apparently protected by the distinction between autocracy and complicity and the complex and articulated dogmatic constructions elaborated in doctrine; the approach of the common lawyers certainly appears more pragmatic, and this could paradoxically constitute one of the causes of the success of the Roxinian doctrine, as remodeled in international criminal law[215]: control over the crime can be defined as a case-oriented solution, which only recently Court is trying to find more solid dogmatic foundations[216].

The advanced solutions according to our opinion often appear aprioristically unbalanced and not very attentive to the compromissory profile, which seems the only aspect capable of giving sufficient

[213]E. SCHRAMM, Internationales Strafrecht, C.H. Beck, München, 2018.
[214]M. DELMAS-MARTY, The contribution of comparative law to a pluralist conception of international criminal law, in Journal of International Criminal Justice, 1, 2003, pp. 13ss.
[215]R. CRYER, A. HUNT, Principles of criminal liability for collective crimes in common law coutries, in O. DE FROUVILLE (a cura di), Punir les crimes de masse: Entreprise criminelle commune ou coaction? Actes de la Journée d'études du 14 mai 2010 organisée à l'Hôtel de Paul, Montpellier par l'Institut de droit européen des droits de l'homme (I.D.E.D.H.), 2012, pp. 105ss.
[216]G. FLETCHER, New court, old dogmatik, in Journal of International Criminal Justice, 9, 2011, pp. 180ss.

legitimacy to any proposal that wants to aspire to a certain degree of sharing. Even taking into account the peculiarities of transnational crime, it would seem appropriate to outline a solution that combines the merit of application agility to the necessary respect for the fundamental principles that govern criminal imputation: a practical-functional solution that does not pose as a sectoral response to the issue of insolvency liability in system crime, but which may constitute a general criterion for the regulation of partnership. The proposed solution consists in providing a central provision that contains a list and a definition of the traditional forms of participation, so as to stimulate a more correct and punctual contestation of the competition contribution in the trial; however, not necessarily a qualification in terms of autocracy or complicity should automatically result in a greater or lesser attribution of responsibility: it would seem more appropriate to provide a set of aggravating and mitigating circumstances, in order to accurately measure the relevance of each individual contribution[217].

Of the circumstantial subjecta based on the severity of the conduct actually held, on its effectiveness and incisiveness with respect to the event, but also on the functional relevance of the role within the collective fact could represent a good balance: on the one hand, foreseeing much more incisive criteria and concrete with respect to simple commensurative indices; on the other hand, containing a decidedly higher coefficient of typicality, but at the same time more flexible than would allow a prediction in terms of narrowness typical. This would ensure, first of all, a careful characterization of the value and weight of the bankruptcy contribution, therefore respect for the fair labeling principle (and consequently, the right of defense) and the necessary personality of criminal responsibility[218].

Rigorous categorizations would be avoided and, correspondingly, the danger of yielding to excessively extensive

[217]T. SQUATRITO, O.R. YOUNG, A. FOLLESDAL, G. ULSTEIN, The performance of international Courts and Tribunals, Cambridge University Press, Cambridge, 2018.

[218]H. AHLBRECHT, K.M. BÖHMEER, Internationales Strafrecht, C.F. Müller, Heidelberg, 2018.

interpretative tendencies of the *actus reus* would be diminished, which inevitably left any possibility of finding a sure criterion for a correct distinction of treatment between contributions. Finally, it would not be determined how often the supporters of the "pure"[219] differentiated model complain and fear-a total shift of focus to the level of the commensurate sanction, if this is intended to deliver a blank proxy to judicial arbitrariness: carefully calibrated circumstances could, on the contrary, constitute an important direct and concrete aid for the judge.

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[219]H. AHLBRECHT, K.M. BÖHMEER, Internationales Strafrecht, op. cit., pag. 246.

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Ambos, K., Romero De Vasconcelos, E., Introduction to the special issue on the Brasilian Mensalão case, in Zeitschrift für Internationale Strafrechtsdogmatik, 18 (1), 2014, pp. 259ss

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