CONTROL OVER THE CRIME THEORY IN THE ROME STATUTE—CRITICAL ANALYSIS

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Abstract

The paper critically analyzes the Control Over the Crime theory under the Rome Statute, focusing on its application in holding high-ranking officials accountable for mass atrocities. Highlighting the Lubanga case, it examines the strengths, limitations, and critiques of this theory, including concerns about its status as customary international law and its reliance on the essential contribution standard. The article also explores modes like co-perpetration, indirect perpetration, and indirect co-perpetration to address hierarchical and organizational control. It argues for improvements to strengthen the theory, such as codifying "planning" as principal liability and adopting a cluster of factors approach. Ultimately, the study advocates refining this framework to enhance the International Criminal Court's ability to prosecute leaders orchestrating crimes remotely.

Keywords: Crime, Theory, Rome Statute, Critical Analysis, Customary International Law, Perpetration, Planning, International Criminal Law.

Introduction

The pursuit of individual criminal responsibility stands as a cornerstone in the quest for justice and accountability within the complex framework of International Criminal Law (ICL). Two prevalent theories of principal culpability that become focal points in assigning criminal responsibility as we explore this terrain are Joint Criminal Enterprise (JCE) and Control over the Crime. The primary goal of this Article is to improve our comprehension of personal responsibility by critically analysing these theories, especially as they relate to denying immunity to high-ranking officials who have committed mass crimes.

This article focuses on the theory of control over crime, which was most prominently demonstrated in the International Criminal Court's (ICC) *Lubanga case*. This theory has strengths and drawbacks that become

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apparent as we analyse it. The critiques are examined, including issues with its standing as a general law principle or customary international law, the hierarchy of responsibility, the combination of two modes of perpetration into indirect co-perpetration, and the standards of essential contribution. Subsequently, the merits of the control over the crime theory are explored in detail. It also makes suggestions for improving the control theory, which could make future ICC prosecutions more effective.

Fundamentally, this article stems from an urgent worry: preventing high-ranking officials from immunity when they use their subordinates to commit mass crimes. In unravelling the complexities of Control over the Crime theory, this article aspires not only to contribute to the academic discourse on ICL but also to offer practical insights that may inform the evolution of control theory as an effective mode of principal liability for high-level leaders orchestrating mass atrocities remote from the crime scene, ultimately advancing the pursuit of justice on the international stage.

Jurisdiction of International Criminal Court

The instrument governing the ICC is the Rome Statute. ICC was established after the conclusion of a treaty on 11 July 2002.[1] It has jurisdiction over the gravest of crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression. Furthermore, it has jurisdiction over only those individuals who are nationals of a state party to the Rome statute. The court can prosecute only those crimes that occurred after 1 July 2002, which means that the Rome Statute does not have a retrospective effect. The ICC can only exercise its jurisdiction over a non-state party after its assent.

Moreover, if the defendant is a national of a non-state party, the ICC can still exercise jurisdiction over him if the crime is committed within the territory of a state party or a non-state party which has assented to the jurisdiction of the Court. The ICC aims to prosecute those individuals who are most responsible for the commission of the gravest crimes, such as state leaders. Such leaders should be imputed as perpetrators and not accessories just because they are remote from the crime scenes. In the *Lubanga case*, the Pre-Trial Chamber held that the conviction under Article 25(3)(a) of the Rome Statute is based on the control theory.[2]

Birth of the Control Theory (*Lubanga Case*)

Thomas Lubanga was one of the founding members and leader of an armed group known as the Union of Congolese Patriots (UPC), made for the purpose of establishing military and political control over Ituri in the Democratic Republic of Congo (DRC) after agreeing upon a common plan.[3] To fulfil this purpose, boys and girls under the age of 15 were recruited to take part in the hostilities. It was found that Lubanga controlled and coordinated the activities of the group.[4] The Trial Chamber found Lubanga guilty as a co-perpetrator under Article 25(3)(a) for a war crime of enlisting boys and girls under the age of 15 to participate in hostilities based on control over the crime theory. Control theory is derived from the writings of Claus Roxin—a German Criminal law scholar. The crux of this theory is that a defendant who has control over the crime can be held responsible as a perpetrator.[5]

There are three types of perpetrations covered in article 23(3)(a): direct perpetration, co-perpetration and indirect perpetration (commission of a crime through another). The elements of each type of perpetration are provided in detail below.

