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## Assessing the Control-Theory

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# Assessing the Control-Theory

JENS DAVID OHLIN, ELIES VAN SLIEDREGT, AND THOMAS WEIGEND\*

## Abstract

As the first cases before the ICC proceed to the Appeals Chamber, the judges ought to critically evaluate the merits and demerits of the control-theory of perpetratorship and its related doctrines. The request for a possible recharacterization of the form of responsibility in the case of *Katanga* and the recent acquittal of Ngudjolo can be taken as indications that the control-theory is problematic as a theory of liability. The authors, in a spirit of constructive criticism, invite the ICC Appeals Chamber to take this unique opportunity to reconsider or improve the control-theory as developed by the Pre-Trial Chambers in the *Lubanga* and *Katanga* cases.

## Key words

ICC; *Lubanga* case; *Katanga* case; control-theory; joint perpetration; indirect co-perpetration; hierarchy of blameworthiness

## I. INTRODUCTION

The conviction of Thomas Lubanga Dyilo of 14 March 2012 marked an important moment in the ICC's history.<sup>1</sup> It was the first judgment by an ICC Trial Chamber. Lubanga was found guilty of having committed the war crime of enlisting and conscripting child soldiers and sentenced to 14 years' imprisonment.<sup>2</sup>

On 18 December 2012, the ICC issued its second judgment, this time an acquittal. Mathieu Ngudjolo Chui was acquitted of charges for crimes against humanity and war crimes committed during an attack on Bogoro village in the DRC.<sup>3</sup> Both the *Lubanga* conviction and the *Ngudjolo* acquittal came with vigorous dissents with regard to the 'control theory' of liability for perpetration.<sup>4</sup> This theory, developed by the Pre-Trial Chambers in *Lubanga* and *Katanga and Ngudjolo* centres upon the concept of 'control' as marking a distinction between principal liability and accessorial liability and is based on the assertion that Article 25(3) of the ICC Statute provides

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1 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, Trial Chamber I, ICC-01/04-01/06, 14 March 2012 (hereinafter *Lubanga* judgment).

2 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber I, ICC-01/04-01/06, 10 July 2012.

3 *Prosecutor v. Mathieu Ngudjolo Chui*, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, ICC-01/04-02/12, 18 December 2012 (hereinafter *Ngudjolo* judgment/acquittal).

4 Separate Opinion of Judge Adrian Fulford to *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, Trial Chamber I, ICC-01/04-01/06, 14 March 2012 (hereinafter Separate and Dissenting Opinion Judge Fulford); Concurring Opinion of Judge Christine van den Wyngaert to *Prosecutor v. Mathieu Ngudjolo Chui*, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, ICC-01/04-02/12, 18 December 2012 (hereinafter Concurring Opinion Judge Van den Wyngaert).

for a hierarchical structure of the modes of participation. According to the Pre-Trial Chamber in *Lubanga*, this hierarchical structure implies that co-perpetration, as principal liability, requires proof of an *essential* contribution to the common plan that resulted in the commission of the crime.<sup>5</sup>

The control-theory has its source in the writings of criminal-law scholar Claus Roxin, who attempted to devise a theory for holding Nazi leaders such as *Adolf Eichmann* responsible as perpetrators of the atrocities committed under their regime.<sup>6</sup> At the ICC and beyond, the control-theory has remained controversial. The control-theory can, however, be credited for promoting fair labelling.<sup>7</sup> But Judge Fulford, in his separate opinion in *Lubanga*, opines that the control-theory (i) is unsupported by the text of the Statute, (ii) does not create a hierarchy of liability, and (iii) that joint perpetration does not require an essential contribution of each co-perpetrator. The latter requirement, in his view, would set too high a threshold for liability. He argues in favour of a plain-text reading of Article 25(3)(a) of the ICC Statute and, with regard to joint perpetration, proposes that a contribution to the crime is '[d]irect or indirect, provided either way there is a causal link between the individual's contribution and the crime'.<sup>8</sup>

Judge Van den Wyngaert, in her opinion in the *Ngudjolo* decision of acquittal, agrees with Fulford that the control-theory is not consistent with the ordinary meaning of Article 25(3)(a) of the ICC Statute and that Article 25(3) does not create a hierarchy of blameworthiness. With regard to the requirement of an essential contribution, she is of the view that:

[f]or joint perpetration, there must, in my view, be a direct contribution to the realisation of the material elements of the crime. This follows from the very concept of joint perpetration. Under Article 25(3)(a), only persons who have committed a crime together can be held responsible. The essence of committing a crime is bringing about its material elements.<sup>9</sup>

Van den Wyngaert is further critical of the combination of joint perpetration and indirect perpetration into 'indirect co-perpetration'. This combined form of liability has been developed by the Pre-Trial Chamber in *Katanga and Ngudjolo* with the purpose of capturing complex forms of collective violence. To Van den Wyngaert's mind, this theory, which presupposes an organized structure of power that uses ('controls') individuals as tools to commit crimes, conflicts with the text of Article 25(3) of the ICC Statute and Article 22 of the ICC Statute.

Contrary to the approach favoured by Judges Fulford and Van den Wyngaert, judicial practice at the ICC, at least so far, has demonstrated a penchant for judicial

5 *Lubanga* judgment, para. 999.

6 C. Roxin, 'Straftaten im Rahmen organisatorischer Mchtsapparate', *Goldammer's Archiv für Strafrecht* (GA) (1963), translated to English: C. Roxin, 'Crimes as Part of Organized Power Structures', (2011) 9 JICJ, 193–205. See also C. Roxin, *Täterschaft und Tatherrschaft* (2006), at 242–52, 704–17; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. 2 (2003), 46 et seq.

7 See D. Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law', (2011) 64 *Current Legal Problems* 1, at 6. See E. van Sliedregt, 'The Curious Case of International Criminal Liability', (2012) 10 JICJ 1171, at 1182–85.

8 Separate and Dissenting Opinion Judge Fulford, para. 16.

9 Concurring Opinion Judge Van den Wyngaert, para. 44.

activism and creativity. This stands in contrast to the textual approach one would expect, given the fact the ICC Statute contains elaborate statutory definitions, a general part, and extensive Elements of Crimes. Article 21 of the Statute primarily refers the judges to these sources rather than to general rules that may be found in domestic laws.

In this paper, we will not discuss the question whether there exists a sufficient legal basis for the control-theory; this has been done elsewhere.<sup>10</sup> We instead wish to appraise the substance of control-theory. We will focus primarily on two of its manifestations: joint perpetration and indirect co-perpetration. Third, we discuss the alleged hierarchy in Article 25(3) of the ICC Statute, on which some aspects of control-theory have been based.

## 2. JOINT PERPETRATION AND THE ‘ESSENTIAL CONTRIBUTION’

### 2.1. Control-theory and joint perpetration

With respect to joint perpetration, the Pre-Trial Chamber in *Lubanga* defined ‘control’ as ‘joint control over the crime by reason of the *essential* nature of the various contributions to the commission of the crime’.<sup>11</sup> The Chamber recognized that in cases of joint perpetration none of the perpetrators normally ‘controls’ the commission of the offence by himself, because the defining feature of co-perpetration is a division of labour.<sup>12</sup> But

when the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime.<sup>13</sup>

The defining feature of joint perpetration, according to the Chamber’s definition, is a hypothetical power, namely ‘the power to frustrate the commission of the crime by not performing their tasks’.<sup>14</sup> Because this decisive criterion is framed in negative terms (‘frustrating’ by ‘not performing’), there exists no particular affirmative act that a person must perform in order to become a joint perpetrator. The *Lubanga* Trial Chamber indeed emphasized that a person can be a co-perpetrator even where he does not physically perpetrate any of the elements of the crime in question and

<sup>10</sup> S. Manacorda and C. Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’, (2011) 9 JICJ 159. See also T. Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’, (2011) 9 JICJ 91. E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 83–8.

<sup>11</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber, ICC-01/04-01/06, 29 January 2007, para. 341 (emphasis added) (hereinafter *Lubanga* Confirmation Decision). See *Lubanga* Judgment, para. 1000.

<sup>12</sup> *Lubanga* Confirmation Decision, para. 342. The Chamber concluded: ‘Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.’

<sup>13</sup> *Ibid.*, para. 347.

