Leiden Journal of International Law (2015), 28, pp. 977–992
 doi:10.1017/S0922156515000540

Indirect Perpetration Theory: A Defence

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Abstract

The aim of this article is to show that the concept of perpetration by means as it appears in Article 25 of the Rome Statute of the International Criminal Court (Rome Statute) accurately reflects liability for crimes committed by high-level perpetrators who exercise control over the actions of the lower-level (fully responsible) perpetrators. Finding the proper mode of liability in these cases is crucial to the International Criminal Court's (ICC) mission of ending impunity for serious international crimes. While international criminal law may be unlikely to deter criminals, especially heads of state and other powerful leaders, it *can* provide some sense of justice for the victims by convicting and punishing those responsible for their suffering. As such, the functions of international criminal law are to a large extent expressive and retributive. At the same time, it is important to keep the focus of international criminal law on individual responsibility of the perpetrators. It is, therefore, crucial to find proper labels that reflect culpability well. I hope to make a contribution to this search in what follows.

This article is divided into five sections. First, I provide a background to the move, recently articulated by the ICC, from the concept of joint criminal enterprise (JCE) to that of indirect perpetration (and indirect co-perpetration) (section 2). Second, I analyse the original presentation of this idea by the German jurist Claus Roxin (section 3). Third, I examine the application of this concept by the German courts, particularly in the 1994 trial of three high level GDR officials held liable as indirect perpetrators for the killings (carried out by the border guards) of refugees at the East/West German border (section 4). Then I present a recent (Winter 2011) proposal by Jens Ohlin to abandon both JCE and indirect perpetration in favour of another mode of collective liability based on joint intentions (section 5). Finally, I defend the concept of indirect perpetration against Ohlin's criticisms, arguing that it offers a more accurate way to label the conduct of high-level perpetrators who carry out crimes by means of direct perpetrators who are themselves liable (section 6).

Key words

indirect perpetration; Jens Ohlin; joint criminal enterprise; joint intentions; perpetration by means

1. Introduction

We generally think that in order to be responsible for an act a person must not only carry it out, but also intend that the conduct bring about the particular consequences. In other words, people do not deserve to be praised or blamed for something they did not mean to do, or for something that was an accident. Even as applied to individual actions, however, our moral and legal judgments are much more complicated than this initial description suggests. The complexity is best captured by a phenomenon

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known as moral luck: there are (many) situations in which we receive praise or blame for things whose occurrence we did not control.[1] Similarly, theories of liability in international criminal law must find the middle ground between a subjective focus on intention and an objective requirement of action. Because international crimes often involve whole groups rather than individuals, it is even more challenging to find the proper balance between intention and act. When members of a group that carried out genocide, engaged in mass murder or rape, or committed war crimes are to be brought to justice, difficult issues of collective responsibility arise. In the wake of the Second World War, some have tried to ascribe collective guilt to Germans as a nation. But many, including Hannah Arendt, resisted this move. In a 1945 essay entitled 'Organized Guilt and Universal Responsibility', Arendt wrote: 'It is many years now that we meet Germans who declare that they are ashamed of being Germans. I have often felt tempted to answer that I am ashamed of being human'.[2] This way of broadening the scope of shame to human beings as such, rather than to a particular ethnic group, has the peculiar effect of highlighting individual guilt. If responsibility cannot be attributed to a collective, then each person must answer for his or her choices. Whether or not psychological explanations can provide insight into the causes of atrocities that human beings inflict on each other, a system of justice must, if it is to be effective at all, be grounded in individual responsibility. The ICC is designed to judge and punish perpetrators of the most serious international crimes.[3] Its ability to do so in the best way possible depends on developing an adequate concept of responsibility that is grounded in both intent and act.

In the context of international crimes committed by a plurality of individuals, indirect perpetration (or co-perpetration) is the most coherent way to assign responsibility for crimes that actors did not commit directly. Those who exercise control over the crime but are far removed from the place of its actual commission must be punished as perpetrators and not merely as accessories. The concept of indirect perpetration provides the most accurate way of labeling the high-level, behind-the-scenes perpetrators including heads of state. My argument for indirect perpetration proceeds in five steps. First, I explain the context for the use of the theory by the ICC. Second, I analyse the original formulation of the theory by Claus Roxin. Third, I present the use of this theory by the German Supreme Court in the trial of high-level officials responsible for the killings of people attempting to cross the East/West

1 Thomas Nagel identifies four kinds of moral luck: outcome, constitutive, circumstantial, and causal. Outcome luck refers to the way things turn out as opposed to the way we intend them; constitutive luck has to do with the kinds of people we become as a result of genetic make-up and upbringing; circumstantial luck captures the fact that our moral choices are determined by the circumstances in which we are born; causal luck raises the broader problem of determinism. Particularly relevant in the present context is the category of circumstantial luck. Nagel gives the examples of Germans who left for Argentina for business reasons and therefore did not have to make the moral choices presented to those who stayed in Nazi Germany (as a result of mere accident). See T. Nagel, *Mortal Questions* (1993) ('Moral Luck').

2 H. Arendt, *Organized Guilt and Universal Responsibility*, in L. May and S. Hoffman (eds.), *Collective Responsibility* (1991), 281.