Co-perpetration

This type of perpetration is also known as horizontal liability. In co-perpetration, a crime is realised due to coordinated contributions by more than one perpetrator.

The *actus reus* requirements are as follows:

- An agreement or a common plan[6]
- An essential contribution made by the accused over the commission of the crime.[7]

The common plan can be implicit and must include an element of criminality.[8] The requirement of essential contribution is imported from Claus Roxin's theory of co-perpetration.[9] It is a contribution which could frustrate the commission of a crime.[10] In other words, the contribution must be so essential that the crime cannot be realised if the defendant fails to do his part. This contribution can be made at any stage.[11] The essential tasks are divided among the co-perpetrators for the commission of the crime. An

essential contribution can be determined by considering the objectives of the group of co-perpetrators, events that lead to the commission of the crime, and the structure of the group.[12] In order to satisfy the standard of essential contribution, a defendant does not need to have complete control over his subordinates[13] or be involved in every detail of the decision.[14] A credible testimony by a witness that a leader, whether political or military, has provided necessary finances or logistical support for the commission of the crimes may be a sufficient essential contribution.[15]

The *mens rea* requirements are as follows:

- The accused must possess a requisite mental state for the commission of the crime, which means intent and knowledge requirements provided in Article 30(1) of the Rome Statute.[16]
- The accused's awareness and acceptance that execution of a common plan may result in the realisation of the objective elements of the crime[17]
- The accused's awareness of factual circumstances that he has joint control over the crime and his failure to perform his part would result in frustration with the crime.[18]

Indirect Perpetration

It is also known as the perpetrator behind the perpetrator.[19] In this form of perpetration, an individual uses another person as a means to commit a crime. In other words, the individual who directly commits the crime is being used as a tool or instrument by an indirect perpetrator who is actually the crime's mastermind. The mastermind or the person in the background is also referred as 'Hinterman'.[20] In common law, Hinterman is regarded as principal. It is not necessary that the direct perpetrator has to be mentally or physically defective and there can be a fully responsible direct perpetrator. This happens when Hinterman controls the direct perpetrators by means of a hierarchical organisational structure. It is identical to Claus Roxin's theory of *Organisationsherrschaft,* an organisational version of indirect perpetration.

Many domestic tribunals have recognised this doctrine. This doctrine was adapted by the German Supreme Court to impute generals of the National

People's Army for the killings that the guards at the border directly committed.[21] The ICC addressed this notion for the first time in the *Lubanga case*. The Pre-trial Chamber held that the commission of a crime through another person is the most typical demonstration of the control over the crime theory.[22] However, the PTC in the *Lubanga case* did not apply this concept. It was in the case of *Katanga and Chui* that the PTC deliberated on the crimes where the perpetrator committed the crimes through another by virtue of 'control over an organisation'.[23]

The actus reus requirements are as follows:

- Perpetrator's control over the organisation[24]

The PTC in the Katanga case affirmed that the commission of crime through another also includes cases in which the principal has control over an organisation.[25] This concept is employed to hold leaders of the organisations responsible as principals based on the idea that a person's responsibility increases with his rank in an organisational structure.[26] The superior has the authority to hire, discipline, train, and provide resources to his subordinates. This authority should be used to ensure compliance with orders of commission of crimes that are within the court's jurisdiction.[27]

- The existence of an organised and hierarchical apparatus of power[28]

The organization must have a proper hierarchical structure, including superiors and a sufficient number of subordinates. The subordinates must be fungible so that they can be easily replaced if they fail to execute the superior's order. If a centralised and effective chain of command does not exist, the group cannot be called an organised apparatus of power.[29]

- Execution of crimes through automatic compliance with orders.[30]

The automatic compliance can be established if the subordinates are trained through strict and violent training regimes, for example, abducting minors and teaching them to kill, rape, pillage,[31] or employing punishment and payment methods.