<sup>14</sup> *Katanga and Ngudjolo Chui*, Decision on the Confirmation of Charges, Pre-Trial Chamber, ICC-01/04-01/07, 30 September 2008, para. 525 (hereinafter *Katanga and Ngudjolo* Confirmation Decision).

where he is not even present at the scene of the crime.<sup>15</sup> It can be sufficient, for example, for the actor to be a ‘mastermind’ who decides ‘whether and how the offence will be committed’.<sup>16</sup>

The effect of the control-theory, as devised by the *Lubanga* Pre-Trial and Trial Chambers, is ambivalent. The theory *limits* the concept of (joint) perpetration to those participants in a criminal enterprise whose contribution is a condition without which the criminal plan could not have come to fruition. But on the other hand, the theory *expands* the scope of perpetratorship to persons who are far removed from the scene of the crime and do not personally perform any of the acts required by the offence definition.

## 2.2. Criticism of Judge Fulford

Judge Fulford, in his separate opinion in *Lubanga*, agrees with the expansive element of the definition given by the majority of the Trial Chamber. But he regards that definition as too narrow where it demands an ‘essential’, indispensable contribution. Judge Fulford proposes instead a very simple test for joint perpetration, namely whether there exists ‘an operative link between the individual’s contribution and the commission of the crime’.<sup>17</sup> By applying this test, a court would be able to avoid ‘a hypothetical investigation as to how events might have unfolded without the accused’s involvement’.<sup>18</sup> Yet, Judge Fulford seems to equate the required ‘operative link’ with causation, because in the following paragraph of his opinion he demands for co-perpetration that there exist ‘a causal link between the individual’s contribution and the crime’.<sup>19</sup> That phrase raises the question what exactly Judge Fulford understands by a ‘causal link’. If an act (say, the furnishing of a weapon to a murderer) is ‘operative’ in the commission of the offence (because the murderer uses that weapon), does that create a causal link between the furnishing of the weapon and the killing? If so, how would Judge Fulford distinguish between a (joint) perpetrator and a mere aider and abettor? Can there be different (stronger or weaker) types of ‘causal link’? Can there be a ‘causal link’ that is not essential? Does causation not necessarily imply that without the existence of the factor in question the consequence would not have occurred? And if not, why would a marginal, easily replaceable contribution be sufficient to turn a mere helper into a co-perpetrator? How about a man who provides not the weapon used in the offence but a bicycle which the killer rides to the site of the crime? Would furnishing the bicycle also have an ‘operative’ or ‘causal’ link to the killing? Would the answer to that question depend on whether the bicycle was, under the circumstances, the only means by which the killer could arrive at the relevant site in time to kill the victim? If so, does Judge Fulford’s analysis not also have to take into account whether the means provided was ‘essential’?<sup>20</sup>

15 *Lubanga* Judgment, para. 1004.

16 *Lubanga* Confirmation Decision, para. 330; *Lubanga* Judgment, para. 1003.

17 Separate and Dissenting Opinion Judge Fulford, para. 15.

18 *Ibid.*, para. 17.

19 *Ibid.*, para. 16.

20 Probably Judge Fulford’s ‘operative link’ would, upon closer inspection, end up looking very much like the *Lubanga* majority’s ‘essential contribution’.

There may well be convincing answers to all these questions, but Judge Fulford unfortunately does not provide them. The test of perpetratorship which he suggests therefore remains vague and leaves the judges very much to their intuition rather than providing them with standards by which to make the difficult distinction between perpetration and mere accessorial liability. Judge Fulford is correct, of course, in pointing out that many legal systems, including the Statute of the ICC, do not provide for different sentencing levels for perpetrators and accessories. Yet, as long as the law distinguishes between several forms of involvement in a criminal offence – and the ICC Statute in Article 25 (3) clearly makes such a distinction<sup>21</sup> – those who apply the law may not use the various labels arbitrarily. A judge cannot on Monday convict a defendant of aiding and abetting, and on Tuesday convict another defendant of joint perpetration on the same or very similar facts, telling the Tuesday defendant that it makes no difference, in the result, whether he is convicted of perpetration or of aiding and abetting.<sup>22</sup>

### 2.3. Criticism of Judge Van den Wyngaert

Judge Van den Wyngaert, in her concurring opinion in *Ngudjolo*, takes issue with both effects of the control-theory; in her opinion, that theory is at the same time too broad and too narrow. She suggests that joint perpetration does not require an ‘essential’ causal contribution<sup>23</sup> but ‘a *direct* contribution to the realisation of the material elements of the crime’.<sup>24</sup> Like Judge Fulford, Judge Van den Wyngaert rejects the ‘essentiality’ requirement because it compels judges ‘to engage in artificial, speculative exercises about whether a crime would still have been committed if one of the accused had not made exactly the same contribution’.<sup>25</sup> But she also finds insufficient Judge Fulford’s broad-stroke approach under which anyone who provides some ‘causal’ element can be treated as a perpetrator. Instead, Judge Van den Wyngaert would limit perpetratorship to those who *directly* bring about the material elements of an offence.<sup>26</sup> She concedes that the notion of ‘direct’ perpetration is not easy to apply to some of the more complex offences typical of international law, such as displacing a civilian population in violation of Article 8(2)(e)(viii) of the ICC

21 Judge Fulford claims that the concepts which appear in the four subsections of Art. 5(3) of the ICC Statute ‘will often be indistinguishable in their application vis-à-vis a particular situation, and by creating a clear degree of crossover between the various modes of liability, Article 25(3) covers all eventualities’. Therefore, he thinks, ‘the possible modes of commission under Article 25(3)(a)–(d) of the Statute were not intended to be mutually exclusive.’ (Separate and Dissenting Opinion Judge Fulford, para. 7). It is not quite clear on what evidence Judge Fulford makes this claim. But even if the authors of the ICC Statute had foreseen that, in a given situation, more than one mode of liability under Section 25(3) might be applicable, that would not justify leaving these various modes undefined and adjudicating cases using a vague ‘crossover’ form of criminal liability.

22 The dispute over whether Art. 25(3) (a)–(d) of the ICC Statute contains a hierarchical ranking of various forms of liability (*Lubanga* Judgment, paras. 994–999. See also G. Werle, ‘Individual criminal responsibility in Article 25 ICC Statute’, (2007) 5 JICJ 953, 957, or a mere listing (Separate and Dissenting Opinion Judge Fulford, para. 9; Concurring Opinion Judge Van den Wyngaert, paras. 22–30) is not of much relevance to the question whether it is necessary to properly define these forms of liability.

23 Concurring Opinion Judge Van den Wyngaert, paras. 41–42.

24 *Ibid.*, para. 44 (emphasis in the original).

25 *Ibid.*, para. 42.

26 *Ibid.*, para. 44.

Statute. In these cases – which may well be the majority of cases coming before the ICC – she would regard as ‘direct’ perpetrators even those who plan or organize the acts in question, because planning is ‘an intrinsic part of the actual execution of the crime’.<sup>27</sup>

One may regard this ‘softening’ of Judge Van den Wyngaert’s approach as a sign of welcome flexibility. But the adaptations proposed by Judge Van den Wyngaert also indicate that the criterion of ‘directness’ has only a modest measure of distinctive substance. If ‘direct’ causation can also mean participation in the planning stage long before the actual displacement of civilians takes place (to use Judge Van den Wyngaert’s example), what then is the difference between ‘direct’ and ‘indirect’ or ‘remote’ causation? Judge Van den Wyngaert claims that what is ‘direct’ will have to be determined by the facts of each case.<sup>28</sup> But if it is the judges who in each individual case need to determine what is ‘direct’ and what is not, why not simply leave the question who is a perpetrator to the appreciation of the court, as Judge Fulford suggests?

The ‘directness’ criterion also lacks a convincing normative basis. Judge Van den Wyngaert’s main argument in favour of this criterion is that it treats individual and joint perpetrators equally: since a person acting alone can be convicted only if he ‘brings about’ the material elements of the offence (e.g., by shooting the victim), she claims, the same should apply if two or more persons act jointly.<sup>29</sup> But joint perpetration differs in one critical aspect from perpetration by an individual offender: the job of committing the offence is divided up among the co-actors; they join forces for the very purpose of relieving each participant of the necessity to ‘bring about’ by himself the result of the criminal plan. If it were a necessary requirement for every joint perpetrator to individually fulfil each element of the offence definition, the concept of joint perpetration would be superfluous – every participant could be convicted as an individual perpetrator. Judge Van den Wyngaert’s equation of individual and joint perpetration thus misses the very point of joint perpetration: the division of labour among the co-perpetrators.