3 See the preamble to the Rome Statute: 'Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished'.

https://doi.org/10.1017/S0922156515000540 Published online by Cambridge University Press

German border. Fourth, I examine a recent critique of the theory by Jens Ohlin.[4] Finally, I offer a defence based on the foregoing exposition.

2. From JCE to indirect perpetration (background)

Central to the notion of criminal liability in Nuremberg was the idea that membership in certain organizations was itself criminal.[5] The International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) rejected the concept of membership in criminal organizations as a mode of liability. The discussions leading up to the ICTY statute emphasized individual rather than collective responsibility. The UN Secretary-General commented on this shift in a letter to the President of the Security Council:

> The question arises, however, whether a juridical person, such as an association or organization, may be considered [criminal] as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.[6]

The fact remains, however, that the majority of crimes in international conflicts are carried out by (mostly large) groups and as a matter of organizational policy and not by individuals on their own initiative.

In addressing this problem of collective responsibility, the ad hoc tribunals employ the concept of JCE. There are three types of JCE that have emerged in the tribunals' jurisprudence. In order to be liable for the basic form of JCE (Type 1), participants must engage in the criminal acts committed by the group with the requisite *mens rea*, which means the individual members must share the intent of engaging

4 Ohlin focuses on the history of Roxin's control theory and its application in the ICC case law. He argues that the judges' application of the control theory represents their engagement in 'first-order questions of criminal law theory'. He continues: 'Regardless of whether they are reaching the correct answers on any particular question (and on this reasonable minds can disagree), it is laudable that the judges are engaging directly with the deep structure of the criminal law and the key distinctions, such as co-perpetrators and accessories, embodied within it.' (J. Ohlin, 'Co-Perpetration: German *Dogmatik* or German Invasion', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015).

5 See, generally, K. J. Heller, *The Nuremberg Military Tribunal and the Origins of International Criminal Law* (2011). The American strategy for holding groups responsible was developed by Murray Bernays, an officer in the War Department's Personnel Branch. Bernays suggested applying American conspiracy jurisprudence to the SS, SA, and Gestapo. Secretary of War, Henry Stimson, the most powerful advocate of the trials in the Roosevelt administration, encouraged him by applying some of his experience in fighting the sugar trust as a young prosecutor: '[I] told them of my experience at the United States Attorney in finding that only by conspiracy could we properly cope with the evils which arise under our complicated development of big business. In many respects the task which we have to cope with now in the development of the Nazi scheme of terrorism is much like the development of big business'. Stimson added that he had in mind a 'picture of a big trial for conspiracy involving the leaders and actors all the way down who had taken part in the different atrocity camps and mass murder places'. See G. J. Bass, *Stay the Hans of Vengeance: The Politics of War Crime Tribunals* (2000), 171.

6 'Letter dated 24 May 1993 from the Secretary-General to the President of the Security Council', UN Doc. S/1993/674, quoted in N. H. B. Jorgensen, 'A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organizations in the Context of Justice in Rwanda', (2001) 12 Crim. L. F. 371, at 375, note 20.

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in the particular conduct and/or bringing about the particular results.[7] The second form of JCE (Type 2) requires that participants take part in a system of mistreatment (like a concentration camp) while aware of the nature of the system and with intent to further it.[8] The final type of JCE (Type 3) is the most controversial because it imposes liability for collateral offences if these are foreseeable and the participant is reckless as to the possibility of bringing them about.[9] Although I cannot consider the controversy regarding Type-3 in detail here, it is important to note that it has been used by the ICTY to impose liability on the leaders of a criminal enterprise.[10] For the purposes of my analysis here, it is sufficient to compare indirect perpetration with the less controversial forms of JCE (Types 1 and 2).

From its first trial in 2009, the ICC declined to use JCE for attribution of responsibility to high-level perpetrators who use a criminal organization to carry out the crimes. Instead, it relied on the mode of liability articulated in Article 25(3)(a) of the Rome Statute. Article 25(3) reads in relevant part:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible ...

In the *Lubanga* case (the ICC's first), the ICC judges interpreted this provision to include co-perpetration by means of control over crime, while in *Katanga and Ngudjolo*, the judges further explained that control over crime can consist in organizational control.[11] With this move, the ICC adopted co-perpetration by means as a way to charge leaders for crimes committed by their subordinates. The most recent application of the concept by the ICC prosecutor in the application for the arrest warrant of the President of Sudan, Omar Hassan Ahmad Al Bashir, gave rise to extensive scholarly discussion.[12] My goal in taking up this controversy is to address the theoretical strength of the indirect (co-)perpetration model as a way of establishing the responsibility of higher-up commanders for the acts committed by their subordinates. As the first step in this analysis, I turn to the origins of the concept that has become central to the ICC's concept of criminal liability.

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7 D. L. Nersessian, 'Whoops, I committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes', (2006) 30 Sum Fletcher F. World Aff. 81, at 85.

8 Ibid. See also, S. Manacorda and C. Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?', (2011) 9 J. Int'l Crim. Just. 159, at 182.

9 Ibid., 88.

10 See, for example, K. R. Olson, 'War Hero Turned War Criminal: The ICTY Convicts Croatian General Ante Gotovina', (Summer 2011) *Accountability: Newsletter of the American Society of International Law.*

11 *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Issuance of a Warrant of Arrest, ICC-01/04–01/06–8-Corr, Pre-Trial Chamber I, 24 February 2006; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04–01/07–717, Pre-Trial Chamber I, 30 September 2008; see generally Manacorda and Meloni, *supra* note 8, at 164.

