CRIMINAL RESPONSIBILITY IN THE CRIMES COMMITTED BY ORGANIZED STRUCTURES OF POWER: jurisprudence analysis in the light of International Criminal Law

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ABSTRACT

This article aims to examine the issue of criminal responsibility in the crimes committed by organized structures of power, especially from the perspective of jurisprudence under the International Criminal Law. It had been addressed, in particular, the control over the organization theory of Roxin and the praetorian doctrine of joint criminal enterprise, as well as their applicability to foreign and international jurisprudence. Consequently, it seeks to clarify how it should be given criminal responsibility of superiors who, through the organized structures of power controlled by them, determine the criminal practices by subordinates who act freely and voluntarily.

KEYWORDS: International Criminal Law. Control over the organization theory. Joint criminal enterprise doctrine.

A IMPUTAÇÃO PENAL NOS DELITOS COMETIDOS ATRAVÉS DE ESTRUTURAS ORGANIZADAS DE PODER: análise jurisprudencial à luz do Direito Penal Internacional

RESUMO

O presente artigo objetiva examinar a questão da imputabilidade penal nos delitos cometidos através de estruturas organizadas de poder, notadamente sob o prisma jurisprudencial no âmbito do Direito Penal Internacional. Para tanto, foram abordadas, em especial, a teoria roxiniana do domínio da organização e a doutrina pretoriana da *joint criminal enterprise*, bem como sua aplicabilidade na jurisprudência estrangeira e internacional. Com isso, busca-se esclarecer a que título deve se dar a responsabilização criminal dos superiores hierárquicos que, através das estruturas organizadas de poder por eles controladas, determinam a prática delitiva por intermédio de subordinados que atuam livre e voluntariamente.

PALAVRAS-CHAVE: Direito Penal Internacional. Teoria do domínio da organização. Doutrina do *joint criminal enterprise*.

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This article was translated by Ana Luiza Calil and autorized for publication by the author in 07/11/2012. Version in portuguese received in 13/08/2011 , acepted in 18/01/2012 .

1 INTRODUCTION

The issue of criminal responsibility in the crimes committed by organized structures of power is quite debated by the doctrine, which produces effects in the jurisprudential framework. There are many theories that seek to elucidate the title that the highest hierarchical, who determines the commitment of crimes through the referred structure, should be criminally liable. Among them, the most outstanding are currently the control over the organization theory and the doctrine of *joint criminal enterprise.*

The control over the organization theory, also known as "mediate authorship"[2] was formulated by Claus Roxin, in the year of 1963, before the failure of the applicability of the traditional figures of authorship and participation, elaborated considering the structure of individual crimes, to the crimes perpetrated by organized apparatus of power. It consists on a form of mediate authorship, whose peculiarity lies in the immediate author, who is not being under the dominion of duress, error or nonimputability, in other words, acting freely and with faithful representation of reality, is criminally punishable with the mediate author.

Meanwhile, the doctrine of *joint criminal enterprise* is a praetorian construction, developed by the International Tribunal for the former Yugoslavia in the trial of the *Tadic* case. According to this theoretical formulation, the leader of the organization should be accountable for the crime determined by him when remains evident his involvement in a joint criminal enterprise, in any of its forms.

In this article, it will be made an overview over the placement of international and foreign courts on the issue of criminal responsibility of hierarchical superiors for offenses committed by power structures, especially in light of theories above listed. Thus, it will be discussed how the issue is being dealt, directly and indirectly, by the International Criminal Law.

First, in the following chapter, it will be analyzed how the foreign jurisprudence deal with the issue, evidencing a significant recognition of the organization theory in the field of criminal liability of the leader of the power structure. This approach has immediate importance for the development of international criminal law in relation to the issue. It should be noted that, as the Brazilian courts keep treating the issue through the prism of the classic criteria of

[2] Translator's note: the expression in Portuguese is "autoria de escritório", which literally means "office authorship" that represents, in the context of the present work, "mediate authorship".

criminal imputation, the analysis of homeland jurisprudence was not considered relevant for the intended scope of this work[3].

In the third chapter, we are going to discuss the placement of international jurisprudence, in which title the highest hierarchical member, who determines the commitment of crimes through the referred structure, should be criminally liable through the power apparatus that he controls. This analysis bears a direct relevance to international criminal law. In this context, there are decisions that adopt either Roxin Theory or the doctrine of joint criminal enterprise.

Therefore, it is clear that there is no doctrinal or jurisprudential consensus of what is the most appropriate theoretical solution to the issue of criminal responsibility of the mediate author. Nevertheless, as it will be demonstrated, gradually prevails, in the area of international criminal law, the application of German construction of mediate authorship owing to organized apparatus of power.

2 INTERNATIONAL COURTS AND THE CONTROL OVER THE ORGANIZATION THEORY

Since 1985, the control over the organization theory has been receiving protection from courts of several states, such as Germany, Argentina and Peru, in cases of crimes committed by organized apparatus of power automatically operated. The major part of the cases concerns the state organized delinquency, as occurred in Latin-American dictatorships, although the Roxin Theory has already obtained judicial application in relation to criminal non-state structures, such as the Peruvian terrorist organization "*Sendero Luminoso*".

The "mediate authorship" is a peculiar institute, since both the direct executor of the crime, as the superior who ordered its commitment, are criminally responsible for the same, featuring the figure of the author behind the author. Its configurators premises, as originally proposed by Roxin, are: a rigid hierarchical power structure, its dissociation in relation to law and its fungibility of direct executors, so that the apparatus works automatically.

[3] As an observation, the brasilian courts, specially the Federal Regional Court of the 4th Region, are invoking the control over the organization theory only in the sphere of economic crimes, which does not seem relevant for the purposes proposed in this article. To a better approach of the issue, see: DUTRA, Bruna Martins Amorim. A aplicabilidade da teoria do domínio da organização no âmbito da criminalidade empresarial brasileira. In: SOUZA, Artur de Brito Gueiros (Org.). Inovações no Direito Penal Econômico: contribuições criminológicas, político-criminais e dogmáticas. Brasília: Escola Superior do Ministério Público da União, 2011, p. 223-248. Available printed and in electronic media: <http://www3.esmpu.gov.br/ linha-editorial/outras-publicacoes>.