#### **2.4. What makes joint perpetration?**

What, then, is the distinctive feature of joint perpetration? Before we proceed to suggest an answer to this question let us consider why it is necessary to do so. As we said above, whenever the law differentiates between perpetrators and accessories there have to be criteria for drawing the line between these categories, lest the courts apply them on a mere hunch or on arbitrary grounds. A need to define joint perpetration and to keep it apart from other types of criminal liability therefore exists in all legal systems that, like the ICC Statute, distinguish between perpetrators and accessories.

As we have seen, single-word ‘theories’ (relying on expressions like ‘direct’ or ‘operative link’ to solve the problem) hardly satisfy the need to inform and shape the

27 Ibid., para. 47.

28 Ibid., para. 46.

29 Ibid., para. 45.

application of the law in this area, because they do not offer more than a very general idea about what may be the gist of joint perpetration. The control theory as devised by the *Lubanga* Pre-Trial Chamber has the great advantage of offering a binary criterion: either one's contribution to the completion of the crime is essential, i.e., a *conditio sine qua non* – or it is not. And the 'essentiality' criterion is also *prima vista* plausible: it reflects the value judgement that those who provide central contributions are, in general, more blameworthy than those who remain at the margins of the criminal enterprise and provide only support that the main actors could have done without.

Yet, even the control-theory may lack sufficient sophistication. One of its problems is the question from what perspective the 'essential' character of a given act is to be determined. This can be done from an *ex ante* and an *ex post* perspective; that is, looking forward from the stage of planning the crime,<sup>30</sup> or looking backward after its completion (or frustration). The analysis of the 'essentiality' of any participant's contribution is easier and more reliable if one gauges it *ex ante*, for example at the planning stage of the crime. Looking at the plans of the persons involved, it is not difficult to determine whose contribution they deem indispensable and which contributions they regard as 'accessorial'; that is, useful but not crucial to the success of the plan. Taking an *ex ante* view has the disadvantage, however, that the judge must accept as binding any miscalculation on the part of the conspirators: if A and B think that a robbery can succeed only if B provides a gun, that expectation would, under an *ex ante* 'essentiality' test, turn B into a joint perpetrator if he actually furnishes the gun; and that would hold true even if A does not use the gun in the robbery but obtains the money by mere verbal threats. Using an *ex post* perspective ("Was B's contribution "essential" to the robbery as it was actually carried out?") avoids this difficulty but leads to the problem of hypothetical guessing, which Judges Fulford and Van den Wyngaert raised in their opinions. If A, in the robbery hypothetical, actually uses B's gun in order to threaten the victim, we cannot say with any degree of certainty what the outcome would have been if B had not provided the gun. Perhaps A would have desisted from the robbery altogether, or perhaps he might have hidden a banana or some other object in his pocket and pretended that it was a gun, thus threatening the victim sufficiently to make him hand over the money. In conclusion, then, while both perspectives may lead to different results in any given case, neither is without flaws.

But that is not even the main problem with the 'essentiality' test. Contrary to what Judge Fulford has written,<sup>31</sup> the *Lubanga* court's control-theory may not define perpetratorship too narrowly but too broadly. The way the Trial Chamber applies

30 The Trial Chamber in *Lubanga* seems to take an *ex ante* perspective where it refers to the *assignment* of roles as the test for what is 'essential' (*Lubanga* Judgment, para. 1000); but it is not entirely clear whether the Chamber would rule out a reassessment of the distribution of roles after the fact. The prosecution in *Lubanga* proposed to distinguish between an assessment *ex ante* (where the co-perpetrator must have been assigned a contribution that was 'central to the implementation' of the common plan) and a retrospective assessment of the plan as it was carried out (where it should be sufficient that the co-perpetrator's contribution can be deemed 'substantial'); cf. *Lubanga* Judgment, paras. 990–991. The Trial Chamber did not adopt or even discuss that distinction, thus leaving unresolved the question whether the requirements of joint perpetration should be assessed from the participants' perspective *ex ante* or from an objective perspective *ex post*.

31 Separate and Dissenting Opinion Judge Fulford, para 16.

the test to the facts of *Lubanga* gives an indication of how far the net of perpetration is cast under the seemingly narrow ‘essentiality’ test. A joint perpetrator, the *Lubanga* majority holds, does not have to be present at the scene of the crime, and there need not even exist a direct or physical link between his contribution and the commission of the crime; it is sufficient for a perpetrator to assist in formulating the relevant strategy or plan, to become involved in directing or controlling other participants’ or to determine the roles of those involved in the offence.<sup>32</sup> If all these contributions, which can be quite remote in time and place from the commission of the offence, are deemed ‘essential’ and thus sufficient to establish perpetratorship, then one must ask what remains for mere accessorial liability as an instigator or an aider and abettor. If, for example, a scientist in 2012 provides critical information which enables the leadership of a state to produce chemical weapons prohibited under Article 8(2)(b)(xviii) ICC Statute, is he then – assuming he has foreseen the use of the weapons – a joint perpetrator of an attack carried out with these weapons in 2014?

If we wish to distinguish between those who are at the centre of the criminal offence and therefore deserve to be labelled as perpetrators, and those who remain at the margins in a supporting role and should therefore be punished as accessories, then the one-dimensional criterion of the indispensability of the contribution may be insufficient because it captures only one aspect that may be relevant. We might indeed have to give up the (attractive) idea of basing the distinction on a single factor and look instead for a cluster of factors that will have to be taken into consideration. In doing so, we should be aware that the line between (joint) perpetrators and accessories cannot be drawn on empirical grounds but requires a normative (value) judgement – a judgement that in the last resort is based on a notion of fair attribution and is therefore soft at the edges. The factors relevant for this value judgment cannot simply be deduced from the facts of each individual case, because facts by themselves give us no clue as to their normative valuation. What we can do, however, is try to identify factors which indicate a ‘central’ role in a criminal enterprise, and thus perpetratorship. Even when we have agreed on such factors, there is still plenty of room for judicial weighing and balancing in each case, because these factors may, on a given set of facts, pull in opposite directions. But at least we would have criteria by which to rationally evaluate any borderline case.

One approach in defining such criteria centres on *mens rea*. It has often been emphasized that participation in or at least adherence to a common plan is one factor that must exist in any case of joint perpetration. A person who does not cooperate with others on the basis of some – albeit silent – agreement may be liable as an individual perpetrator but cannot be a ‘joint’ perpetrator. What other *mens rea* requirements may be necessary for perpetratorship depends on each offence definition.<sup>33</sup> One should note, however, that a common plan, as that term is traditionally understood by international courts, often exists also between perpetrators and accessories: an instigator consciously works together with the perpetrator in

32 *Lubanga* Judgment, paras. 1003–1004.

