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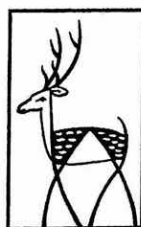
The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes

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with a Foreword by
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an Introduction by
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and an Epilogue by
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Elements of the Notion of Joint Control

III Elements of the Notion of Joint Control of the Crime

In order for a senior political or military leader to be criminally responsible as a co-perpetrator under the notion of joint control of the crime, the following two objective elements must be fulfilled: (i) the relevant leader must be part of an agreement or common plan between two or more persons;²⁷ and (ii) the relevant leader and his fellow co-perpetrators must carry out in a coordinated manner their essential contributions resulting in the realisation of the objective elements of the crime (joint commission of the crime).²⁸ As seen below, writers, however, have often shown disagreement regarding the scope of the common agreement or plan and of the essential contribution.

Moreover, it will also be necessary that the following three subjective elements be fulfilled: (i) the relevant leader must fulfil the subjective elements of the crime in question, including any requisite ulterior intent or *dolus specialis*;²⁹ (ii) the relevant leader and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime;³⁰ and (iii) the relevant leader must be aware of the factual circumstances enabling him to jointly control the crime.³¹

A Objective Elements

i Common Agreement or Common Plan

The need for a common agreement or a common plan is inherent to the very concept of co-perpetration, according to which a senior political or military leader is considered as a principal to the crime as a whole despite the fact that he has not carried out all the elements of such crime. This is only possible because the contributions made by the other co-perpetrators are attributed to him insofar as they

²⁷ *Lubanga Case* Confirmation of Charges (Above n 1), at paras 343–5; *Katanga and Ngudjolo Case* Confirmation of Charges (Above n 1), at paras 522–3. See also *Stakic Case* Trial Judgment (Above n 7), at paras 470–77, which, as seen below in Ch 5, s VI.C.ii.b and s VI.C.ii.c, divided this element into the following two sub-elements: (i) common goal; and (ii) agreement or silent consent.

²⁸ *Lubanga Case* Confirmation of Charges (*Ibid*), at para 346–8; *Katanga and Ngudjolo Case* Confirmation of Charges (*Ibid*), at paras 524–5. See also *Stakic Case* Trial Judgment (*Ibid*), at paras 478–91, which, as seen below in Ch 5, s VI.C.ii.d and s VI.C.ii.e, divided this element into the following two sub-elements: (i) coordinated co-operation; and (ii) joint control over criminal conduct.

²⁹ *Lubanga Case* Confirmation of Charges (*Ibid*), at paras 349–60. See also *Stakic Case* Trial Judgment (*Ibid*), at para 495, which refers to this element as ‘*mens rea* for the specific crime charged’.

³⁰ *Lubanga Case* Confirmation of Charges (*Ibid*), at paras 361–5. See also *Stakic Case* Trial Judgment (*Ibid*), at para 496, which refers to this element as ‘mutual awareness of substantial likelihood that crimes would occur’.

³¹ *Lubanga Case* Confirmation of Charges (*Ibid*), at paras 366–7. See also *Stakic Case* Trial Judgment (*Ibid*), at paras 397–8, which refers to this element as ‘Dr. Stakic’s awareness of the importance of his own role’.

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need to take into consideration the facts of the case. These guidelines should be based on the notion of the 'unitary sense of the action'. As a result, events which are necessary for, directly linked to, or immediately before the carrying out of the objective elements of the crime, are part of the execution phase.

Numerous authors do not share Roxin's view that only contributions at the execution stage may give joint control of the crime.⁵⁷ In this regard, Gimbernat Ordeig has affirmed that this approach is contradictory because if the key element of the notion of joint control of the crime is the power to disrupt the plan by withholding one's contribution, it would seem that those persons who carry out essential contributions at the preparatory stage also have this power and therefore, would also have functional control of the crime.⁵⁸ Others, such as Munoz Conde, Jescheck, Weigend and Kuhl have pointed out that the requirement of a contribution at the execution stage can be waived because the contribution of any senior political or military leader in the crime for the purposes of determining whether or not he has functional control of the crime must be assessed from the overall perspective of the implementation of the common plan.⁵⁹ And, from this perspective, playing a key role at the preparatory stage suffices to have joint control of the crime.⁶⁰ Thus, the key element is not the intervention at the execution stage but the joint control of the crime, which can exist despite the fact that the contribution does not, *stricto sensu*, consist of executive acts.⁶¹

In the author's view, there are several reasons which support the view that co-perpetration based on joint control of the crime does not necessarily require that the contribution is made at the execution stage. First, from the perspective of the diversity of the criminal phenomenon, there is conduct that, despite the fact that it is not directly executive, is directly and immediately linked to the execution of the objective elements of the crime and the consequent harm on the societal value protected by international criminal law. Therefore, it should be considered an integral part of the commission of the crime.

Second, it is true that some writers see the notion of co-perpetration as a kind of conspiracy which is put in practice. Hence, they distinguish co-perpetration from conspiracy in that co-perpetration requires, besides the meeting of the minds, a subsequent contribution at the execution stage. However, it is also true

⁵⁷ See inter alia H Welzel, 'Studien zum System des Strafrechts' 58 (1939) ZSTW 551; Jescheck and T Weigend (Above n 2) 680; Kuhl (Above n 4), at No 111; K Ambos, *La Parte General del Derecho Penal Internacional: Bases para una Elaboracion Dogmatica* (Uruguay, Konrad-Adenauer-Stiftung, 2005) 192; Diaz y Garcia Conlledo (Above n 41), at 672.

⁵⁸ Gimbernat Ordeig (Above n 52), at 149.

⁵⁹ F Munoz Conde, '¿Dominio de la Voluntad en virtud de Aparatos Organizados en Organizaciones no Desvinculadas del Derecho?' (2000) 6 *Revista Penal* 113 [hereinafter Munoz Conde, *Dominio de la Voluntad*]; Jescheck and Weigend (Above n 2), at 680; Kuhl (Above n 4), at No 111.

⁶⁰ *Ibid.* See also Kindhauser (Above n 44), at § 25 No 38. According to German case law, a contribution in the preparatory phase is sufficient, because they follow a more subjective approach of distinguishing between perpetrators and aidors and abettors.

⁶¹ F Munoz Conde, 'Problemas de Autoria y Participacion en la Criminalidad Organizada' in C Ferre Olive and E Anarte Borralló (eds), *Delincuencia Organizada: Aspectos Penales, Procesales y Criminologicos* (Universidad de Huelva, 1999) 67 [hereinafter Munoz Conde].