12 On the use of indirect perpetration in the case against Al Bashir, see, e.g., T. Giamanco, 'Note: The Perpetrator Behind the Perpetrator: A Critical Analysis of the Theory of Prosecution Against Omar Al-Bashir', (2011) 25 Temp. Int'l & Comp. L.J. 217, at 239.

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3. Roxin's theory of indirect perpetration

The best starting point for the discussion of perpetration by means is Roxin's own articulation of the idea in the early 1960s. A segment of Roxin's seminal essay was recently published in English for the first time in the *Journal of International Criminal Justice* along with a collection of articles devoted to discussing its meaning and implications.[13] These passages contain the foundations of the theory of liability now being applied by the ICC, so I begin by presenting its main points. Roxin defined perpetration as 'domination of the act' (*Tatherrschaft*). 'A perpetrator, Roxin held, is a person who 'dominates' the commission of the criminal offence in that he or she has the power to determine whether or not the relevant acts are carried out'.[14] Roxin's overall aim was to distinguish principals from accessories, reflecting the common intuition that the former are more culpable in bringing about criminal harm than the latter.

Roxin was concerned that German courts presiding over prosecutions of Nazi crimes in Germany in later 1940s and 1950s were relying on a subjective theory to make the distinction. If subjective intentions alone set perpetrators apart from those who merely assist in the commission of the crime, then it becomes much easier to argue that an accused does not share the intention of the perpetrators but merely wishes to assist them (perhaps because she did not want to disobey superiors, and/or was afraid to be harmed or lose a job as a result of disobedience). Assistance entails a lesser degree of culpability precisely because the requisite intention appears to be missing. As a result, a conviction for aiding and abetting rather than perpetration may (although it does not necessarily) prompt judges to consider mitigating factors.[15] In postwar Germany, the subjective theory served the unseemly purpose of minimizing individual responsibility of anyone but Hitler and the top Nazi command and bolstered revisionary assessments of the Nazi era in which many ordinary Germans were all too happy to view themselves as Nazism's victims rather than its enablers.[16]

In his contribution to the symposium on indirect perpetration, George Fletcher discusses the corresponding distinction between principal and accessory in American law. He writes:

> American law recognizes the concepts of principal and accessories (they [sic] even distinguish between principals in the first degree and second degree) but these

13 *Symposium: Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?* (2011) 9 J. Int'l Crim. Just. 89–226.

14 G. Werle and B. Burghardt, 'Introductory Note to Anthology: Claus Roxin on Crimes as Part of Organized Power Structures', (2011) 9 J. Int'l Crim. Just. 191.

15 For example, the ICTR recently found Grégoire Ndahimana guilty of the crime of extermination by 'aiding and abetting as well as by virtue of his command responsibility over communal police on Kivumu'. (*The Prosecutor v. Grégoire Ndahimana*, Judgement and Sentence, ICTR-01–68-T, T. Ch. II, 30 December 2011, para. 29, affirmed on appeal ICTR-01–68-A, Judgment, 16 December 2013). The majority found that the large scale of the operation in which a church was destroyed and thousands of ethnic Tutsi civilians were killed served as a mitigating factor. 'Though this did in no way exonerate the accused, it did, however, suggest that his participation through aiding and abetting may have resulted from duress rather than from extremism or ethnic hatred.' See International Law Prof Blog, 20 November 2011, available at http://www.typepad.com/services/trackback/6a00d8341bfae553ef0162fca54e16970d (accessed 11 August 2015).

16 Werle and Burghardt, *supra* note 14. For a good account of this tendency for revisionism in postwar Germany see generally, T. Judt, *Postwar: A History of Europe Since 1945* (2005).

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> distinctions have no direct bearing on punishment, at least not on the statutory range of punishment. It is possible that judges punish differently based on the degree of participation but there is no way of knowing this short of a massive empirical investigation. Yet if we accept the retributive principle that each person should be punished for his wrongdoing as modified by his personal culpability, we should arrive at a principled distinction between the punishment for perpetrators and for accessories.[17]

I will return to Fletcher's point about the need for 'principled distinctions' in Section 6 below, but it is important to note here that Roxin's defence of indirect perpetration is, to a large extent, motivated by the need to provide accurate labels for the modes of liability employed by the criminal justice system. These labels are accurate only if they reflect the degree of personal culpability properly attributable to the particular defendant.

According to Roxin, the issue of indirect perpetration is particularly pressing for international criminal law because international crimes, unlike domestic crimes, often tend to be perpetrated by groups rather than individuals 'or a few people on the basis of independent initiative.'[18] Difficulties arise when criminal law concepts created to deal with individual acts need to be applied to crimes committed by groups and organizations, often ones that involve the state apparatus itself. Jens Ohlin provides a stark formulation of this challenge in his article 'Joint Intentions to Commit International Crimes' that I will discuss in detail in Section 5. In his words: 'The question is how to develop a sophisticated doctrine that navigates between the *collective nature* of international criminality and the *individualized determinations* of criminal law'.[19] Ohlin criticizes the ICC's decision to embrace Roxin's solution to the problem as shifting the balance too far in the direction of act, away from intention. However, Ohlin's own theory of joint intentions suffers from the opposite fault of overemphasizing collectivity (see Section 4 below). First, however, what exactly is Roxin's solution?