Thus, the leader of the criminal structure of power should be responsible as a mediate author for the crimes that he have determined through the apparatus when held the control over the facts by virtue of the control of the organization. This control would occur because the success of the overall plan of the "man behind" would be assured regardless of the identity of the direct performer, so that "the one who acts immediately is just replaceable sheave within the gears of power apparatus" [4].

Despite the fact that the reception of the mediate authorship is not undisputed by part of jurisprudence of superior courts, as will be shown in next chapter, it is worth noting that foreign cases that have adopted it bear notorious importance for international criminal law in a mediate way. As explains Kai Ambos "a judicatura nacional pode influir no desenvolvimento do direito penal internacional de um modo indireto, por meio da derivação, por meio do direito comparado, de princípios gerais do direito ou como fonte subsidiária do direito, conforme o art. 38 (1) (d) do ECIJ"[5]. In the presente topic, so, it will be broached the main cases in which were adopted the Roxin theory by the courts from foreign States, contributing for the elucidation of the issue of criminal responsibility of hierarchical superiors in the sphere of international criminal law.

Settled these assumptions should be highlighted that the control over the organization theory was adopted in court for the first time, in the case of the military junta in Argentina. The National Chamber of Criminal Appeals and Correctional of Federal Capital of Argentina, on 09/12/1985, condemned as mediate authors, the commanders of the Argentinian Armed Forces, Jorge Rafael Videla, Emilio Eduardo Massera, Orlando Ramón Agosti, Roberto Eduardo Viola and Armando Lambruschini, because they have ordered the crimes of kidnapping, torture and murder by using the state apparatus in the fight against opponents in opposition to subversion[6].

According to the National Chamber, which adopted the control over the organization theory with the contours originally indicated by Roxin, the commanders of Argentinian Armed Forces, by that time, would hold the domain of the fact in virtue of the domain of the organization and, given that, considering the rigid military structure presented, the direct executors of the crimes would be fungible and anonymous. According to the handed judgment:

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[4] ROXIN, Claus. *Autoria Mediata por meio do Domínio da Organização.* Tradução de José Danilo Tavares Lobato. In: GRECO, Luís; LOBATO, Danilo (Coord.). Temas de direito penal. Rio de Janeiro: Renovar, 2008, p. 324.

[5] AMBOS, Kai. *A parte geral do direito penal internacional*: bases para uma elaboração dogmática. Tradução de Carlos Eduardo Adriano Japiassú e Daniel Andrés Raizman. Revisão de Pablo Alflen e Fabio D´Avila. Atualização de Kai Ambos e Miguel Lamadrid. Ed. brasileira reform. e atual. São Paulo: RJ, 2008, p. 53. Título original: Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung.

[6] Cf. <http://www.pucp.edu.pe/idehpucp//images/boletin_ddhh/CASOS/cccf%20-%20causa%2013-9-12-85.pdf> Accessed in 10 November 2011.

> En efecto, los procesados se encontraban en el pleno ejercicio del mando de las fuerzas armadas, y en su carácter de comandante en jefe, emitieron las órdenes ilícitas, dentro del marco de operaciones destinadas a combatir la subversión terrorista, actividad ésta última que resulta indudablemente vinculada con el cumplimiento de las funciones que a ellos les correspondía desempeñar en virtud de expresas disposiciones legales.[…]
> Los procesados tuvieron el dominio de los hechos porque controlaban la organización que los produjo. Los sucesos juzgados en esta causa no son el producto de la errática y solitaria decisión individual de quienes los ejecutaron, sino que constituyeron el modo de lucha que los comandantes en jefe de las fuerzas armadas impartieron a sus hombres. Es decir que los hechos fueron llevados a cabo a través de la compleja gama de factores (hombres, órdenes, lugares, armas, vehículos, alimentos, .etc.), que supone toda operación militar. Sin el imprescindible concurso de todos esos elementos, los hechos no hubieran podido haber ocurrido. Luego de la asonada del 24 de marzo de 1976, las fuerzas armadas, bajo las órdenes de los enjuiciados, prosiguieron la lucha contra la subversión, es cierto que de un modo manifiestamente ilícito, pero con toda la estructura legal que se empleaba hasta ese momento.[7]

Unreconciled to the decision of National Appeal Chamber, the defendant filed the cassation appeal before the Supreme Court of Argentina. Then, the judges members of the Court, in its judgment handed down by the date of December 30, 1986, have not agreed with the incidence of the control over the organization theory, despite three of the five votes were in its favor[8]. Thus, it was decided that should be applied to the case the Formal-objective theory instead of the control over the fact theory, especially the control over the organization.

In accordance with the Supreme Court, the formulation of the German criminalist would not be sufficiently concrete, it would offend the principle of responsibility due to comprise in the mediate authorship the figure of the author behind the author, besides it transcends the limits of the Article 45 of the Argentinian Penal Code as it extends the authorship concept

[7] Sentença da Câmara Nacional de Apelações Criminais e Correcionais de Buenos Aires de 09/12/1985. Causa nº 13/84. Free translation: In fact, the defendants were in its full exercise of the command of the armed forces, and acting as chief commanders, issued illegal orders in operations to fight terrorist subversion, this activity, undoubtedly, is linked to the performance of the tasks that were competed by them in virtue of express statutory provisions. [...]The defendants had the domain of the facts because they controlled the organization that produced them. The events judged in this cause are not a product of the erratic decision and lonely individual of who executed them, but constituated sthe way of fighting that the chief commanders of the Armed Forces have given to their men. This means that the facts were made through the complex range of factors (men, orders, locations, weapons, vehicles, food, etc..), which requires every military operation. Without the vital support of all these elements, the facts could not have happened. After the failed coup of 24 March 1976, the armed forces, under the command of the defendants continued to struggle against subversion, it is true that in a manifestly illegal way, but with all the legal framework that has been used previously.

[8] SANCINETTI, M. A.. *Derechos humanos en la Argentina postdictatorial*, Marcos Lerner Editora, Buenos Aires, 1988, p. 243, *apud* CABANA, Patricia Faraldo. Op. cit. p. 39, clarifies, in a note, that “la parte dispositiva en la que constan las firmas de los cinco ministros no se corresponde con los votos, especialmente en punto al título de la imputación de la responsabilidad personal. Según una tradición de la Corte, cuando los votos de los ministros forman mayoría diferente con relación a cada aspecto controvertido, la firma final de los jueces es insertada en la parte dispositiva que corresponde al voto del presidente. Sin embargo, esto genera una discordancia, al menos en este caso, entre el dispositivo aparente y los considerandos de la sentencia. En punto a la autoría, en particular, la mayoría del tribunal, mediante el voto de Bacqué, Fayt y Petracchi, resolvió el problema de la imputación de la responsabilidad personal, como caso de *autoría mediata*. Y no lo contrario, como dice el voto del presidente, Caballero, y de Beluscio”.

without legal bases. So, the Argentinian Superior Court condemned the ex-commanders of Armed Forces as criminal needed participants, and not as mediate authors.