33 It is not logically impossible for several persons to co-perpetrate a crime of recklessness or *dolus eventualis*; but inadvertent negligence and joint perpetration in a technical sense seem to be mutually exclusive.

the initial stage, and aiders and abettors also often support the commission of the offence based on an agreement with the main perpetrators. The existence of such a minimal agreement therefore is a necessary but not a sufficient condition of joint perpetration. One of the authors of this article has recently developed the idea that a joint intention that the group commit a collective crime is the defining element of co-perpetration; what is required, under this approach, is joint deliberation and the meshing of sub-plans among co-perpetrators.<sup>34</sup> Another subjective factor of possible relevance is a strong personal interest in the success of the criminal enterprise, going beyond the minimal requirement of *mens rea*. Such a personal interest may be regarded as a (weak) indicator of joint perpetration, because a person interested in the outcome will, *ceteris paribus*, contribute more eagerly and persistently than a person who acts out of altruism or for a set fee.<sup>35</sup>

An alternative approach places greater emphasis on *objective* factors. If one follows that approach, the indispensable nature of a person's contribution weighs heavily as an indicator of perpetratorship, and might even be regarded as a necessary requirement for a finding of perpetratorship. A person whose contribution has no critical bearing on the implementation of the criminal plan hardly qualifies as a 'central' or 'essential' participant. But as we have tried to show above, the indispensability of a contribution is not under all circumstances a sufficient condition for attributing perpetratorship. One option is to add an element of immediacy, of carrying out a task temporally close to the commission of the material elements of the offence. Roxin, whose writings have to some extent influenced the international debate on this subject,<sup>36</sup> has suggested that only those who participate in the crime after the stage of attempt has been reached should be considered co-perpetrators.<sup>37</sup> This limitation goes in the right direction but may be a bit too 'technical' since it would make joint perpetration depend on the vagaries of the definition of attempt. But under an objective approach, an element of 'control' over the actual commission of the offence is an important indicator of joint perpetration. Typically, a joint perpetrator (co-)decides whether and how the offence is actually perpetrated, either by directly

34 See J. D. Ohlin, 'Joint Intentions to Commit International Crimes', (2011) 11 Chicago JIL 693, at 721.

35 German courts have traditionally relied heavily on subjective factors for distinguishing between perpetrators and accessories, treating as mere accessories those who participated in the crime with an *animus socii* (mind of an associate); see Bundesgerichtshof (Federal Court of Justice), Judgment of 23 January 1958, 11 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 268, at 271–2; Bundesgerichtshof, Judgment of 10 March 1961, 16 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 12, at 14; for a summary of the present position of the Federal Court of Justice see Bundesgerichtshof, Judgment of 24 October 2002, 48 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 52, at 56. Of course, in most cases it is the judges who determine, in hindsight and on considerations of equity, what may have been the 'mind' of a participant at the time of the crime. The emphasis on subjective elements thus leaves the distinction between perpetrators and accessories to the practically unreviewable discretion of the trial court.

36 It is not necessary here to discuss at length Professor Roxin's many contributions to the German debate on perpetratorship. But it should be noted that Roxin has expressly rejected the 'essentiality' theory as defined by the *Lubanga* majority: Roxin – followed by the great majority of German writers – requires for co-perpetratorship a 'substantial' contribution to the common plan as regarded *ex ante*, but writes that the contribution of a co-perpetrator need not be 'causal' for the offence as a whole (See Roxin, *Strafrecht Allgemeiner Teil supra* note 6, at Section 25, marginal note 213). For an overview of the current German debate on the subject, see B. Weißer, *Täterschaft in Europa* (2011), 333–7.

37 See Roxin, *Strafrecht Allgemeiner Teil supra* note 6, at Section 25, marginal note 199.

taking part in the *actus reus* or at least by overseeing – by telephone, for example – the commission of the crime by the immediate actors.<sup>38</sup>

In sum, the concept of ‘control’ in the control-theory as propounded by the *Lubanga* majority may be too one-dimensional. What we should be looking for is a more comprehensive model of joint perpetratorship which contains both subjective and objective elements. Typical factors are a person’s involvement in the planning of a joint enterprise, his *mens rea*, and possibly his personal interest in the success of the enterprise; furthermore, the importance of his contribution to the success of the criminal plan and the proximity of his contribution to the actual commission of the offence. It is a matter of debate whether greater emphasis should be placed on subjective or on objective factors. But only if we recognize that there is a cluster of different considerations that may be relevant can we rationally lead that debate.

### 3. INDIRECT CO-PERPETRATION

Judge Van den Wyngaert, in her concurring opinion in the *Ngudjolo* acquittal, analyses the mode of liability known as indirect co-perpetration and concludes that the theory is not included in Article 25(a) of the ICC Statute.<sup>39</sup>

The issue is of the highest importance, since many of the recent indictments at the ICC, including *al-Bashir* and the Kenya cases, have accused the defendants of perpetrating their crimes as indirect co-perpetrators.<sup>40</sup> Indeed, one can easily understand why the doctrine is so powerful. Since the ICC concentrates on the highest-level perpetrators far removed from the scene of the crime (and the *actus reus*), the Office of the Prosecutor must assert a linking principle that connects the defendants to the physical commission of the crime by street-level perpetrators.

The building blocks of the doctrine stem from combining other modes of liability already introduced into the ICC jurisprudence through German criminal-law theory. In *Lubanga*, an ICC Pre-Trial Chamber defined co-perpetrators as perpetrators exercising joint control over the crime.<sup>41</sup> In addition, Roxin had developed the notion that a person can be guilty of indirect perpetration where he controls the direct perpetrators – who may themselves be criminally responsible – by means of a hierarchically organized structure. He labelled this as

38 Under that test, a gang leader might be a joint perpetrator of a bank robbery where he is in contact, by mobile phone, with the actors in the bank, and can decide, for example, that the robbery attempt should be abandoned when the perpetrators report unexpected obstacles. If that is not the case, the leader of a criminal group would come under the label of ‘ordering, soliciting or inducing’ (Art. 25(3)(b) ICC Statute), or he might be considered a perpetrator ‘through another person’ if the special requirements of domination of others are fulfilled. For extensive argument on these points, see Roxin, *Strafrecht Allgemeiner Teil supra* note 6, at Section 25, marginal notes 198 et seq.; B. Schünemann, Section 25, marginal notes 180 et seq., in H. W. Lauffhütte, R. Rissing-van Saan, and K. Tiedemann (eds.), *Strafgesetzbuch: Leipziger Kommentar*, Vol. 1 (2007).

39 Concurring Opinion Judge Van den Wyngaert, para. 59.

40 See, e.g., *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Confirmation of Charges, Pre-Trial Chamber II, ICC-01/09-02/11, 23 January 2012 (hereinafter *Muthaura et al.* Confirmation Decision); *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Confirmation of Charges, ICC Appeals Chamber, Case No. ICC-01/09-01/11 (hereinafter *Ruto et al.* Confirmation Decision); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009.

41 *Lubanga* Confirmation Decision, para. 340.

*Organisationsherrschaft*, or perpetration through an organized apparatus of power.<sup>42</sup> By combining these two modes of liability, the Office of the Prosecutor and the ICC developed the doctrine of indirect co-perpetration – what can only be described as a truly potent prosecutorial tool; it allows the conviction of defendants who are substantially removed from the physical perpetrator of the crime along two axes.<sup>43</sup>

One can imagine the wide applicability of this theory; it is certainly not limited to the *Katanga and Ngudjolo* case. Indeed, it may very well represent the future of international criminal prosecutions before the ICC, just as joint criminal enterprise (JCE) came to define the prosecutorial strategy regarding perpetration at the ICTY. In most cases involving governmental or similarly organized atrocities, multiple higher-level government or rebel officials will collaborate to perpetrate the criminal conduct. Moreover, none of these officials will commit the crimes directly by themselves; rather, one or more of them will utilize vertical bureaucracies under their authority. The result is a deadly efficient division of labour. Or so proponents of the doctrine would argue, thereby equating the culpability of all leaders at the horizontal level as full perpetrators. Indeed, this was the original theory in the *Katanga and Ngudjolo* case. Both Katanga and Ngudjolo allegedly utilized rebel organizations at their disposal and only by combining their forces could they perpetrate the atrocities. Therefore, according to the OTP, each defendant was not only responsible for the actions of their own troops but also responsible for the actions of the other's troops.<sup>44</sup> This cross-liability represented the full force of the indirect co-perpetration doctrine. Leaders become responsible not just for individuals under their command, but also for individuals that their collaborators command.

### 3.1. Can modes of liability be combined at will?

In our view, Van den Wyngaert was right to express caution about this mode of liability. First and most importantly, Van den Wyngaert argued that there was nothing in the text of Article 25 to justify such ad-hockery.<sup>45</sup> Article 25(3)(a) talks of perpetrating 'jointly with another' and 'through another person', but does not mention the possibility of combining these modes of liability.<sup>46</sup> Can separate modes of liability be combined without special justification?<sup>47</sup> There are normative reasons to be sceptical of such combinations and it must be determined whether they are consistent with *international* criminal law in general and the ICC Statute in particular.