The *mens rea* requirements include:[32]

- The requisite mental state of the accused for the crime
- The accused's awareness of the character of their organisation

- The accused's awareness of their authority within the organisation
- The accused's awareness of the factual circumstances enabling near-automatic compliance with orders.

In conclusion, this mode of perpetration is more relevant and practical in cases where a hierarchical structure exists between superiors and their subordinates, and the former exercises control over a sufficient number of subordinates.

Indirect Co-perpetration

As the name suggests, indirect co-perpetration is not a new mode of principal liability but an amalgamation of two already existing forms of perpetration, i.e., indirect and co-perpetration. This mode of perpetration was introduced in the case of *Prosecutor vs Germain Katanga and Matheiu Ngudjolo Chui*.[33] The Pre-Trial Chamber held that a co-perpetrator can be held mutually responsible for the crimes committed by the inferiors of his co-perpetrator.[34]

The *actus reus* could be proved by establishing indirect perpetration and co-perpetration elements. In addition to the *mens rea* requirements of co-perpetration, indirect co-perpetration also includes another additional subjective element: the accused must be aware of the factual circumstances that enable him to commit a crime by exercising control over another person. These circumstances include the nature of an organization, his position within the organisation, and factual circumstances that ensure automatic compliance with the orders.[35]

Thomas Weigend provides a simple illustration of this notion. Two individuals, A and B, agree on a common plan to commit a crime of arson over a house. Both individuals take their sons, C and D, along to help them commit the crime. C and D are ordered to make a fire. In this case, in addition to being co-perpetrators, A and B are also indirect perpetrators of the crime of arson.

In the case of *Katanga and Chui*, the PTC first provided the elements of indirect perpetration. The subordinates of both defendants were of distinct ethnicities, so it was unlikely that they would follow the orders of a leader who was not of their ethnicity.[36] The chamber was critical of holding them

responsible under co-perpetration. As these crimes could not have been committed without the joint participation of both groups, the PTC introduced indirect co-perpetration to attribute the separate liabilities of Katanga and Chui mutually.

Problems with the Control Theory

Overthrowing JCE and the adoption of 'control theory' by international criminal law has raised a lot of criticism from legal scholars as well as judges.[37] The first part will discuss the validity of the source of control theory, part two will address whether there exists a hierarchy of blameworthiness, part three will discuss whether two modes of perpetration be combined, and finally, part four will assess the appropriate standard of contribution required to hold defendants liable as principals.

Source of Control Theory?

International criminal law in recent times has shown a great willingness to consider the domestic law of Germany.[38] Even the ICC has resorted to German domestic law to import a doctrine of Control theory to interpret article 25(3) of the Rome Statute, which does not comply with the universalist mission of the ICC.[39] Article 22 of the Rome Statute warrants the strict interpretation of the statute and prohibits extension by analogy. The ICC can import only such doctrines that qualify as general principles of national laws. There must exist evidence that such a principle is adopted by a majority of the states, including the principal legal systems of the world.[40] Whereas there is no evidence available that suggests that control theory has achieved the status of the general principle of international law, neither did ICC shed any light on the status of control theory to justify its reading in article 25(3). Moreover, the concept of indirect perpetration adopted by ICC in the case of *Prosecutor V Katanga and Ngudjolo Chui* is similar to Claus Roxin's theory of *Organisationscherrscheft.*

Hierarchy of Blameworthiness?

Article 25(3)(a) is based on a normative approach to criminal liability. This means that the most responsible person is labelled as principal because of his decisive control over the commission of a crime without being a physical perpetrator. Contrast to this is the empirical approach, which emphasises the culpability of the physical perpetrator of the crime.[41] ICTY has drawn upon a

normative approach while adopting the doctrine of JCE. The Appeals Chamber in *the Tadic case* regarded JCE as a form of 'commission' to differentiate it from aiding and abetting, which was considered to be a lesser degree of criminal responsibility.[42] The ad hoc tribunals treated aided and abetting less blameworthy compared to other forms of criminal liability.[43] Similarly, the ICC has also resorted to a normative approach to distinguish between principals and accessories based on control theory. Subparagraph 3(a) comes under the ambit of commission and is regarded as a principal liability, whereas subparagraph 3(b-d) comes under the ambit of contribution and is regarded as an accessorial liability.[44] The conviction of the accused under article 25(3)(a) as a principal denotes that he was an intellectual mastermind by virtue of his control over the crime.[45] The ICC asserted that there exists a hierarchy of blameworthiness under article 25(3) which means that liability under subparagraph 3(a) is most blameworthy and least blameworthy under subparagraph 3(d).[46]