In Germany, it is right that the Federal Supreme Court had already invoked the control over the organization theory as an *obiter dictum* argument in the case of "The King of the Cats", in a sentence handed down in 15/09/1988[9], in order to corroborate the dogmatic viability of the figure of the authorship behind the author. However, the court definitely has acclaimed the Roxin construction for the hypothesis of crimes committed through organized power apparatus in the case of the deaths of Berlin Wall.

Register that initially, when considering the case of deaths at the Berlin Wall, the Berlin Regional Court condemned Heinz Kessler, Fritz and Hans Albrecht Streletz as participants of homicides committed directly by border guards against the fugitives of the former GDR, since that the conduct had been reached in a resolution of the National Defense Council[10]. According the judicial organ *a quo*, the defendants should not be charged as mediate authors in virtue of the control over the organization because East Germany would not be a totalitarian state as the dictatorship of Hitler, beyond what the superiors would not hold the domain of the criminal act, especially with regard to the decision taken in concrete and to the *modus operandi*.

Nevertheless, in appeal level, the 5th Panel of BGH reversed the verdict to convict the defendants as mediate authors for the crimes of homicide. Amid the judgment handed down on 26/07/1994, the court settled that the accused would be leaders of hierarchical military organization, having hereby ordered that the snipers located on the Berlin Wall would kill the fugitives from RDA. So, invoked as *ratio decidendi* for the conviction of members of the National Council for the Defense of RDA's the mediate authorship in virtue of the domain of the organization, formulated by German criminalist Claus Roxin in 1963, without prejudice to the criminal liability of border guards[11]. According to the Superior Court,

> existe considerable unidad en la literatura a la hora de juzgar a los autores que han actuado en el marco de un aparato organizado de poder. Aquí, a pesar de que el intermediario actúa de forma típica y completamente responsable, el hombre de atrás y quien con mando independiente en el marco de la jerarquía da curso... de la orden

[9] BGHSt, 35, *apud* ROXIN, Claus. *Autoría y dominio del hecho en derecho penal*. Translation of the German 7ª ed., 1999, de Joaquín Cuello Contreras e José Luis González de Murillo. Madrid: Marcial Pons, 2000, p. 647.
[10] Note that Kessler and Streletz inducers were considered homicides, while Albrecht was charged as an accomplice of Honecker because the decision to commit the crime was already taken.
[11] Even before the trial of the case in question, the Bundesgerichtshof had already condemned soldiers for border killings they committed directly.

> delictiva deben ser autores mediatos, porque la fungibilidad del intermediario confiere al autor de escritorio el dominio del hecho...[12]

It is worth noting that the Superior Court lean the imputation of criminal defendants in § § 212 and 25 of the StGB[13], observing that § 25, I, would be open to the figure of the authorship behind the author as it disposes that is considered also author the one who practices a crime through others. Moreover, The Court rejected the defensive allegation in the sense that the defendants would be subject to *Honecker*, Chairman of the National Defense at that time, showing the important position occupied by each of the accused in the military hierarchical organization.

That needs to be stressed that the case of the deaths in Berlim Wall was paradigmatic for the effective consecration of the Control over the organization theory as a modality of mediate authorship by the Germany Federal Supreme Court, for crimes practiced through organized structures of power. In the year of 1997, the judicial decision under consideration was confirmed by the Constitutional Federal Court ((BVerfG – *Bundesverfassungsgericht*), which maintained it by it owns basis.

On the other hand, in Peru, the Roxinian construction was pioneer applied by jurisprudence in the case *"Abimael Guzmán"*. In a sentence handed down by the *"Sala Penal Nacional"*, it was confirmed that Guzmán, in the role of leader of the Communist Party of Peru – *Sendero Luminoso* (PCP – SL), controlled the guerilla organization with a hierarchical rigid structure and determined the commitment of many crimes by the interchangeable direct executors[14]. He was convicted as a mediate author because the domain of the organization for

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[12] BGHSt, 40, p. 2706, *apud* CABANA, Patricia Faraldo. Op. cit. p. 69. Free Translation: There is considerable unit in literature on the time to judge the authors who have worked in the context of an organized apparatus of power. Here, although the fact that intermediary acts in a typical and fully responsible way, the man from behind and who, with independent control within the hierarchy gives way ... of the criminal order should be mediate authors, because the fungibility of intermediate gives the domain of the fact to the mediate author…

[13] § 212: "Totschlag (1) Wer einen Menschen tötet, ohne Mörder zu sein, wird als Totschläger mit Freiheitsstrafe nicht unter fünf Jahren bestraft. (2) In besonders schweren Fällen ist auf lebenslange Freiheitsstrafe zu erkennen". Tradução livre: § 212: Homicídio (1) Qualquer que matar uma pessoa sem ser um homicida de acordo com a seção 211 deve ser condenado por homicídio e se sujeitar à prisão por não menos que cinco anos. (2) Em casos especialmente sérios, a pena deve ser a prisão perpétua.

§ 25: "Täterschaft. (1) Als Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht. (2) Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)". Tradução livre: § 25: Autoria. (1) Qualquer pessoa que cometer crime por si mesma ou por meio de terceiro deve ser responsável como autor. (2) Se mais de uma pessoa cometer o crime conjuntamente, cada uma deve ser imputada como autor (co-autores).

It is worth noting that the German Federal High Court, as the Court of first instance, used the StGB instead of DDR-StGB (Criminal Code of the GDR) to discipline the case because it is more favorable to the defendants.

[14] Cf. <http://www.haguejusticeportal.net/Docs/NLP/Peru/GuzmanReinoso_Decision_13-10-2006.pdf> Accessed in 10 November 2011. According to the peruvian sentence, "el dominio que ejercía en la organización, además de las órdenes directas o los planes generales, se complementaba en rigor con un control de las actividades de sus

the crimes of aggravated terrorism against the state and murder against 69 residents of Lucanamarca and surrounding area, having been imposed to him the penalty of life imprisonment.