42 See Roxin, 'Crimes as Part of Organized Power Structures', *supra* note 6, 193–207.

43 Not only are such defendants vertically removed from the commission of the crime (by virtue of their indirect perpetration), but they are horizontally removed as well (by virtue of their co-perpetration with other collaborators on the horizontal level). The notion of 'control' then provides the connection that links such defendants, along the two axes, to the physical perpetrators of the atrocities. See J. D. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability', (2012) 25 LJIL 771. Indirect co-perpetration therefore has some *structural* similarities with later versions of JCE theory, because under the latter doctrine the leadership-level JCE need not encompass the relevant physical perpetrators, who might report directly to one member of the JCE.

44 *Katanga and Ngudjolo* Confirmation Decision, para. 484.

45 See Concurring Opinion Judge Van den Wyngaert, para. 60.

46 *Ibid.*, para. 61.

47 See Concurring Opinion Judge Van den Wyngaert, para. 62 (concluding that modes of liability can be combined when the elements of each are established). For a comparative-law perspective on combining modes of liability: Van Sliedregt, *supra* note 10, at 68–9.

In the case of indirect co-perpetration, one might argue that the defendants in such cases will independently satisfy the criteria for each mode of liability. Consequently, the demands of both co-perpetration and indirect perpetration are independently satisfied. So what could be the harm in that?

Indirect co-perpetration involves something more than a *straightforward* application of the concepts of indirect and co-perpetration as those terms are used in Article 25 of the ICC Statute. The *Katanga and Ngudjolo* Pre-Trial Chamber decision on the Confirmation of Charges concluded that only with the co-operation of both forces were the defendants able to consummate the international crimes.<sup>48</sup> But it was not the case that each of the defendants met the standards for both co-operation and indirect perpetration. Indeed, if that had been the case, the doctrine of indirect co-perpetration would have been superfluous; prosecutors could simply have selected between co-perpetration and indirect perpetration and could have proceeded with one of these doctrines as their theory of the case. For example, in the ICTY *Stakić* case, one of the first to attempt application of the control-theory, the Trial Chamber, held that Stakić was responsible as a principal to the crime even though it was subordinates of his co-perpetrator who performed the actual killings.<sup>49</sup> It was therefore not the case that Stakić independently met the standards for indirect perpetration, since he was not personally in control of the vertical organization that performed the killings. The question is whether such doctrinal overreach is a natural *outgrowth* of the judicial application of the doctrine of indirect co-perpetration or whether it is implicit in the doctrine itself.

None of this suggests that an adequate theory of indirect co-perpetration cannot be constructed. However, it cannot be merely assumed, and that theory is certainly not a straightforward application of the bare text of the Statute. Constructing this theory requires a judicial recognition of how the control-theory has evolved in German criminal law doctrine and how far it should be extended, based on an independent examination of basic principles of criminal law *Dogmatik*. Some theory must explain this new mode of liability as it emerges from the raw materials of Article 25(3)(a). Through forming a common intent, both Katanga and Ngudjolo allegedly reached beyond their own troops. They built a team of two, a collective with power over both of their troops. This fact may justify a legal attribution of the acts of Lubanga's troops to Ngudjolo, and vice versa.<sup>50</sup> However, an adequate theory needs to carefully distinguish between individuals who control distinct organizations but deploy them towards a common cause and individuals who jointly exercise combined authority over a single vertical organization. The latter constitutes a junta model of indirect co-perpetration via a single apparatus of power, while the former represents a joint

48 *Katanga and Chui* Confirmation Decision, para. 493.

49 *Prosecutor v. Stakić*, Trial Judgement, IT-97-24, T.Ch., 31 July 2003, para. 469.

50 On this point, see the analysis by B. Burghardt and G. Werle, 'Die mittelbare Mittäterschaft – Fortentwicklung deutscher Strafrechtsdogmatik im Völkerstrafrecht?', in R. Bloy (ed.), *Gerechte Strafe und legitimes Strafrecht: Festschrift für Manfred Maiwald zum 75. Geburtstag* (2010), 849; Weigend, *supra* note 10, at 110–11; S. Wirth, 'Co-Perpetration in the Lubanga Trial Judgment, (2012) 10 JICJ 971, at 980 et seq.

perpetration through multiple vertical organizations.<sup>51</sup> The judicial standards for each flavour of the doctrine might be different, given the different structure of the ‘control’ in these cases. So far the ICC has not explored these differences to a satisfactory degree.

### 3.2. The role for organizations under Article 25

Van den Wyngaert also expressed anxiety about the growing importance of organizations within the control-theory. Simply put, she argued that Article 25 applies to indirect control over *persons* committing international crimes, but not indirect control over *organizations* committing the crimes.<sup>52</sup> This is a complex point and one that the various Pre-Trial Chambers have shown insufficient dedication to addressing. Of course, all organizations, whether criminal or corporate, are composed of natural persons.<sup>53</sup> Hence Article 25 is applied to the indirect control of persons even where control is exercised by means of an organization. The question is whether it is appropriate for the doctrine to give a special position to ‘organizations’ as a legally significant mediator that stands between the defendant and the relevant physical perpetrators who commit the actual crimes.<sup>54</sup> For Van den Wyngaert, apparently, the concept of the organization is a distraction that finds no support in the Statute; furthermore it necessarily involves situations where individual control over the street-level perpetrators is increasingly attenuated (through bureaucracy) rather than direct. This objection is debatable. Roxin’s theory in fact emphasized that bureaucratic control is, in its own way, ‘immediate’ because the organization carries out the orders of the leader as a matter of course.

If the ICC Appeals Chamber wishes to continue using *Organisationsherrschaft* within the context of indirect co-perpetration, it ought to come up with a deeper theoretical argument that explains why indirect perpetration through an organization is consistent with the language of Article 25 and its reference to persons. One argument might be that the organization is nothing more than a convenient legal shorthand for the control exercised by the defendant over the street-level perpetrators who performed the *actus reus* of the crime. Under this approach, *Organisationsherrschaft* would not be a separate mode of liability at all, and therefore its absence from the text of Article 25 would be irrelevant. Rather, it would be classified as one avenue towards reaching the Article 25 standard of indirect perpetration: under that view, the indirect perpetrator indeed commits the offence through

51 See Burghardt and Werle, *supra* note 50, at 863–4 (distinguishing between ‘indirect co-perpetration’ per se and cases of ‘joint indirect perpetration’); Weigend, *supra* note 10, at 1111 (junta model involves ‘one group of subordinates subject to control by a group of leaders working together’); Ohlin, *supra* note 43, at 779.

52 See Concurring Opinion Judge Van den Wyngaert, para. 52 (‘elevating the concept of “control over an organization” to a constitutive element of criminal responsibility under Article 25(3)(a) is misguided’).

53 *Ibid.*, para. 53.

54 *Ibid.* (‘there is a fundamental difference between the interaction among individuals, even within the context of an organisation, and the exercise of authority over an abstract entity such as an “organisation”. Moreover, by dehumanising the relationship between the indirect perpetrator and the physical perpetrator, the control over an organisation concept dilutes the level of personal influence that the indirect perpetrator must exercise over the person through whom he or she commits a crime’).

another person, namely the immediate actor. The organization provides the ‘through’ element; it connects the indirect perpetrator with the actor.

Another trend that might support the role of organizations within Article 25 is the growing importance of organizations in other areas of the substantive doctrine of international criminal justice. For example, the requirement of an ‘organizational plan or policy’ in crimes against humanity is now an accepted element along with the requirement of a widespread or systematic attack.<sup>55</sup> Although this element is controversial, and some would prefer to eliminate it, the recent cases at the ICC are built around it.<sup>56</sup> For example, the indictments against the Kenyan suspects relied on the existence of two organizations – the Mungiki and what the ICC dubbed the ‘Network’ – to fulfil both the organizational requirement for crimes against humanity and also the organizational requirement for an organized apparatus of power.<sup>57</sup> A coherent judicial theory of ‘organizations’ within international criminal law would have to holistically address all of these issues with one theory of macro-criminality.

### 3.3. *Dolus eventualis*

The final – and perhaps most important – objection to the ICC’s continued reliance on indirect co-perpetration involves the application of *dolus eventualis* to these cases. The term *dolus eventualis* is notorious for competing and often conflicting definitions; the term may very well obscure more than it illuminates. Scholars at the domestic and international levels have argued extensively over whether it includes a so-called ‘volitional’ component, i.e. an attitude by the defendant (either resignation, reconciliation, approval, or consent) regarding the future event. There is also a parallel debate about whether *dolus eventualis* is similar to – or greater than – its common-law cousin, recklessness. However, all definitions agree that *dolus eventualis* involves liability for foreseeing the mere *possibility* of future events.