The plain reading of Article 25(3) does not provide for a hierarchy of crimes. In a dissenting opinion, Judge Fulford asserted that there is no reasonable basis for concluding that the crimes of ordering, soliciting, or inducing a crime under Article 25(3)(b) are any less severe compared to the crime of commission through another under Article 25(3)(a).[47] Moreover, Judge Van den Wyngaert is very critical of the hierarchy of crimes under Article 25(3) based on the control theory.[48] Some scholars believe that Article 25(3) just provides different modes of participation to choose from based on facts at hand.[49]

Combining Two Modes of Perpetration?

The ICC has often relied upon indirect co-perpetration to indict the defendants under this mode of liability, including *the Al-Bashir* and *Kenya* cases. It is a combination of two modes of liability that has the potential of convicting the defendants who are remote from the physical perpetrator of the crime along two axes (horizontal and vertical).[50] Since the purpose of ICC is to hold the most responsible leaders for the commission of mass atrocities and who are remote from the crime scene as principal culprits, this theory has the potential to fill that gap both on horizontal and vertical axes. Most of the organised atrocities in the world are committed with the collaboration of high-level government officials or rebels. These officials have their vertical bureaucracies at their disposal for such acts as they do not

commit such crimes directly. Indirect co-perpetration is something more than a combination of two modes of perpetration. It is not sufficient that the subjective and objective elements of both the modes of perpetration are satisfied. The PTC lays down an additional condition in the Katanga and Ngudjolo cases, i.e., the crimes could not have been committed if *not for the cooperation of both* forces.[51] Katanga and Ngudjolo belonged to distinct ethnic groups, and it was unlikely that subordinates of another ethnicity would listen to the orders of a leader from another ethnicity.[52] Both of them did not have control over the subordinates of their co-perpetrator. But they had a common intention, and they had built a team of two, so they exercised collective power over both of their troops. This may justify the responsibility of acts of Katanga's troops to Ngudjolo and vice versa.[53]

Judge Van de Wyngaert criticised this new mode of perpetration and asserted that the text of Article 25 of the Rome Statute did not warrant such ad-hockery[54] and argued that Article 25(3)(a) in no way provides for the possibility of combining any two modes of perpetration.[55] In order to be an adequate doctrine of perpetration, indirect co-perpetration needs to differentiate between the instances where defendants control different organisations and use them toward a common cause and defendants who jointly control a single organisation.[56] The former is a joint perpetration through multiple organisations, and the latter is indirect co-perpetration through a single organisation.[57] This distinction has not been determined by the ICC to a satisfactory degree so far.

Contribution to the Crime?

The text of Article 25(3)(a) does not provide for the elements that constitute co-perpetration. What can be drawn from the phrase 'jointly with another' is that a plan or common intention is required, which may be either expressed or implied.[58] In the *Lubanga case*, PTC held that the defendant's contribution to the common plan needs to be essential.[59]

This standard of essential contribution is denounced as being too narrow and too extended[60] by the Judges and scholars. Judge Fulford discards the essential contribution for being too narrow and suggests a new standard for the existence of a causal link between the crime and the defendant's contribution.[61] He argues that this would help the court abstain from a hypothetical investigation of whether the crime would still be committed if

the defendant had not done his part. The closer inspection of this test makes it much like Lubanga's essential contribution, as causation necessarily suggests that a consequence would not have transpired without the existence of a factor in question.[62] Judge Fulford does not explain this test of causal link, which remains vague.