The condemnation of Abimael Guzman was confirmed by the "Segunda Sala Penal Transitória da Corte Suprema de Justiça" in 14 December 2007[15], and by the Supreme Court of Justice, in 03/01/2008[16]. As an observation, in September 2008, alleging violation of rights, Abimael Guzmán required to the Inter-American Commission on Human Rights the annulation of his judgment. This requirement is now in processing[17].

Moreover, in 07/04/09, the Special Criminal Chamber of the Supreme Court sentenced former Peruvian President Alberto Fujimori, as the mediate author of the crimes of murder and grievous bodily harm against a total of 29 people, referring to the cases of Barrios Altos and La Cantuta, and the crime of aggravated kidnapping in the case *Sótanos SIE*[18]. According to the tribunal, Fujimori, occupying the highest position of the Peruvian State, have exercised the command power in the conduction of the policy of subversion's confrontation. The guidance given by the leader of the power apparatus consisted in the elimination of terrorism suspects and support bases, which led to several human rights violations, departing from the state organization of the National and International Law.

As exposed by the Special Criminal Chamber of the Supreme Court:

> 6. Los delitos de asesinato y lesiones graves ocurridos en Barrios Altos y La Cantuta fueron acciones ejecutivas de tales objetivos, estrategia y patrón táctico de operaciones especiales de inteligencia contra la subversión terrorista, de notoria ilegalidad y clandestinidad que no son avalables por el ordenamiento jurídico nacional e internacional del cual se apartan plenamente o lo subordinan sistemáticamente.
> 7. Los delitos de secuestro contra los agraviados Gorriti y Dyer respondieron también a disposiciones dadas y/o avaladas directamente por el acusado para el control ilícito de la disidencia o crítica políticas a su régimen de facto, en una coyuntura de inestabilidad democrática donde se practicó por la fuerza el desconocimiento de garantías y derechos fundamentales.[...]
> 746°. Ahora bien, la actividad y operaciones delictivas de Barrios Altos y La Cantuta, y en los sótanos del SIE, realizadas por el aparato de poder organizado que construyó y dinamizó el acusado desde el SINA, cuyo núcleo ejecutor básico en el ámbito del

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miembros, elemento indispensable para verificar la eficacia en el cumplimiento de las órdenes previamente fijadas" (expediente acumulado nº 560-03).

[15] Cf. <http://www.pj.gob.pe/CorteSuprema/salassupremas/SPT2/documentos/RN_5385-2006_2DA_SPT_160108.pdf> Accessed in 10 November 2011.

[16] Cf. <http://g1.globo.com/Noticias/Mundo/0,,MUL246329-5602,00-CHEFE+DO+SENDERO+LUMINOSO+TEM+PRISAO+PERPETUA+CONFIRMADA.html> Accessed in 10 November 2011.

[17] Cf. <http://peru21.pe/noticia/224546/abimael-guzman-pide-ante-cidh-que-se-anule-su-juicio> Accessed in 10 November 2011.

[18] Cf. <http://www.pj.gob.pe/CorteSuprema/spe/index.asp?codigo=10409&opcion=detalle_noticia> Accessed in 10 November 2011.

> control de las organizaciones subversivas terroristas fue el Destacamento Especial de Inteligencia Colina, constituyeron una expresión de criminalidad estatal contra los derechos humanos con evidente apartamiento e infracción continua del derecho nacional e internacional.[19]

These were the cases of greatest notoriety in which foreign courts have applied the theory of the domain of fact in virtue of the control over the organization. It is important to note that, despite the increasing adoption of this theoretical construction in crimes committed by organized structures of power, their application is not done uniformly by foreign jurisprudence, which is a reflection of the bitter disagreements around the issue in doctrine.

The viability of mediate is even not peaceful. The main criticism is related to the alleged incompatibility between a domain of will by the "man from behind" and a domain of the action for the immediate executor of the crime, rejecting the figure of the authorship behind the author. Thus, from a strict interpretation of the principle of responsibility, it would be impossible for the leader of the power apparatus held the domain of the fact, in case the crime, as a mediate author when the direct executor has acted with fully responsibility, in the absence of coercion or error.

This argument is rebutted by scholars who admit the mediate authorship due to control over the organization for the reason that it is based on the criteria of fungibility, so that it would become irrelevant to the success of the crime a free and autonomous decision of the executor. The man behind, despite not owning the domain of duress or error, would hold the domain of the fact through the domain of the will, since the success of the criminal plan would be provided by the executor fungibility. Thus, although the front man, in the exercise of his freedom of action, would refuse to obey the order of a hierarchical superior, the execution plan of the crime would be guaranteed by another operative man, considering that the organization has automatic and independent of their individuality members.

The control over the organization by the mediate author does not alienate the domain of the fact by virtue of the fact that the domain of action by the material executor material of the

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[19] Expediente nº A.V. 19-2001. Free Translation: The crimes of homicide and serious injury occurred in Barrios Altos and La Cantuta were the executive actions of these objectives, strategy and tactical standard special intelligence operations against terrorist subversion, of notorious lawlessness and illegality not endorsed by national and international law which turn it away fully or systematically subordinate it.
7The crimes of kidnapping against the victim Gorriti and Dyer also responded to certain provisions and / or supported directly by the accused to illegal control of the political dissent or criticism of his regime, in a context of democratic instability where it was practiced by the lack of strength of guarantees and fundamental rights. [...]However, criminal activity and operations of Barrios Altos and La Cantuta, and in the basement of the SIE, performed by the apparatus of organized power that built and strengthened since the defendant SINA, whose basic core executor under the control of subversive terrorist organizations was The *"Destacamento Especial de Inteligência Colina"*, constituted an expression of state criminality against human rights with clear separation and continuous violation of national and international law.

criminal command. So, the criminal liability of both, being based on different grounds, it is shown compatible, characterizing the authorship behind the author[20].