One way of extending criminal liability to cases where the actor does not directly foresee the harmful result has been devised by the ICTY. Under the third variant of JCE (JCE III), a participant in a JCE is held responsible for any reasonably foreseeable act of any other participant done in furtherance of the joint enterprise. JCE III thus allows convictions – as a principal, no less – for crimes committed by co-venturers that fall outside the scope of the agreed-upon plan. The ICC has so far been reluctant to adopt JCE doctrine. By refusing to read JCE doctrine into Article 25(3)(d) of the ICC Statute, the ICC developed a reputation for analytical rigour with regard to criminal-law theory. Yet, at least part of the rationale for the ICC’s adoption of control-theory, though never explicitly stated as such,<sup>58</sup> may have been to reach

55 For different views on this requirement, see the symposium in (2010) 23 LJIL 825.

56 But see M. Cupido, ‘The Policy Underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate’, (2011) 22 *Criminal Law Forum*, 275 (suggesting that the facts as applied in various cases show a greater similarity between the ICTY and ICC standards for crimes against humanity with regard to the plan or policy requirement).

57 See *Muthaura et al.* Confirmation Decision, para. 229; *Ruto et al.* Confirmation Decision, para. 186.

58 The Trial Chamber in *Stakić* was more explicit about searching a new path away from JCE.

similar results as would have been possible under JCE without explicitly adopting that much-maligned doctrine.

Indirect co-perpetration, as *applied* by the ICC, may indeed not be that much different from JCE III and its *Pinkerton*-like vicarious liability.<sup>59</sup> A structural similarity appears as soon as liability for *dolus eventualis* is imposed. To be sure, there is conflicting precedent in this area, and some ICC Chambers have concluded that *dolus eventualis* is not applicable to most crimes prosecuted before the court.<sup>60</sup> But some Chambers have declared that *dolus eventualis* (or some version of it) is consistent with Article 30; and when combined with indirect co-perpetration, the two produce a result that is very similar to the controversial JCE III.<sup>61</sup> Specifically, indirect co-perpetration allows the defendant to be convicted for the crimes committed by the virtual apparatus of power deployed by one of the defendant's co-perpetrators. If *dolus eventualis* is added to the mix, a conviction is allowed even if the crimes committed by the organized apparatus of power were not part of the criminal endeavour agreed to by the horizontal co-perpetrators. The only limiting principle, according to the Pre-Trial Chamber in *Lubanga*, is that the defendant must have been aware of the possibility that such crimes might be committed and must have reconciled himself to that possibility or consented to it.<sup>62</sup> Indeed, the Pre-Trial Chamber recognized that 'if the *risk* of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements *may* result from his or her actions or omissions'.<sup>63</sup> The result is substantially similar to JCE III because both the defendant and his co-perpetrator are prosecuted as principals even though their attitudes to the crime are quite different. The defendant did not desire the crimes but nonetheless realized that they might occur; his co-perpetrator, however, might have indirectly perpetrated the crimes with full-blown intent. Whatever the merits of this theory, one should not pretend that it departs *significantly* from the underlying premise of JCE III.<sup>64</sup> Both involve liability for risk-taking behaviour.<sup>65</sup>

None of this is to suggest that *dolus eventualis* is not a legitimate mental state, used in many jurisdictions, to ground criminal culpability. It certainly is. Rather, the doctrinal question is whether it is consistent with the default *mens rea* standard expressed in Article 30 of the Statute, which states that the applicable mental state shall be intent and knowledge 'unless otherwise provided'. Intent and knowledge

59 *Pinkerton* liability allows vicarious liability for the acts of co-conspirators that fall outside the scope of the criminal plan. It was cited with approval in *Prosecutor v. Tadić*, Judgment, Appeals Chamber, IT-94-A, 15 July 1999, para. 224 n. 289 (hereinafter *Tadić* Appeals Judgement), citing *Pinkerton*, 328 U.S. 640 (1946).

60 See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the ICC Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, paras. 366–369 (rejecting application of *dolus eventualis* under the ICC Statute).

61 For example, see the analysis in *Lubanga* Confirmation Decision' paras. 352–353 (applying *dolus eventualis*).

62 *Ibid.*, para 352. There are, of course, different formulations of *dolus eventualis* in domestic legal systems; the notion of 'reconciling' oneself to the potential consequence is just one of them, though it is arguably the most influential. For a discussion of the different versions, see M. E. Badar, 'Dolus Eventualis and the Rome Statute without It?', (2009) 12 *New Crim. L. Rev.* (2009) 433.

63 *Lubanga* Confirmation Decision, para. 354 (emphasis added).

64 See, e.g., Ohlin, *supra* note 43, 771 et seq.

65 In *Tadić*, the ICTY Appeals Chamber explicitly referred to *dolus eventualis* as the basis for JCE III, where the defendant 'willingly took the risk'. See *Tadić* Appeals Judgement, para. 220.

require awareness that the consequence will occur ‘in the ordinary course of events’. Most of the authoritative commentators writing about the ICC Statute drafting process agree that *dolus eventualis* was not explicitly covered by the Article 30 standard. For example, Roger Clark famously wrote that ‘*dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus’ at Rome.<sup>66</sup> The key piece of evidence is the draft of the 1996 Preparatory Committee report, which included a subsection on *dolus eventualis* and recklessness that was subsequently *deleted* and never made it into the final version of the ICC Statute.<sup>67</sup>

To reiterate the point, none of this demands a form of global scepticism regarding *dolus eventualis*. Rather, the point is simply that its application to situations of indirect co-perpetration is powerful, and the ICC must tread carefully to determine whether it is consistent with the principle of individual culpability. A defendant charged with being an indirect co-perpetrator is held responsible for actions perpetrated by a vertical organization that he does not personally direct. In cases of *dolus eventualis*, the crimes are not desired by the defendant but merely foreseen as a potential risk. What is this hypothetical defendant’s level of culpability? Surely such individuals are guilty of some offence under some mode of liability, but that is not the question here – the issue is whether they are deserving of Roxin’s label of *Täter hinter dem Täter*, the mastermind who stands behind the criminal operation. Given that indirect co-perpetration is not explicitly listed in Article 25, the ICC ought to be certain that such a classification is warranted. As it stands now, none of the previous opinions of the court have yet accomplished this task.

#### 4. HIERARCHY OF BLAMEWORTHINESS?

##### 4.1. Normative approaches to criminal participation

According to the proponents of control-theory, Article 25(3)(a) is an expression of what can be called a normative approach to criminal participation: the principal is the one who is ‘most responsible’ in the sense that he or she has decisive influence on the commission of the crime, without necessarily physically committing it. This contrasts to what can be termed the naturalistic or empirical approach to liability, which takes as a starting point the natural world and the reality of cause and effect.<sup>68</sup> In ‘empirical terms’, the perpetrator is the one who performs the material elements of the offence and thus ‘perpetrates’ or ‘commits’ the crime. The accessory or accomplice is the one who contributes to causing the *actus reus*. Anglo-American

66 See R. Clark, ‘Elements of Crimes in Early Decisions of Pre-Trial Chambers of the International Criminal Court’, (2009) *New Zealand YIL*. Piragoff and Robinson conclude that while *dolus eventualis* can be defined in many ways, if it refers to ‘substantial or serious risk that a consequence will occur and indifference whether it does’ then it was ‘not incorporated explicitly into article 30’ and the only way to bring it into play is with the ‘unless otherwise provided’ prong of Article 30. D. K. Piragoff and D. Robinson, ‘Mental Element’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), at 849, 860 n. 67. Schabas’s analysis is similar. See W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), at 476 (concluding that *dolus eventualis* was rejected during Rome Statute negotiations).

67 Chairman’s Text, UN Doc. A/AC.249/1997/WG.2/CRP.4.

68 On normative and naturalistic approaches to criminal participation in international law, see J. Vogel, ‘How to Determine Individual Criminal Responsibility in Systematic Contexts: Twelve Models’ (2002) *Cahiers de défense sociale*, 151–69.

complicity law, based on a physical concept of 'commission', is the classic example of the empirical approach to criminal participation.