Two defendants serve as Roxin's starting point. One is Adolf Eichmann whose lawyer argued at the trial in Jerusalem that his client's 'crime is not the act of an individual; the state itself is the perpetrator'.[20] The other is Bogdan Stashynsky, a KGB agent, who assassinated two Ukrainian nationalists in Germany (Lev Rebet in 1957 and Stepan Bandera in 1959).[21] The Federal Supreme Court in Germany found Stashynsky to be an abettor of the murders because he had no interest in committing the crimes but was a mere tool of the KGB. Roxin argues that neither Stashynsky nor Eichmann can meaningfully be called an abettor. The former committed the act which the KGB orchestrated. Stashynsky, the agent, and KGB leadership that ordered the assassination are perpetrators – direct and indirect. Eichmann, in turn, committed crimes through an organization in which he held a senior position. The

17 G. Fletcher, 'New Court, Old Dogmatik', (2011) 9 J. Int'l Crim. Justice 179, at 188.
18 C. Roxin, 'Crimes as Part of Organized Power Structures', (2011) 9 J. Int. Criminal Just. 193 (translated by Belinda Cooper).
19 J. Ohlin, 'Joint Intentions to Commit International Crimes', (2011) 11 Chi. J. Int'l L. 693, at 720 (emphasis added).
20 Roxin, *supra* note 18, at 200.
21 Ibid., at 94, note aa1. I follow the editors' account of the circumstances of the case provided in this note.

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key to Roxin's position is that in these types of collective crimes both the behind-the-scenes perpetrator *and* the actual direct perpetrator are principals rather than mere accessories. In contrast, domestic law conceives of perpetration by means in terms of an innocent person being used as an instrument to commit a crime.[22] The tension here is apparent: How can there be a fully liable perpetrator behind the guilty actor? How can responsibility for the same act be attributable to two distinct people who did not commit the crime together?

Roxin answers by relying on the idea of *Tatherrschaft* (control over the act).[23] An indirect perpetrator controls the acts of a culpable actor by means of an organized power structure.[24] Within this structure, a particular (fully culpable) perpetrator does not alone control the occurrence of the crime. Instead, those in charge of the organization can replace actors with others and still make sure that the crime is committed. A complex criminal organization like the Nazi extermination machine continues to operate regardless of whether or not a particular actor carries out his part. This exchangeability does not, of course, relieve individuals of criminal responsibility (contrary to what Eichmann tried to argue). Instead, it turns the actions of superiors who set the machine in motion, but do not necessarily commit the particular murders, into perpetration.[25] Roxin writes:

> We can see that the objective elements of organizational control are very clearly delineated here: whereas normally, the farther removed a participant is from the victim and the direct criminal act, the more he is pushed to the margins of events and excluded from control over the acts, in this case, the reverse is true. Loss of proximity to the act is compensated by an increasing degree of organizational control by the leadership in the apparatus.[26]

It is important to note that perpetration by means can be attributed to behind-the-scenes actors in various positions of authority. In other words, not only leaders but anyone whose position within the organizational structure gives him or her control of the crime is liable as a principal. Eichmann, for instance, was not at the very top of the organizational hierarchy, but he did exercise control over the acts of his subordinates. In this way, at each level of the hierarchy, a perpetrator can be both a fully culpable instrument and an indirect perpetrator.

4. Indirect perpetration and the German courts

The German Supreme Court applied Roxin's concept of perpetration by means in the 1994 trial for the killings of East Germans who tried to cross the border into West

22 See Model Penal Code, §2.06(2) and (2)(a): 'A person is legally accountable for the conduct of another person when: acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct'. Roxin cites several scholars who argue that it is impossible to hold indirect perpetrators responsible for acts of those who are themselves responsible (Roxin, *supra* note 18, at 197–8).

23 Ibid., 196.

24 Ibid., 198.

25 Ibid., 199.

26 Ibid., 200. Roxin notes that the Jerusalem Court refused to adopt the usual categories of participation (i.e. principal vs. aider and abettor) and instead characterized the events as 'mass crime'.

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Germany. The Court ascribed criminal responsibility to the high-ranking accused. Keßler, Streletz, and Albrecht were members of the National Defence Council for the German Democratic Republic, the organization in charge of establishing the border policy of killing those attempting to cross. The District Court found Keßler and Streletz liable as instigators (*Anstifter*) and Albrecht as an aider and abettor (*Gehilfe*) for the killings carried out by the border guards.[27] However, the Federal Supreme Court of Germany rejected these verdicts, applying the category of indirect perpetrator instead.[28] It may be significant for evaluating the status of the concept in international customary law that the Court did not simply rely on Roxin's theory but rather cited a number of different scholars who concurred that 'indirect perpetration was possible despite the direct perpetrator's criminal liability'.[29]

The Court focused on the element of control over crime, which belongs fully to the perpetrator and not (most of the time) to the accessory. Cases in which the decisions of the behind-the-scenes actor lead to the commission of the crime serve as examples of indirect perpetrations. The high-level leaders who order the crime are not accessories of the direct perpetrators; rather, they control whether or not the act is going to take place. The border guard cases belong to this category. The following passage is a concise summary of the circumstances creating the conditions for indirect perpetration:

> There are, however, groups of cases in which, despite the presence of a direct perpetrator acting with unconditional responsibility, the contribution of the person behind the scenes almost automatically leads to the accomplishment of the act aimed at by this person. This can be the case if the person behind the scene uses conditions determined by an organizational structure, within which his contribution to the act triggers regular processes.[30]

The control theory provides a good explanation for the way behind-the-scenes perpetrators can operate through those who physically commit the crime. As did the Jerusalem Court in the *Eichmann* trial, the German Court here emphasized that distance from the deed can in these situations increase rather than decrease the degree of responsibility.[31] Roxin's theory, together with its application in the trials of high-level official for the German border killings, set the stage for the ICC's use of the concept of perpetration by means. The one significant 'blind spot in the argument'[32] of the German Supreme Court in the border case is the failure to consider that the defendants, along with others in the GDR defence council leadership perpetrated the crimes together. The ICC corrects this oversight by applying the concept of indirect co-perpetration.

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27 Werle and Burghardt, *supra* note 14.
28 Ibid.
29 Ibid., 209, 224.
30 Ibid., at 224. The concept of indirect perpetration was also used in the so-called *Grudge Informer* Case, see D. Dyzenhaus, 'The Grudge Informer Case Revisited', (2008) 83 NYU Law Rev. 1000, as well as in the Juntas Trials, (1987) 26 ILM 317–72. However, a comparative analysis of the way the concept was used in these other cases is beyond the scope of this paper.
31 Werle and Burghardt, *supra* note 14, at 225.
32 Ibid., at 210.

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5. A NEW ALTERNATIVE? OHLIN'S THEORY OF JOINT INTENTIONS

In his critique of the perpetration by means doctrine Ohlin labels it 'the new darling of the professoriate'.[33] Contrary to the endorsements that the ICC theory has won, Ohlin argues that it represents an overreaction to the shortcomings of the JCE doctrine. What is missing from the ICTY analysis of JCE, Ohlin claims, is the notion of joint intentions. The doctrine of indirect (co-)perpetration does not address this shortcoming. Instead, it focuses on the control that the indirect perpetrator exercises over the acts carried out by others. Admittedly, the indirect (co-)perpetration doctrine does address a central problem with JCE, namely the inadequate link it establishes between the actions of the leader (the behind-the-scenes perpetrator) and those of the subordinates. This weakness leads to the expansion of JCE to include a recklessness standard – vicarious liability for foreseeable but not intended results. Many commentators find this extension troubling, but Ohlin does not think that we need to abandon all the elements of JCE to remedy the problem. Instead, he advocates the joint intentions model of collective responsibility; this model is grounded in a philosophical theory of joint intentions.

Ohlin's shared intentions theory draws on the philosophies of Bratman and Searle, among others. The key relevant feature of these accounts is that the collective nature of acts committed by a group of people lies in their ability to plan and co-operate with regard to the results. Co-operative behaviour is usually characterized, Ohlin argues, by pooling information and shared decision-making.[34] However, it is also possible in the absence of deliberation.[35] Ohlin then goes on to apply the shared intentions theory to five hypotheticals in order to demonstrate that it provides better outcomes than the control theory. His hypotheticals include the love parade stampede, the Essen lynching, the Concentration camp, the deportation, and the attack against civilians. Very briefly, the first is based on the stampede at a concert in Germany in which many people were killed in a crowd after they got trapped in a narrow tunnel leading to the outdoor location of a concert. The second is the lynching of British prisoners of war by a crowd in Essen at the instigation of a German officer. In the third example, three officers work as guards at a concentration camp in the former Yugoslavia. They are aware of the murder, torture, and rape systematically committed at the camp. One of them commits torture and rape himself, while the others do not and are not even aware of the particular incident. Fourth, a unit of soldiers is engaged in deportation as part of an ethnic cleansing campaign. One of them decides to shoot the victims instead of proceeding with the deportation. Finally, a unit of soldiers ordered to seize a town decides to kill all the civilians.[36]

Ohlin is surely correct in saying that the joint-intentions theory accurately captures the various levels of liability involved in these five cases that range from deaths resulting from a crowd that rushes to escape a fire to intentional killings. Furthermore, this analysis has important consequence for the JCE doctrine. It imposes two

33 Ohlin, *supra* note 19, at 693.
34 Ibid., at 739.
35 Ibid., at 741.
36 Ibid., 726–8.

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restrictions on JCE: the first one consists in 'eliminating vicarious liability for actions that fall outside the scope of the original agreement', the second in 'differentiating levels of participation in the group endeavor'.[37] But to say that the control theory is less successful at explaining liability in the five cases above is not to say that it does not provide a valuable form of criminal liability. Indeed, the joint intentions theory raises some of the same problems that Roxin saw in the subjective approach to the perpetrator/accessory distinction. Ohlin explains:

> [T]hose who jointly intend to commit the crime with each other would be liable as co-perpetrators (or some other designation), whereas those who simply assist the group with mere knowledge that their assistance will help complete the crime are then labeled as accomplices. If the joint intentions theory is capable of making this distinction (and doing it better), it is unclear what is left for control theory to do.[38]