Besides, it is questioned that the man behind is effectively safe in relation to the fulfillment of the illicit command. On this track, Kai Both, while not deviating the applicability of the theory itself, exposes that "la fungibilidad puede fundamentar un dominio a lo sumo en sentido general, pero no en la situación concreta del hecho. Por más que el hombre de atrás pueda dominar la organización, no domina directamente a aquellos que ejecutan el hecho concreto".[21] Herzberg shows that, in the case of the deaths of Berlim Wall, if the border guards had not executed the command of killing the fugitives from the RDA, the crime would not be timely committed by others.[22]

Claus Roxin, in contrast, asserts that criticism in regard to the uncertainty of the effectuation of the determined crime would not go against the control over the organization theory, but would evince just the viability of the attempt, as occurs in other types of mediate authorship. According to the criminalist, "pode não importar se há automotismo em cada caso particular. Ele funciona no caso padrão, o que não se pode dizer da instigação"[23]. After all, he explains, in the organizations of automatic operation, the execution of illegal commands is ensured by a surveillance system, in the specific case of deaths at the Berlin Wall, the East German border was guarded by a group of guards.

Surpassed the debated question regarding his own acceptance of the control over the organization theory, it is worth mentioning that there are also numerous doctrinal controversies concerning the assumptions of the figure of the mediate author, which reflects in jurisprudential framework.

In his work "*Täterschaft und Tatherrschaft*", published in the year of 1963, Claus Roxin presented, originally, as the conditions to characterize the control over the organization, a rigidly hierarchical structuring of the power apparatus, its dissociation in relation to law and a

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[20] ROXIN, Claus. *Autoria Mediata por meio do Domínio da Organização.* Tradução de José Danilo Tavares Lobato. In: GRECO, Luís; LOBATO, Danilo (Coord.). Temas de direito penal. Rio de Janeiro: Renovar, 2008, p. 324.

[21] AMBOS, Kai. Dominio por organización. Estado de la discusión. Tradução de Ezequiel Malarino. *Revista Brasileira de Ciências Criminais*, vol. 15, nº 68, 2007, p. 79. Free translation: The fungibility may base a domain in a more general sense, but not in the concrete situation of the fact. As much as the man behind the organization can dominate, he does not directly dominates those performing the actual fact.

[22] *Herzberg*, en: Amelung (editor), Verantwortung (2000), p. 37 e ss. *apud* AMBOS, Kai. Op. cit. p. 79-80.

[23] ROXIN, Claus. Op. cit. p. 328.

fungibility of direct executors of the crime[24]. This construction was strictly followed by the National Chamber of Appeal on the Criminal and Federal Correctional of the federal capital of Argentina, in the case of "The Military Junta" [25] [26], and by the Segunda Sala Penal Transitória da Corte Suprema de Justiça do Peru, in the case Abimael Guzmán[27]. In the other judgments mentioned above, however, it appears that the foreign jurisprudence has moved away from the original contours of The Roxin's theory.

In the case of the deaths at the Berlim Wall, The German Federal Supreme Court listed as additional requirements for the configuration of the mediate authorship: the unconditional willingness of the direct executor to commit the crime and the desire of the man behind in relation to the outcome as the result of his own acts. In the words of BGH,

> [...] hay casos en los que, pese a un intermediario que actúa con completa responsabilidad, la intervención del hombre de atrás conduce casi de forma automática a la realización del tipo perseguido por el mismo. [...] Si en tales supuestos el hombre de atrás actúa conociendo estas circunstancias, y en especial aprovecha la disposición incondicionada del ejecutor inmediato para realizar el tipo, y el hombre de atrás quiere el resultado como consecuencia de su propia actuación, entonces es autor en la forma de autoría mediata. Él posee el dominio del hecho. [...] También el problema de la responsabilidad en las empresas económicas puede solucionarse de esta forma.[28]

Firstly, regarding the need for the man behind to want the criminal result as a corollary of his own performance, Roxin found that there had been an undue reappointment to the subjective theory at the expense of the theory of the domain of the fact. This formulation would be devoid of any meaning, because the inductor would nurture the same desire for the criminal outcome and for the reason that would be also be feasible to say that the man behind wanted back the result as a consequence of the act of the executor[29].

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[24] Id. *Autoría y dominio del hecho en derecho penal*. Tradução da 7ª ed. alemã, 1999, de Joaquín Cuello Contreras e José Luis González de Murillo. Madrid: Marcial Pons, 2000, p. 269-280.

[25] Cf. <http://www.pucp.edu.pe/idehpucp//images/boletin_ddhh/CASOS/cccf%20-%20causa%2013-9-12-85.pdf> Accessed in 10 November 2011..

[26] Cf. <http://www.pucp.edu.pe/idehpucp//images/boletin_ddhh/CASOS/cccf%20-%20causa%2013-9-12-85.pdf> Accessed in 10 November 2011.

[27] Cf. <http://www.pj.gob.pe/CorteSuprema/salassupremas/SPT2/documentos/RN_5385-2006_2DA_SPT_160108.pdf> Accessed in 10 November 2011.

[28] BGHSt, 40, p. 2706, *apud* CABANA, Patricia Faraldo. Op. cit. p. 71. Free translation: [...] There are cases in which, despite an intermediary to act with full responsibility, the intervention of the man behind leads, almost automatically, to the achievement of the kind pursued by himself. [...] If, in such cases, the man behind acts knowing these circumstances, and in particular takes the unconditional provision of the immediate executor to carry out the type, and the man behind wants both the result as a consequence of their own performance, then he is author in the form of mediate authorship. He holds the domain of fact. [...] Also the problem of accountability in economic enterprises can be solved this way.

[29] ROXIN, Claus. *Autoría y dominio del hecho en derecho penal*. Tradução de Joaquín Cuello Contreras e José Luis González de Murillo. Madrid: Editorial Marcial Pons, 2000, p. 655; Id. *Autoria Mediata por meio do Domínio da Organização*. Tradução de José Danilo Tavares Lobato. In: GRECO, Luís; LOBATO, Danilo (Coord.). Temas de direito penal. Rio de Janeiro: Renovar, 2008, p. 340.

In regard to the issue, Kai Ambos questions whether the mention of wanting the result as an outcome of the act itself of the man behind would be irrelevant, consecrating the german jurisprudence, definitely, the control over the fact theory, or whether the Court would have adopted the subjective theory with the objective corrections coming from the control over the fact. Anyway, according to the author, "lo que es seguro es que el BGH no apoya de modo general la autoría mediata en el interés en el hecho del hombre de atrás, de modo que no retorna a la teoría subjetiva extrema".[30]

At the same time, the demand that the immediate executor halt an unconditioned disposition to commit the criminal type to characterize the domain of the will by the man behind, originally elaborated by Schroeder in the year of 1965[31], is rejected by the prevalent German doctrine. According to Roxin, even if the referred condition is absent and the subordinate refused to comply with the determination of the man behind, the success of the order would remain guaranteed by the characteristics of the power apparatus, notably the fungibility of the executors. So, seems irrelevant to the criminal resolution of the subordinate. Moreover, Roxin asserts that the unconditional disposition of the executor to perform the type, as provided in § 30, II, the StGB[32], can also occur in induction[33].