The empirical system can be referred to as a bottom-up system. If it is applied to a complex structure of criminal co-operation, say an army, one starts with the soldier who killed a civilian, and then moves on to his superior who gave the orders, and then further on to the government minister who devised the relevant policy. The normative approach, on the other hand, represents a top-down system. One starts with the person who has the main responsibility, for example the minister, and then works one's way down to the smaller fry in the lower echelons of the military unit. Thus, in the Anglo-American complicity scheme the government minister is an accessory, while on the basis of a normative system like the control-theory he is a principal.

The ICTY has adopted a normative approach with regard to JCE liability. The Appeals Chamber in *Tadić* referred to JCE, or common purpose as it was then termed, as 'a form of accomplice liability'.<sup>69</sup> But it also used the term 'perpetrator' and 'co-perpetrator' to refer to a 'participant' in a JCE.<sup>70</sup> Moreover, it brought JCE liability under the heading of 'committing' and distinguished it from aiding and abetting, which, it felt, understates the degree of criminal responsibility.<sup>71</sup> These findings sparked a debate amongst Trial Chambers in subsequent cases. There were judges who felt it important to adhere to the principal/committing–accomplice/participation distinction,<sup>72</sup> and there were others who thought that the principal–accomplice classification is immaterial because it is at sentencing level that variance in roles is expressed.

Without going into details of the debate,<sup>73</sup> it suffices to conclude that with JCE a categorization of offenders along normative lines was introduced to ICTY case law. In the *Odžanić* Decision, the majority of the Appeals Chamber – over a strong dissent by Judge Hunt – affirmed that 'joint criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of commission'.<sup>74</sup> With the latter position, aiding and abetting developed into a mode of liability that is considered less blameworthy than participation in a JCE. This was confirmed in *Šljivančanin*, where the Appeals Chamber held that 'aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence'.<sup>75</sup> Research into international sentencing confirms that aiding and

69 *Tadić* Appeals Judgement, para. 220.

70 *Ibid.*, para. 192.

71 *Ibid.*

72 The *Krstić* and *Kvočka* Trial Chambers, on the other hand, readily accepted the distinction between co-perpetrators and aiders and abettors. *Prosecutor v. Krstić*, Judgement, Trial Chamber I, IT-98-33-T, 2 August 2001, paras. 643–645; *Prosecutor v. Kvočka*, Judgement, Trial Chamber I, IT-98-30/1-T, 2 November 2001, paras. 278 and 284.

73 See further H. Olasolo, *Criminal Responsibility of Senior Political and Military Superiors as Principals to International Crimes* (2009), 23–7; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes* (2008), 198–212; E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5 JICJ 184.

74 *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction – Joint Criminal Enterprise, Pre-Trial Chamber, IT-05-87-PT, 22 March 2006, para. 20.

75 *Prosecutor v. Šljivančanin*, Judgement, Appeals Chamber, IT-95-13/1-A, 5 May 2009, para. 407.

abetting has been treated, by the ad hoc tribunals, as less blameworthy than other modes of liability.<sup>76</sup> By now it is safe to assume that a mitigation principle applies at the ICTY with regard to aiding/abetting versus JCE liability, which shows the influence of a normative approach to criminal participation.<sup>77</sup>

The same hierarchy of blameworthiness with regard to aiding/abetting vis-à-vis JCE can be found in SCSL law. The conviction of Charles Taylor is interesting in that respect. Taylor was convicted for aiding and abetting war crimes and crimes against humanity and sentenced to 50 years in prison.<sup>78</sup> Had he been convicted for JCE, the sentence would have been higher.<sup>79</sup> Still, 50 years is a serious sentence in the overall SCSL sentencing practice. While aiding and abetting is considered a lesser form of liability, it does not *automatically* imply a lenient sentence; leniency is a relative concept.<sup>80</sup>

Preference for the normative model is even stronger at the ICC. The majority of the Court strictly adheres to the distinction – introduced by the control-theory – between principals and accessories and distinguishes between principal liability (‘committing’) in subparagraph 3(a) and accessorial liability (‘contributing to’) in subparagraphs (3)(b–d) using a normative approach.<sup>81</sup> Charging defendants as intellectual or remote principals under 25(3)(a) means that they played a central role, that they had ‘control of the crime’.<sup>82</sup> This is contrasted to liability under subparagraphs 25(3)(b–d) where control plays no role and accessories are regarded as less responsible and less blameworthy.

But also at the ICC the normative approach of the control-theory has been subject to dispute. Judge Tarfusser, in his dissent to the Appeals Decision in the Regulation 55 case in *Katanga*, referred to the Court’s case law on Article 25(3) as ‘far from ... uncontentious or settled’;<sup>83</sup> and Judges Fulford and Van den Wyngaert in their concurring opinions manifestly disagreed with the normative hierarchy that the control-theory (allegedly) creates in Article 25(3) of the ICC Statute.

From the viewpoint of comparative law, it is interesting to note that the majority opinions in *Lubanga* (PTC and TC), on the one hand, and the concurring opinions of Judges Fulford and Van den Wyngaert, on the other hand, reflect a clash of legal cultures that, interestingly, cuts across the civil-common-law divide. The majority

76 As empirical research has shown. B. Hola et al., ‘International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR’ (2011) 9 JICJ411, at 417.

77 See also Olasolo, *supra* note 73, at 27.

78 *Prosecutor v. Charles Taylor*, Judgment, Trial Chamber, SCSL-03-1-T, 26 April 2012, para. 6959.

79 Consider the statement of Judge Lussick, a member of the Taylor bench, who held that the 80-year imprisonment requested by the prosecutor would have been excessive as Taylor was convicted of aiding and abetting, which ‘as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation’.

80 Rather, it affects, along with other factors, the sentence of the convicted person. Charles Taylor’s capacity as a former head of state was an aggravating factor that seems to have ‘compensated’ the mitigation that aiding/abetting implies.

81 *Lubanga* Confirmation Decision, paras. 330–335; *Katanga and Ngudjolo* Decision, paras. 506–508.

82 *Katanga and Ngudjolo* Confirmation Decision, para. 518.

83 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’, Appeals Chamber, ICC-01/04-01/07 OA 13, 27 March 2013, para. 15.

views stand for a ‘dogmatic’ concept of perpetratorship and accessorial liability, which expects the substantive law to reflect (or describe) subtle differences in the measure of responsibility and seeks to establish criteria that permit distinctions between forms of liability (and, consequently, degrees of blameworthiness). This approach is typical for the German/Hispanic tradition. The minority approach, by contrast, looks at the substantive criminal law more from the perspective of the legality principle: it is enough that the definitions of the general and special parts capture as comprehensively as possible all potential forms of reprehensible conduct. Differentiating between degrees of responsibility is not the purpose of offense descriptions or of rules of the general part, but is left for judicial sentencing. This reflects the French and the Anglo-American traditions.

Leaving these comparative-law considerations aside, in what follows we try to shed some light on the reasons and implications of the dispute between the majority opinions and the Fulford and Van den Wyngaert opinions.

#### 4.2. Accessorial and derivative liability

Problematic in the control-theory is the use of the term ‘accessorial’ and the normative meaning attached to it. Consider the *Katanga and Ngudjolo* Confirmation Decision with regard to indirect co-perpetration viz-a-vis ordering:

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 organization, essentially decides whether and how the crime would be committed.<sup>84</sup>

‘Accessorial liability’ is equated to ‘lesser liability’. This is confusing to the extent that it does not comport with the empirical model of criminal participation where ‘accessorial’, as non-principal/accomplice liability, has no normative connotation.<sup>85</sup> It merely indicates that liability is ‘derivative’, i.e. that liability depends on the principal crime. Indeed, the modes of liability in Article 25(3)(b–d), by requiring the crime to be at least attempted, and by criminalizing a contribution to a crime, constitute forms of derivative liability. They differ from principal liability in subparagraph 25(3)(a), where ‘commission’ of a crime is defined. Clearly Judge Van den Wyngaert reasoned from an empirical approach to criminal participation when she argued that the principal–accessory distinction in Article 25(3) of the ICC Statute is merely ‘conceptual’ and that it should not translate to a ‘different legal treatment’.<sup>86</sup> We agree with that position to the extent that the terminology in Article 25(3)

84 Ibid., para. 518, emphasis added.

85 Originally, in felony law there was a normative distinction between principals in the first degree (the perpetrator/principal), principals in the second degree (secondary principal), and accessories before the fact. The difference between secondary principals and an accessory before the fact, both of whom are accomplices, was that the secondary principal was *at* the scene of the crime while the accessory was not. The secondary principal was generally more closely involved in committing the crime than the accessory, while the crime was physically committed by the principal in the first degree. J. Dressler, ‘Reassessing the Theoretical Underpinning of Accomplice Liability: New Solutions to an Old Problem’, (1985) 37 *Hastings LJ* 191, at 194–5. See Van Sliedregt, *supra* note 10, 112–16.