This explanation brings us back to the problems of applying a subjective analysis to cases like *Eichmann* or *Stashynsky*. If defendants in those cases claim not to share the intention of the behind-the-scenes perpetrators (Heydrich or Hitler in Eichmann's case, the KGB leadership in Stashynsky's case), can they be considered accessories? For Stashynsky, the answer is simpler – the actual perpetrator is not an accessory. For Eichmann, organizational control over crime provides the answer. None of the five cases discussed by Ohlin involve this organizational structure central to Roxin's (and ICC's) theory of indirect perpetration. As a result, his criticism appears to be misplaced. The control theory provides an objective way to distinguish perpetrators and accessories that the intentional theory lacks. The focus on organizational structure may pose problems for the application of indirect co-perpetration to cases where bureaucratic organization is less apparent.[39] Despite the potential evidentiary challenges, however, this form of liability provides a particularly fitting way to charge those responsible for the most serious international crimes.

In sum, while a nuanced analysis of joint intentions is indeed valuable, I do not think that it can solve the problems that JCE presents. Rather, the control theory is much better at dealing with these issues. More specifically, it better reflects culpability by setting aside a separate category for the indirect perpetrators who ensure the commission of crimes from a distance.

Neither JCE nor Ohlin's joint intentions theory captures the higher degree of responsibility belonging to leaders of criminal organizations as effectively as the concept of indirect perpetration does.[40] In fact, Ohlin identifies this failure of JCE, making the following observation:

> There is a difference, after all, between the proverbial Milošević who, on the one hand, directs the joint enterprise at the highest level, and the foot soldier who, on the other

37 Ibid., 747.
38 Ibid., 745.
39 A situation like that in Sudan, for example, might pose this problem. See Manacorda and Meloni, *supra* note 8, at 172.
40 See F. Jessberger and J. Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at the Hague?' (2008) 6 J. Int'l Crim. Just. 853, at 866.

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> hand, merely participates in the endeavor at the low level. Their relative culpability demands differentiation.[41]

Ohlin's solution is to replace JCE by what he calls 'two more specific and accurate modes of liability: (1) co-perpetrating a JCE; and (2) aiding and abetting a JCE.'[42] Co-perpetration would be a mode of liability appropriate for actors satisfying three conditions: '(1) they participate in a joint criminal endeavor at a high level; (2) they have the intent of furthering the criminal purpose of the group endeavor; and (3) they are indispensable to the success of the joint criminal endeavor'.[43] While this approach focuses specifically on the intent, it fails to provide sufficient differentiation for high-level perpetrators. Ohlin acknowledges that the theory requires further elaboration of the meaning of 'high level' participation:

> [T]he level of contribution could be used to distinguish between co-perpetrating a JCE and aiding and abetting a JCE. A full analysis of the required level of contribution (de minimus, substantial, or indispensable) for vicarious liability is outside the scope of the present [a]rticle).'[44]

But this is a crucial point: to focus the distinction between perpetrator and abettor primarily on the intention behind the act does not do justice to the differences in degree of participation between the mastermind of the act and the mere foot soldier.

Before turning to a more explicit defence of indirect perpetration, one last point regarding the need for differentiation of liability must be addressed. While few disagree that there is indeed a difference between a high-level participant who orders the crimes and the foot soldier who carries out the orders, some argue that the difference can be addressed at the sentencing stage rather than by applying distinct forms of liability.[45] However, I think Ohlin is right to claim that 'it seems intuitively correct that the culpability principle is about more than just punishment'.[46] In this regard, a recent article by Werle and Burghardt entitled 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute' provides a useful starting point. The authors argue that Article 25(3) of the ICC Statute favours a differentiation model of liability for the following three reasons: (i) the literal and contextual reading of the statute itself; (ii) the case law of the ad hoc tribunals; and (iii) the 'phenomenological and normative features of international criminal law and the aim and purpose of [Article] 25(3) of the ICC Statute all support the differentiation model'.[47] Although a detailed discussion of these arguments belongs elsewhere, it is worth noting that one reason for taking the control theory seriously is that it captures the significance of liability as such, apart from any practical consequences it may have for sentencing.

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41 Ohlin, *supra* note 19, at 714.
42 Ibid., 716.
43 Ibid., 715.
44 Ibid., 748, note 258.
45 See, e.g., *Amicus Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine*, (*Kaing Guek Eav (Duch Case)*), Case No 001/18–07–2007-ECCC/OCIJ (PTC 02), 27 October 2008, at 82(ii) (Cited in Ohlin, *supra* note 19, at 750, note 271).
46 Ohlin, *supra* note 20, at 751.
47 G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law*(2014).

https://doi.org/10.1017/S0922156515000540 Published online by Cambridge University Press

Even leaving the debate regarding modes of liability aside, it should be fairly uncontroversial to say that a way must exist to charge leaders who lack *actus reus* as principals. The argument that I advance here is that indirect perpetration does the job better than the available alternatives (including Ohlin's revision of JCE) because it achieves a more balanced mix of objective and subjective criteria.