On the other hand, Judge Van den Wyngaert proposes a direct contribution test, [63] which she suggests would help judges avoid a speculative investigation as to whether the crime would still be committed if the defendant had not made his contribution.[64] She restrains the liability to those individuals who are directly involved in the commission of the crime.[65] She even qualifies the planners and contributors of the act in question as direct perpetrators because planning is an inherent part of executing the crime.[66] If direct contribution includes planning an act, then what exactly is the distinction between direct and indirect contribution? Moreover, she argues that only those defendants would be perpetrators who directly bring about the material elements of the crime, and the same is the case with joint perpetrators. However, the idea of joint perpetration is based on the division of essential tasks among the co-perpetrators, which means that each participant could not bring about the realization of the crime. They just have to do their respective tasks, which makes them joint perpetrators. If each co-perpetrator had to fulfil all the elements of the crime, then they would have been held responsible as direct perpetrators, which renders the notion of joint perpetration redundant.[67] The distinction between perpetrator and accessory based on essential contribution is regarded as one-dimensional and insufficient, and it is suggested that a cluster of factors needs to be considered rather than relying on a single factor. [68] These other factors include the defendant's participation in planning, his interest in the success of the joint enterprise, the significance of his contribution to making the criminal plan successful, and the closeness of his contribution to the commission of material elements of the crime.[69]

Merits of the Control Theory

The greatest obstacle for the ICC in convicting high-level leaders is that the Rome Statute does not expressly provide any mode for their culpability. According to Judge Van den Wyngaert, Article 25(3) only provides for the basic and traditional forms of liability, and stretching it to reach the masterminds of international crimes is a path filled with legal and conceptual

problems.[70] He argues that reading control theory into Article 25 (3) contradicts the notion of strict interpretation of the statute.[71]

The *raison d'être* of the ICC is to fight the immunity of the defendants responsible for committing the most serious crimes to mankind.[72] Even the preamble of the Rome statute provides that the most severe crimes of concern must not be left unpunished, and the prosecution of the defendants is ensured through international cooperation. This means that the ICC should make efforts to ensure that perpetrators of mass atrocities do not go unpunished just because the statute has not explicitly phrased a mode of liability that holds high-level leaders liable. The diplomats included in the statute drafting process did not possess practical experience in international criminal law.[73] In another instance, it is noted that during the process of drafting, the assistance was provided by the UN Office of Legal Affairs,[74] which highlights the level of expertise employed in the process. Despite this, ICC should not be prevented from holding responsible high-level leaders just because the statute does expressly provide such a mode of liability. Moreover, commission through another via Article 25(3) is a form of liability that involves a mastermind in the background, one who controls the will of the direct perpetrator.

Adaptability of the Control Theory

One of the significant things about the theory of participation is its adaptability to different complex situations to hold different high-level leaders accountable. The grave violations of international humanitarian laws are quite different and complex in nature.[75] On the contrary, Judge Van den Wyngaert asserts that most of the time, the acts of the high-level leaders will not fit in the ambit of principal liability.[76] Her excellency is of the opinion that in such cases, high-level leaders are liable as accessories rather than perpetrators. This does not necessarily mean that the mode of principal liability for high-level leaders is inflexible. For instance, in the case of genocide, high-level leaders make an enormous contribution but are far from the crime scene. Indirect co-perpetration has the potential to deal with such situations as high-level leaders can be convicted without exercising direct control or sharing the intent.

Another critical factor that a theory of participation must possess is that it must be able to hold responsible defendants irrespective of the fact that such

defendants exercise sufficient power over subordinates in a highly organised or highly disorganised apparatus of power. Some scholars comment that the purpose for the adoption of the control theory was to hold liable leaders of Nazi Germany with a highly structured hierarchy apparatus.[77] Other scholars assert that the control theory only works to the extent of structured organisations.[78] Manacorada and Meloni argue that indirect co-perpetration is unsuitable for convicting defendants with control over an unstructured hierarchical apparatus.[79] Some scholars have also questioned the control theory's application over informal military groups of FRPI and FNI in *Prosecutor vs Katanga and Ngudjolo*.[80]