Claus Roxin, nevertheless, in a Conference held on 23 march 2006, at the close of Doctoral degree from the University Pablo de Olavide, Sevilla, has revised his original position, adding as a fourth condition to characterize the control over the organization, beyond the behest power of the man behind, the untying of the power apparatus in relation to law and fungibility of the executors, the availability considerably high of the direct executor of the

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[30] AMBOS, Kai. Dominio del hecho por domínio de voluntad en virtud de aparatos organizados de poder. Una valoración crítica y ulteriores aportaciones. Tradução de Manuel Cancio Meliá. *Revista de derecho penal y criminología*, nº 3, 1999, p. 134. Free translation: what is certain is that the BGH did not support the mediate authorship fact in interest to the man from behind, so that does not return to the subjective extreme theory.

[31] SCHROEDER, Friedrich-Christian. *Der Täter hinter dem Täter*, 1965, pp. 143 ss, *apud* ROXIN, Claus. *Autoría y dominio del hecho en derecho penal*. Tradução de Joaquín Cuello Contreras e José Luis González de Murillo. Madrid: Editorial Marcial Pons, 2000, p. 655.

[32] § 30: "(1) Wer einen anderen zu bestimmen versucht, ein Verbrechen zu begehen oder zu ihm anzustiften, wird nach den Vorschriften über den Versuch des Verbrechens bestraft. Jedoch ist die Strafe nach § 49 Abs. 1 zu mildern. § 23 Abs. 3 gilt entsprechend. (2) Ebenso wird bestraft, wer sich bereit erklärt, wer das Erbieten eines anderen annimmt oder wer mit einem anderen verabredet, ein Verbrechen zu begehen oder zu ihm anzustiften". Tradução livre: § 30: (1) Aquele que tentar induzir alguém a cometer um crime ou instigá-lo a tanto deve se sujeitar às disposições que regem os crimes tentados. A sanção deve ser mitigada de acordo com o § 49, I. O § 23, III, deve se aplicar *mutatis mutandis*. (2) Aquele que afirme sua disposição, aceite a oferta ou combine com outrem a comissão ou instigação de um crime deve se sujeitar aos mesmos termos.

[33] ROXIN, Claus. *Autoría y dominio del hecho en derecho penal*. Tradução de Joaquín Cuello Contreras e José Luis González de Murillo. Madrid: Editorial Marcial Pons, 2000, p. 655; Id. *Autoria Mediata por meio do Domínio da Organização*. Tradução de José Danilo Tavares Lobato. In: GRECO, Luís; LOBATO, Danilo (Coord.). Temas de direito penal. Rio de Janeiro: Renovar, 2008, p. 339-340; Id. Problemas de autoría y participación en la criminalidad organizada. Tradução de Enrique Anarte Borrallo. *Revista Penal*, nº 2, 1998, p. 62.

fact[34]. This last condition pointed out by Roxin, though, does not coincides strictly with the lessons of Schroeder and the German Federal Court of Justice.

According to Roxin, the wide availability of the executor to the fact does not substantiate the control of the man behind, because his freedom remains, but it is an element of the control over the fact through the control over the organization. The probability of fulfilling the command perpetrated by the superior would be increased by the condition under discussion because the integration of the front man to the power apparatus would influence him in order to make him more prepared than common criminals to practice criminal fact. Roxin says that "todos estos factores [...] conducen a una disposición al hecho de los miembros condicionada a la organización que, junto a su intercambialidade para los hombres de atrás, es un elemento esencial de la seguridad con la que pueden confiar en la ejecución de sus ordenes".[35]

Moreover, Roxin tinted the requirement of decoupling of the power structure in relation to the legal system, claiming to be sufficient to characterize the control over of the will through the control over de organization that the state apparatus distance itself from the law only with respect to criminal types performed, as occurred with the RDA in the case of deaths at the Berlin Wall[36]. Seeking to bring more concreteness in its criteria, Roxin teaches that the positive rule is void always when violates the State Law of the highest hierarchy, International Treaties, Customary International Law or Human Rights based on natural law[37].

Note that the Special Criminal Chamber of the Supreme Court of Peru, in the Fujimori Case, has positioned itself in with the lessons revised of Roxin[38]. In turn, the Peruvian National Criminal Chamber in the case Abimael Guzman, settled that, for the purpose of characterization of mediate authorship due to the control over the organization, the effective detention of the control by the man behind would set in the use of the predisposition of the executor to comply with his illicit commands[39].

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[34] Id. El dominio de organización como forma independiente de autoría mediata. Tradução de Justa Gómez Navajas. *Revista Penal*, nº 18, 2006, p. 242-248. Original title: *Organisationsherrschaft als eigenständige Form mittelbarer Täterschaft*.

[35] Ibid. p. 247. Free translation: All of these factors lead to a willingness of members to the fact that conditional on the organization, along with their interchangeability for the man behind, is an essential element of security in which they can trust the execution of its orders..

[36] Id. *Autoría y dominio del hecho en derecho penal*. Tradução da 7ª ed. alemã, 1999, de Joaquín Cuello Contreras e José Luis González de Murillo. Madrid: Marcial Pons, 2000, p. 278.

[37] ROXIN, C., <<Probleme von Täterschaft und Teilnahme>>, pág. 557 *apud* IBÁÑEZ, Eva Fernãndez. Op. cit. p. 183-184.

[38] Cf. <http://www.pj.gob.pe/CorteSuprema/spe/index.asp?codigo=10409&opcion=detalle_noticia> Accessed in 10 november 2011

[39] Cf. <http://www.haguejusticeportal.net/Docs/NLP/Peru/GuzmanReinoso_Decision_13-10-2006.pdf> Accessed in 10 november 2011.

Faced with the foregoing, it is clear that there are disagreements regarding the viability of the dogmatic figure of the mediate authorship in virtue of the control over the organization, as well as its requirements setters. Despite this, many foreign courts have applied the Roxin construction in cases of crimes determined by certain leaders of organized power structures, albeit not in a uniform way, influencing indirectly the International Criminal Law.