6. Preserving the balance between intention and act

To define the principal in a criminal act as the agent who has control over crime is to concede the moral intuition that people should be responsible for things that they choose to do. In this way, it is not a purely objective test. Rather, control is intimately bound up with the intention to see the act carried out. In order to mount a defence of indirect (co-)perpetration against the criticisms proposed by Ohlin, it is necessary to articulate the elements of this doctrine in some more detail. Although these elements are by no means firmly settled yet, the Rome Statute and the ICC have formulated some of the key criteria. In the remainder of the article, I present these elements and elaborate on the primary advantages of the concept of indirect perpetration. These advantages are consistent with Roxin's original reasons for proposing the theory: the concept is so valuable for international criminal law because it allows for an objectively grounded distinction between perpetrators and accessories, ascribing liability to those who order crimes but do not themselves participate directly in their commission.

Article 30 ('Mental Element') of the Rome Statute provides for the subjective criteria that must accompany any of the acts described in Article 25 as preconditions for a finding of liability:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

In accordance with these requirements, anyone convicted as an indirect perpetrator would need to have intent and knowledge. Intent in relation to conduct is entirely volitional – that person *means* to engage in the conduct – while intent with regard to consequences may be either volitional or cognitive – the person is 'aware that it will occur in the ordinary course of events'. As Heller points out in his analysis

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of the Rome Statute, it is unclear whether the latter includes recklessness as well.[48] Furthermore, the 'otherwise provided' clause refers to some crimes that require specific intent under the statute. Paragraph (a) of Article 25(3) establishes criminal responsibility for principals through either direct or indirect commission, while paragraph (b) covers inducement, paragraph (c) aiding and abetting, and paragraph (d) other types of accessory liability.[49] By these divisions, Article 25(3)(a)–(c) codifies the distinction between principals and accessories, which Roxin aimed to establish through his doctrine of indirect perpetration.[50] Although the intention requirement remains crucial under Article 30, the distinction is grounded in the objective control requirement for indirect perpetrators.

The ICC defined the objective elements in the *Katanga* case. In brief, they are as follows:

1. 'The organization must be based on *hierarchical relations* between superiors and subordinates';
2. 'The organization must have enough subordinates so that the carrying out of orders becomes "*automatic*"' (the Court quotes Roxin on this point, as well as many others);
3. 'The indirect perpetrator must *exercise control* and this control must be *manifest in the subordinates' compliance* (evidence of control includes capacity to hire, train, impose discipline, and provide resources to his subordinates)'; and
4. 'Compliance includes *commission of crimes* that are under ICC jurisdiction'.[51]

The evidentiary burden for proving indirect perpetration is quite high – appropriately so, given the higher degree of liability belonging to principals. However, such an increased burden should not lead the prosecutor to avoid indirect perpetration and opt for a different mode of liability altogether (such as command responsibility under Article 28, for example). While perhaps easier to prove, superior liability, especially for civilians, focuses on omissions rather than commissions. Furthermore, Article 25 should not be bypassed because it is the primary source of individual responsibility under the Statute.[52]

The ICC and German courts are not alone in using the concept of indirect perpetration to convict leaders who commit crimes through an organized crime apparatus. This wider use may lend some additional legitimacy to the concept. The symposium on indirect perpetration in the *Journal of International Criminal Justice* includes two

48 K. J. Heller, 'The Rome Statute in Comparative Perspective', in K. J. Heller and M. D. Dubber (eds.), *Handbook of Comparative Criminal Law* (2010), at 603–4.

49 For a detailed discussion of the problems raised by the seeming grouping together of principals and accomplices in Article 25(3)(d), see J. D. Ohlin, 'Joint Criminal Confusion', (2009) 12 New Crim. L. Rev. 406, cited in Ohlin, *supra* note 19, at 746, note 254.

50 Ohlin notes that the ICTY Trial Chamber arguably tried to integrate this distinction into the JCE doctrine. See Ohlin, *supra* note 19, at 745, note 249.

51 *Prosecutor v. Katanga*, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008), paras. 512–16, 528–9 and 537–9 (emphasis added).

52 But see Giamanco, *supra* note 12, at 243–5 (arguing that command responsibility is preferable in the prosecution of Al Bashir, especially to establish liability for rape).

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articles on domestic use of the concept. Kai Ambos' contribution deals with the 2009 conviction by the Peruvian Supreme Court of the former president of Peru, Alberto Fujimori. The Court convicted Fujimori for indirect perpetration of crimes against humanity during his presidency by means of an organized power apparatus. The Court followed Roxin's criteria including the presence of a hierarchical organization, the actual exercise of command by the indirect perpetrator, and the interchangeability of the direct perpetrator.[53] Ambos concludes that its use in the Fujimori conviction demonstrates that the theory of indirect perpetration can be used successfully to prosecute serious international crimes. Another article in the symposium by Francisco Muñoz-Conde and Héctor Olásolo, suggests that indirect perpetration has come to play an important role in a number of Latin American jurisdictions.[54] The authors examine instances in which courts of various Latin American countries have used (or rejected) the concept of indirect perpetration and conclude that it has gained some ground in recent years, even if it remains controversial. This comparative overview is valuable in showing that courts find the concept of indirect perpetration useful in the context of prosecuting leaders of organized power structures for serious international crimes like large-scale human rights violations and crimes against humanity.