Although indirect co-perpetration was not successful in convicting the Germain Katanga, the control theory has been the most coherent way to attribute responsibility to higher-level leaders. The control theory can hold the indirect perpetrators responsible for contributing to the crimes from afar.[81] Jens Ohlin introduced a theory of 'shared intentions' compared to the control theory,[82] but it does not distinguish between principals and accessories. He argues that the control theory does not take seriously the mental state of the defendants.[83] Neha Jain argues that Ohlin misunderstood the nature of the control theory, and his theory of joint intentions is very similar to the control theory but is less sophisticated.[84]

Future of the Control Theory in ICC

The following section will look into the improvements that can be made to the control theory at the ICC. While acknowledging difficulties in bringing high-ranking officials to justice for mass atrocities, especially considering the control theory, the study aims to bring to light the improvements that can be made to the control theory. It draws attention to problems like difficulties interpreting Article 25(3)(a) and doubts regarding the theory's acceptance as a general principle. The research would focus on prospective changes to the Rome Statute, such as offering novel methods like a "cluster of factors" analysis and investigating the possibility of indirect co-perpetration, as well as characterising planning as a mode of principal liability and resolving ambiguities in the ICC's court case law. The main objective is to help improve legal systems so the ICC can continue effectively conducting its mandate of ending high-ranking officials' impunity. To prepare a framework for a more stable and adaptable control theory in line with the goals of the

Rome Statute and the principles of international law. Defining and Codifying "Planning" as a Mode of Principal Liability

The word 'Planning' needs to be added to the Rome Statute to improve the scope of control theory by making planning a mode of principal liability. The amendment of the Rome Statute can achieve this, but to bring any change in the statute, it requires the consent of all the state parties. The process of bringing any change to the Rome Statute is very difficult, as getting the Rome Statute in the first instance was not easy. Even though all desired it, it proved exceedingly difficult to make the statute a reality.[85] This is why, instead of opting to rewrite the statute, the improvement can made more effectively by using the existing rules already present in the framework of ICC. Moreover, Planning is one of the most suitable modes of responsibility that can be used to prosecute the individuals who orchestrate the crime from a distance.[86] The Rome statute presently does not have the word planning included in it. Adding the word 'planning' can be a viable amendment in the statute to help hold the individuals planning the crime responsible. However, as already mentioned, amendment is not an easy process, which is why in this paper I will also be discussing other methods for the improvement of the control theory in the Rome Statue.

Control Theory as a General Principle of Law

Judges and scholars have criticised the control theory because the interpretation of Article 25(3)(a) is not unanimous amongst the judges. This is because it is not incorporated in the Rome Statute as a general principle of international law. As per the canons of interpretation of international law, Article 31 of the Vienna Convention on the Law of Treaties plays a crucial role. It states that treaties are to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and light of its object and purpose". However, the Rome statute Article 22(2) suggests that the wording of the statute is to be interpreted strictly, and analogy must not extend to domestic law. However, Article 21 of the same statute also allows the ICC to consider the general principles of law while interpreting the Rome statute. Considering this, I will assess different methods to interpret Article 25(3).

The ICC has extremely limited sources of law on which it can rely. Article 21 of the statute provides that a judge, while interpreting, can rely on the

treaties and principles of international law and the general principles of national law. However, the pre-trial chamber in the *Lubanga case* did not identify whether the control theory is to be considered as the principle of customary international law, the principle of conventional international law, or a general principle of law.[87] It is unlikely that the court relied on customary international law, which requires uniform and widespread state practice and opinio juris.[88] The most likely option is for the court to rely on the control theory as the general principle of international law. However, even this possibility requires the court to derive national law of various legal systems where it exercises jurisdiction. However, out of all the options available, the court considering the control theory as the general principle of international law seems the most viable.[89]

The control theory can be considered as the general principle of international law based on available jurisprudence. The control theory is not only present in German domestic law as most comments portray it to be.[90] In the *Katanga case*, the Pre-trial Chamber held that the control theory had been used in several domestic jurisdictions[91]. Moreover, it is also 'widely recognised in legal doctrine.'[92] The indirect perpetration has been codified in the American Moral Penal Code and has also been referred to by the Argentinean Court of Appeal.[93] However, the ICC has not analysed comprehensively whether the control theory is a general principle of law. The ICC needs to analyse it properly per the domestic jurisprudence available so that the control theory can be incorporated into the Rome Statute as the general principle of law per Article 22(1)(c).