3 THE POSITION OF INTERNATIONAL COURTS IN CRIMINAL LIABILITY FOR CRIMES COMMITTED BY ORGANIZED STRUCTURES OF POWER

At the supranational level, there is no jurisprudential consensus about what is the most appropriate dogmatic construction to stow the criminal responsibility of hierarchic superiors that determine the commitment of crimes through the organized power structure that they guide. It seems that it is prevailing in international courts the adoption of the doctrine of joint criminal enterprise, especially in the International Criminal Tribunal for the former Yugoslavia (ICTY). Nevertheless, recently, the International Criminal Court (ICC) has enshrined in its decisions, the Roxin's theory of mediate authorship in virtue of the control over the organization at the expense of that doctrine of praetorian origin.

Thus, in this topic, the main theories regarding criminal responsibility for crimes committed by apparatuses of power and its applicability on the likes of international jurisprudence will be analyzed. Constructions elaborated based in omissive conduits, as the doctrine of the responsibility of superiors, because this article is confined to the question of attribution of criminal liability of individuals that, controlling a given organization, command actively the practice of crimes by direct executors who act independently of duress, mistake or nonimputability.

3.1 Doctrine of the *joint criminal enterprise*

The doctrine known as of *joint criminal enterprise* was initially pioneered by the ICTY trial, in the judgment of the Tadic case[40], based on judgments which have employed the notion of criminal common purpose (doctrine of *common purpose* or *common design*). From there, the praetorian construction was consecrated by the jurisprudence of several international tribunals such as the International Tribunal for Rwanda (ICTR), the Special Court of East Timor (SPSC) and the Special Court for Sierra Leone (SCSL), so that is possible to say that it

[40] Case IT-94-1-A, judged in 15 July 1999 by the Appeal Chamber of ICTY. Cf. < http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> Accessed in 10 november 2011.

integrates customary international law. Moreover, it appears that this mode of criminal liability is supported by normative, even implicitly, in arts. 7 (1) of the ICTY Statute[41],, 6 (1) of the ICTR Statute[42], 6 (1) of the SCSL Statute[43] and 14.3 (a) and (d) of Regulation 2000/15 of the United Nations Transitional Administration in East Timor (UNTAET) [44].

As recognized by the Appeal Chamber of ICTY in the case Tadic, there are three forms of joint criminal enterprise, known as: basic, systemic and extended[45]. The basic form or *joint criminal enterprise* I concerns the cases of co-authorship in which several people with a common purpose share the intent as to a particular criminal result, although some of them do not practice the criminal act personally. The systemic form or *joint criminal enterprise* II is a variant of the first category[46], including the cases of the concentration camps in the Second World War, in which the hierarchic authority is co-author of the crime for the reason of its participation in the execution of the repression system, with awareness and willingness to promote the project of common criminal mistreatment of detainees. Generically, this category is concerning any detention camp in which a common criminal plan is finalized against detainees[47]. Last, the extended form or the *joint criminal enterprise* III referees to the criminal responsibility for the acts that, despite not belonging to the common criminal design, were a natural and foreseeable consequence of its realization, with the assumption of the risk of producing a result not agreed by some members of the joint criminal enterprise (dolo eventual).

Specifically in the Tadic case, the Appeal Chamber of the ICTY used the third form of joint criminal enterprise to base the responsibility of the accused for the murder of five men in

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[41] Caso IT-94-1-A, julgado em 15/07/99 pela Câmara de Apelação do ICTY. Cf. < http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> Acesso em 10/11/11.

[42] Art. 6 Individual criminal responsibility (1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

[43] Art. 6 Individual criminal responsibility (1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

[44] Art. 14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person: (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; *[…]* (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or (ii) be made in the knowledge of the intention of the group to commit the crime

[45] Caso IT-94-1-A, §§ 196 a 220. Cf. < http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> Acesso em 10/11/11.

[46] Por isso, algumas decisões do ICTY designam as primeiras duas modalidades de *joint criminal enterpise* de formas básicas.

[47] Caso IT-98-30/1-A, julgado em 28/02/05 pela Câmara de Apelação do ICTY, § 182. Cf. < http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf> Acesso em 10/11/11.

the village of Jaskici during a conflict with an armed group to which he belonged. Although Ducko Tadic has not personally committed the crimes, the Chamber found that he took the risk of producing them by integrating the joint criminal enterprise with the common purpose of removing non-Serbs from the spot. In his words, "the Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk"[48].

It should be noted that Kai Ambos does not consider the extended form of joint criminal enterprise as a mode of co-authorship, but as an "extension of the punishment in the sense of responsibility for belonging to a criminal organization"[49] and, therefore, open to criticism. Thus, unlike what happens with the basic and systemic forms, that would fall in the art. 25 (3) (d) of the Rome Statute[50], and not in art. 25 (3) (a), the second alternative[51].[52]

Moreover, with regard to basic and systemic forms, it is important to note that the ICTY recognizes three modes of subject's participation in a joint criminal enterprise, either directly practicing the crime agreed, being present at the time of practice or encouraging it, or yet, through his position of authority or of their function in the system in which the crime is committed. In this sense, it is worth transcribing portion of the judgment given by the 2nd Trial Chamber in the case Krnojelac[53] and corroborated later by the court[54]::

> 81. A person participates in that joint criminal enterprise either:
> (i) by participating directly in the commission of the agreed crime itself (as a

[48] Case IT-94-1-A, § 232. Cf. < http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> Accessed in 10 november 2011.

[49] AMBOS, Kai. *A parte geral do direito penal internacional:* bases para uma elaboração dogmática. Tradução de Carlos Eduardo Adriano Japiassú e Daniel Andrés Raizman. Revisão de Pablo Alflen e Fabio D´Avila. Atualização de Kai Ambos e Miguel Lamadrid. Ed. brasileira reform. e atual. São Paulo: RJ, 2008, p. 93.

[50] Art. 25 Individual criminal responsibility *[…]* (3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: *[…]* (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime

[51] Art. 25 Individual criminal responsibility *[…]* (3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible

[52] AMBOS, Kai. Op. cit. p. 214.

[53] Case IT-97-25-T, §§ 81 e 82. Cf. < http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf> Accessed in 10 november 2011..