Indirect perpetration provides international criminal law with an instrument for capturing a proper level of liability. Culpability generally reflects the blameworthiness of what an actor has done and can include, as the idea of moral luck described in the introduction illustrates, more than just intentions.[55] This sense of culpability is particularly difficult to capture adequately in international crimes because of their collective nature. As many have noted, international crimes

> typically occur during periods of war, ethnic conflict or other societal breakdown and chaos characterized by the erosion, if not inversion, of basic social norms against violence, either generally or relative to certain demonized and dehumanized ethnic, political, religious, national or racial groups.[56]

In this moral 'gray zone',[57] a legal doctrine reflecting culpability is both especially important and especially difficult to articulate.

The idea that crimes must be labeled fairly to reflect harm as well as culpability is firmly established in criminal law theory. 'Although not an element of any crime per se, fair labeling nevertheless is viewed as a fundamental principle of criminal law: that "justice not only must be done, but must be seen to be done"'.[58] The

53 K. Ambos, 'The Fujimori Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus', (2011) 9 J. Int'l Crim. Just. 137, at 150.

54 F. Muñoz-Conde and H. Olásolo, 'The Application of the Notion of Indirect Perpetration Through Organized Structures of Power in Latin America and Spain', (2011) 9 J. Int'l Crim. Just. 113.

55 See, e.g., K. Ambos, 'Remarks on the General Part of International Criminal Law', (2006) 4 J. Int'l Crim. Just. 660, at 665–8 ('*culpa* is no longer (only) the intent to cause a certain result, but the blameworthiness of the perpetrator's conduct'), cited in Ohlin, *supra* note 19, at 751, note 273.

56 R. Sloane, 'The Expressive Capacity of International Punishment', (2007) 43 Stan. J. Int'l L. 39, citing W. M. Reisman, 'Legal Responses to Genocide and Other Massive Violations of Human Rights', (1996) 59 Law & Contemp. Probs. 75, at 77. See also, M. Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', (2005) 105 *Columbia Law Review* 1751.

57 The term comes from an essay of that title by P. Levi, *The Drowned and the Save* (1989).

58 Nersessian, *supra* note 7, at 96.

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source of this principle is a subject of some debate, which I can only mention in passing here. While some believe that it is the nature of criminal law doctrine itself which requires that various degrees of culpability be proportionately represented by corresponding labels,[59] others have argued that there exists a basic human right to fair labeling.[60] Whatever the ultimate justification for fair labeling, the requirement of fairness cannot be explained with reference to case law or statutory provisions alone. As Ohlin suggests, for example, 'moral and philosophical theories that ground culpability are crucial, particularly when courts are … in the position of not just applying, but also of announcing such theories'.[61]

In his analysis of indirect perpetration, George Fletcher also advocates a proto-philosophical grounding for categories of liability. More specifically, he sees the turn to Roxin's theory by the ICC as indicative of a return to an old German Dogmatik (roughly defined as a supporting culture of ideas and principles). He applauds this turn because it is motivated by a concern with individual rather than restorative justice. Fletcher concludes his essay with the following passage:

> The deeper message of the return to the Old Dogmatik is that its roots are in the protection of individuals from the demands of the victims who suffer from group massacres. May the future of international criminal justice keep its focus on individual justice and relegate to the background the cataclysmic event[s] that require an international court to intervene to maintain international peace and security.[62]

Of course, the focus on individual justice should not be overstated. As I have discussed, collective responsibility problems dominate the theories of responsibility in international criminal law. However, the renewed attention to the perpetrator's *acts*, rather than the consequences of those acts, provides an important reminder that individual liability must be grounded with precision, precision that many have argued is lacking in the JCE doctrine.

Indirect perpetration is better at fair labeling in the context of serious international crimes because it achieves a more adequate balance between the focus on intention and that on act. While not applicable in every context, this theory of liability is particularly appropriate for establishing the responsibility of commanders (especially those at a high level) for crimes they commit by means of an organized group of direct perpetrators. By focusing on the control that the superiors exercise of the direct actors, indirect perpetration (and co-perpetration) reflects the moral intuition that a commander's criminal actions are highly culpable and gives expression to this intuition in criminal jurisprudence.

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59 Ohlin, *supra* note 19, at 751.

60 Ibid. Citing F. Mégret, 'Prospects for "Constitutional" Human Rights Scrutiny of Substantive International Criminal Law by the ICC, with Special Emphasis on the General Part' (paper presented at Washington University School of Law, Whitney R. Harris World Law Institute, International Legal Scholars Workshop, Roundtable in Public International Law and Theory, 4–6 February 2010). For a general discussion, Ohlin also refers to A. Ashworth, 'The Elasticity of *Mens Rea*', in C. F. H. Tapper (ed.), *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross*(1981), at 45.

61 Ibid., 753.

62 Fletcher, *supra* note 17, at 190.

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7. Conclusion

The theory of indirect perpetration (and co-perpetration) as developed by Claus Roxin, applied by the German courts, and further developed in the Rome Statute and the ICC jurisprudence provides a powerful way to attribute responsibility for serious international crimes to leaders of criminal organizations and militias. On this theory, the leaders (and other behind the scenes perpetrators) can be convicted as principals, and the label will adequately reflect their high level of culpability. While it is difficult to articulate a precise and exhaustive concept of criminal liability in the context of collective crime, indirect perpetration makes a significant contribution to this goal. Thus, if it has indeed become the 'the new darling of the professoriate',[63] the attention is well deserved.

63 Ohlin, *supra* note 19, at 693.

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