Essential Contribution to the 'Common Plan' is Not Sufficient

The Trial Chamber in the *Lubanga case* held that the 'essentiality test' for the control theory provides that the joint perpetrator does not need to be present at the place where the crime takes place,[94] and there is no specific requirement of any physical link to be established between the join perpetrator contribution and the commission of the crime.[95] The court also held that it is sufficient to hold an individual responsible based on control theory if he provides any assistance in formulating the 'common plan'.[96] If the joint or co-perpetrator controls the other participants of the crime or directs them, then he can be held responsible as per the control theory.[97] This raises the concern that resorting to essentiality criteria imputes defendants as principals who are remote from the place and time of the offence, and there

is no room left for the liability of accessories.[98] For instance, can a scientist who provides information to a leader for making chemical weapons be regarded as a co-perpetrator if such weapons are manufactured and used several years later? And what about the liability of a person who just guides a leader through a route on a rough mountain who is going to commit genocide?

In this regard, the essential contribution criteria laid down by the PTC in *the Lubanga case* is not enough as it does not lay down a yardstick for distinguishing between the defendants at the centre and those at the margins of the commission of an offence. According to Jain, one of the key factors of international criminal law is to establish a standard that is appropriate for separating defendants of an offence who are at the center from those who are at the edge.[99] This does not mean that the essentiality criteria of the control theory be rejected once and for all. Different scholars propose some additional requirements to bridge this gap, which are referred to as a 'cluster of factors'.[100] This cluster of factors includes some additional objective and subjective requirements, as Jens Ohlin, Thomas Weigend, and Elies van Sliedregt suggested. The objective factors include 'immediacy', which means that the perpetrator is held responsible based on how temporally close to the crime he has made his contribution.[101] Roxin suggests that only such individuals must be imputed as co-perpetrators who contribute to the crime after the attempt stage.[102] The subjective factors include the meshing of sub-plans among co-perpetrators [103] and a strong personal interest to make criminal enterprise successful that goes beyond required *mens rea*.[104]

Conclusion

International Criminal Law is still in its infancy, but it has already become a vibrant and developing field that is both separate from and connected to public international law and international humanitarian law. ICL's primary goal is to overcome barriers that prevent prominent leaders from being labelled as the masterminds behind mass atrocities and not mere accessories. The goal of this endeavor is to develop a participation theory that works and can undermine the immunity that these leaders frequently enjoy.

Beyond just being a tool for sentencing and designating people as principals or accessories, it is essential for informing victims and the world community about who the real masterminds of these atrocities are. The normative

approach emphasises the need to label the principals as those who are most responsible, the intellectual masterminds, in line with the larger objectives of ICL. The Joint Criminal Enterprise (JCE) theory and the Control theory, two popular theories of participation used by international tribunals to hold high-level leaders accountable as principals, are critically examined in this article. This research argues for the conviction of high-level leaders as principals, especially when orchestrating crimes from a distance, challenging the claims of jurists such as Judge Fulford, who maintains that only direct perpetrators should be called principals.

Given the complex nature of international atrocities, a flexible and adaptable theory of perpetration is essential. This article rejects joint criminal enterprise because of its wide application and over-emphasis on a subjective approach, which could result in the conviction of people who are merely associated with a criminal enterprise. Contrarily, control theory is preferred because it strongly emphasises the degree of control over the commission of the crime and its essentiality constraint, guaranteeing that only those who make essential contributions to the crime are held accountable. While acknowledging the flaws of the control theory, this research advocates for its continued use. It suggests improvements, including ICC justifying its status as a general principle of law, expanding the essential criteria by considering other clusters of factors, and amending the Rome Statute to incorporate explicit provisions for the liability of high-level leaders as principals.

In conclusion, this research contends that the ICC should take steps to resolve its jurisprudential contentions, uphold the essential contribution criteria, and explore the promising prosecutorial avenue of indirect co-perpetration. By doing so, the ICL can evolve into a more robust and effective tool for prosecuting high-level leaders responsible for grave international crimes.

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