86 Para. 22.

(b–d) cannot in itself be taken as a normative indication of lesser blameworthiness. Support for this position can be taken from comparative criminal law; there is no rule or theory that categorically links accessorial/non-principal liability to lesser responsibility.<sup>87</sup>

Having said that, aiding and abetting in subparagraph (3)(c) can be regarded as less blameworthy vis-à-vis joint perpetration in subparagraph (3)(a). Where accomplices such as aiders and abettors are further removed from the centre of the commission of the offence, their responsibility is reduced in comparison to perpetrators, and consequently their punishment should be reduced as well. This interpretation of aiding and abetting comports with the previously mentioned normative approach to aiding and abetting in international jurisprudence.

In our view, the hierarchical distinction among four types of perpetrators and accomplices, as proposed by the *Lubanga* Pre-Trial and Trial Chamber and the Pre-Trial Chamber in *Katanga and Ngudjolo*, does not adequately reflect the normative relationship between these types of participant. Ordering, soliciting and inducing others to commit crimes in subparagraph 3(b) is not necessarily less blameworthy than indirectly perpetrating a crime as penalized in subparagraph (3)(a). Even Kai Ambos, a staunch supporter of the control-theory and its (alleged) hierarchical structure,<sup>88</sup> admits that the hierarchy in Article 25(3) is ‘less evident with regard to subparagraph (b) – especially with regard to ‘ordering’ which belongs structurally and systematically to subparagraph (a)’.<sup>89</sup>

Moreover, it is highly questionable whether Article 25(3) is based on a single coherent, normative theory of participation. Nothing in the drafting history of the ICC suggests that Article 25(3) was to constitute a self-contained system of criminal participation with a coherent doctrinal grounding. To the contrary, as the chairman of the Working Group on General Principles recalls, drafting Article 25(3) posed great difficulties to negotiate; eventually, a near-consensus was reached where there would be one provision to cover the responsibility of principals and all other modes of participation. Article 25(3) was to provide the Court with a range of modalities from which to choose.<sup>90</sup>

Bearing in mind this ‘aggregate’ background of Article 25(3) of the ICC Statute, it seems that Article 25(3) reflects elements of the normative and empirical approaches to criminal participation without clearly distinguishing between the two. The fact that Article 25(3)(a) provides for instances of intellectual perpetration does not make it the sole theoretical grounding for the whole of Article 25. Nor does it relegate all participants covered by subparagraphs (b–d) to lesser liability. The ICC, in forging

87 Even in those systems that provide for a distinction between principals and accessories where labelling comes with a sentence reduction, ‘principal liability’ may still be derivative/accessorial. For instance, co-perpetrators in Dutch law have the status of accessories. Their liability rests on that of the physical perpetrator; they are only liable when the crime is committed or attempted. They are punished as if they were principals (Art. 47(1) Dutch Penal Code: ‘Als daders van een strafbaar feit worden gestraft: 1zij die het feit plegen, doen plegen of medeplegen’).

88 K. Ambos, *Treatise on International Criminal Law*, Vol. 1 *Foundations and General Part* (2013), 146–7.

89 *Ibid.* at 152–3.

90 As discussed in P. Saland, ‘International Criminal Law Principles’ in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999), at 198.

its path to identifying the responsibility of principals versus accessories, has been too rigorous in drawing lines according to the vague legislative concepts embodied in Article 25(3) of the ICC Statute.

## 5. CONCLUDING OBSERVATIONS

The fact that international courts adhere to a principal–accomplice classification is noteworthy, particularly since this labelling in international law does not result in a mandatory mitigation or increase of sentences.<sup>91</sup> The reason why the distinction is cultivated may well be a desire to extend the status of principal in international criminal law.<sup>92</sup> Despite the noted lack of practical value, stigmatization through attributing the status of principal is important because of the expressive value and the denunciatory and educational function of conferring this status in international criminal law.<sup>93</sup> Making clear who masterminded crimes by referring to him/her as the ‘principal’ who ‘commits’ crimes is important in communicating to victims and the international community as a whole who was the ‘real’ culprit.<sup>94</sup> Bearing this purpose in mind, there is value in adopting a normative approach to conferring the status of ‘principal’ (rather than accomplice) to persons who are the main concern of international criminal law: the remote or intellectual perpetrators who use others to commit crimes.

Yet the control-theory as developed by the ICC Pre-Trial Chambers and Trial Chamber in the *Lubanga* and *Katanga and Ngudjolo* cases suffers from ambiguities and wrongful assumptions. So far, the control-theory does not provide the limitation of liability that some expected it to bring.<sup>95</sup> In current ICC jurisprudence, co-perpetration and indirect co-perpetration are broad liability theories, suffering

91 According to Arts. 77 and 78 of the ICC Statute the Court can impose any sentence (up to lifelong imprisonment) taking into account the gravity of the crime and the individual circumstances of the convicted person; no distinction is made between forms of responsibility. This does not mean that in sentencing role-variance does not play a role. Rule 145(1)(c) of the Rules of Procedure and Evidence of the ICC stipulates that judges in their determination of sentence give consideration to the ‘degree of participation of the convicted person’. This accords with practice at the ICTY where the Appeals Chamber held that ‘the gravity of the offence, as stipulated in Art. 24(2), requires judges to consider the crime for which the accused has been convicted, the underlying criminal conduct in general, and the role of the offender in the commission of the crime (ergo the degree of participation)’. Still, it is at the level of sentencing, not at conviction level, that the degree of responsibility is expressed.

92 Consider in this respect F. Z. Giustanini’s paper on the ICTR’s Appeals Chamber’s ruling in *Seromba* where a broad concept of ‘commission’ was adopted and where instigation would have been more appropriate. According to F. Z. Giustanini this was to impose a severe and exemplary punishment on Seromba. F. Z. Giustanini, ‘Stretching the Boundaries of Commission Liability: The ICTR Appeals Judgment in *Seromba*’, (2008) 6 JICJ 783, at 798. See also G. Townsend, ‘Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda’, (2005) 5 ICLR 147, at 156.

93 See M. A. Drumbl, *Atrocity, Punishment and International Law* (2007), 174. In sentencing practice, this translates to attaching much weight to the sentencing purposes of retribution and deterrence. E.g. *Prosecutor v. Delalić et al.*, Judgement, Appeals Chamber, IT-96-21-A, 20 February 2001, para. 806; *Prosecutor v. Serushago*, Sentence, Trial Chamber, ICTR 98-39-S, 5 February 1999, para 20; *Prosecutor v. Tadić*, Judgement in Sentencing Appeals, Appeals Chamber, IT-94-1-A and IT-94-1-Abis, 26 January 2000, para. 48. See R. Henham, ‘Some Issues for Sentencing in the International Criminal Court’, (2003) 52 ICLQ 81. Note also Section 5 of the preamble of the ICC Statute, which comprises the aim to contribute to the prevention of international crimes.

94 See C. Kress, ‘Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht’, (2006) 153 *Goldammer’s Archiv für Strafrecht* 304, at 308; Weigend, *supra* note 10, at 102–3.

95 See for instance Ambos, *supra* note 88, at 146.

from unclear underlying tenets and a one-dimensional use of the concept of 'control'. Moreover, the alleged normative hierarchy of blameworthiness rests on a confusing interpretation of 'accessorial' and takes the normative interpretation of Article 25(3) of the ICC Statute too far. The authors hope the ICC Appeals Chamber takes this unique opportunity to reconsider or improve the control-theory as developed by the Pre-Trial Chambers in the *Lubanga* and *Katanga and Ngudjolo* cases.