[54] Case IT-97-25-A, § 80. Cf. < http://www.icty.org/x/cases/krnojelac/acjug/en/krn-aj030917e.pdf> Accessed in 10 november 2011; Case IT-98-32-T, § 67. Cf. < http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf> Accessed in 10 november 2011.

> 82. If the agreed crime is committed by either of the participants of the joint criminal enterprise, all participants of the company are responsible for the crime, regardless of the role played by each in its commission.

> principal offender);
> (ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or
> (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.
> 82. If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission.

Based on the foregoing, it is clear that, for purposes of addressing the issue regarding the criminal responsibility of hierarchic superiors that determine the commitment of crimes through organized structures of power, bear particular relevance the basic and the systemic forms of the doctrine of *joint criminal enterprise*, in the third mode of participation above-mentioned. Have being set such premise, it will be highlighted some judgments that the present praetorian construction was invoked under this bias.

On 2nd August 2001, the Trial Chamber of the ICTY found that General Krstic[55], under the condition of political and military authority of the Drina Corps of the Bosnian Serb Army (VRS), planned the forcible transfer of the Bosnian Muslim population of Srebrenica. Then, the Court sentenced him as a member of the joint criminal enterprise that effected the removal of women, children and elderly people of that locality.

In addition, although he has not directly designed or practiced crime, Krstic was convicted as part of the joint criminal enterprise that aimed the genocide of Bosnian Muslim men from Srebrenica in virtue of having coordinated the massacre by their subordinates. In the words of the court, "General Krstic did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign"[56]. It should be notes, however, that, subsequently, for factual reasons, the Appeals Chamber of the ICTY held that Krstic had not composed the joint criminal enterprise for the genocide of Bosnian Muslims at Srebrenica, but had acted only as a criminal participant[57].

Furthermore, the Trial Chamber of the ICTY, on 11 November 2001, condemned Kvocka, deputy commander of the Omarska detention camp, as co-author of the crimes

[55] Case IT-98-33-T. Cf. < http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> Accessed in 10 november 2011.
[56] Case IT-98-33-T, § 644. Cf. < http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> Accessed in 10 november 2011.
[57] Case IT-98-33-A, judged in 19 April 2004 by the Appeal Chamber of ICTY. Cf. < http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf> Accessed in 10 november 2011..

committed against non-Serb prisoners[58]. According to the court, the accused, using his position of authority, has contributed in a relevant way to the functioning of the joint criminal enterprise that was active in that camp. As observed:

> Due to the high position Kvocka held in the camp, the authority and influence he had over the guard service in the camp, and his very limited attempts to prevent crimes or alleviate the suffering of detainees, as well as the considerable role he played in maintaining the functioning of the camp despite knowledge that it was a criminal endeavor, the Trial Chamber finds Kvocka a coperpetrator of the joint criminal enterprise of Omarska camp.[59]

The Appeals Chamber of the ICTY, confirming the judgment rendered by the courts *a quo*, explained that the criminal co-authored offense in the form of *joint criminal enterprise* does not depend on the personal fulfillment of the objective element of the crime - *actus reus* - by all members of the enterprise. Moreover, even it would not be necessary the physical presence of all subjects at the time of criminal activity, which occurs, mainly, in cases of crimes committed by authorities through a power structure. Thus, the Court found to be sufficient for the configuration of co-authorship in the joint criminal enterprise that the subject has given an essential input to the commission of the crime[60].

It should be pointed out, though, that on 16 June 2004, the Trial Chamber of the ICTY rejected the request for acquittal made by Slobodan Milosevik, because they saw the existence of a just cause for the charges against the former president of Serbia at the time[61]. According to the court, there would be minimal probative evidence that the defendant, integrating the joint criminal enterprise with other Bosnian Serb leaders, was co-author of the genocide committed against the Muslim population of the country. As an observation, the criminal proceedings brought against Milosevik ended before the final decision, since the accused died on 11 March 2006.

Considering the above cases, it is clear that the jurisprudence of the ICTY is peaceful towards the application of the doctrine of *joint criminal enterprise* to cases of crimes committed through organized structures of power. It should be noted that such an approach was

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[58] Case IT-98-30/1-T. Cf. < http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf> Accessed in 10 november 2011..
[59] Case IT-98-30/1-T, § 414. Cf. < http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf> Accessed in 10 november 2011..
[60] Case IT-98-30/1-A, §§ 99 to 112. Cf. < http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf> Accessed in 10 november 2011.
[61] Case IT-02-54-T. Cf. < http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm> Accessed in 10 november 2011.

followed by other international tribunals such as the ICTR[62], the SCSL[63] and the SPSC[64], being consolidated as customary international law.

3.1 The Control Over the Organization Theory

In contrast to the view that has been proved widely prevalent in the jurisprudence of international courts, the ICC has recently established the applicability of the Roxin theory of the control over the organization rather than the doctrine of *joint criminal enterprise* for cases in which the leader of the apparatus of power automatic operation determines the commission of the crime through it, controlling the criminal fact. Note, therefore, that the German construction acquires importance directly to the International Criminal Law.

In 29 January 2007, the Pre-Trial Chamber I of the ICC rendered a decision to confirm the charges brought against Thomas Lubanga[65], in which there are three positions that distinguishes authorship and criminal participation, namely the objective, the subjective and the objective-subjective. In the wake of the court's lessons, for the objective conception is the criminal author who practices directly the objective type in its entirety or not. In the other hand the subjective current operates differentiation based on subjective element, and author who has the courage to commit the crime. Finally, for the objective-subjective current, the authorship should be given to the one who holds the domain of the criminal fact, realizing a significant contribution - not necessarily in a direct way - to the crime and having the intention of guiding it.

According to the Court, the praetorian construction of the joint criminal enterprise follows the subject current, considering that Art. 25 (3) of the ICC Statute would have adopted

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[62] F. ex.: Case ICTR-95-1, judged ni 21 May 1999 < http://www1.umn.edu/humanrts/instree/ICTR/KAYISHEMA_ICTR-95-1/KAYISHEMA_ ICTR-95-1-T.html> Acesso em 10/11/11; Case ICTR-01-65-T, judged in 11 September 2006, < http://liveunictr.altmansolutions.com/Portals/0/Case/English/Mpambara/judgement/120906.pdf> Accessed in 10 november 2011.

[63] P. ex.: Case 04/2001, judged in 10 November 2011 , < https://www.wcl.american.edu/warcrimes/wcro_docs/collections/ spscet/SPSC,_East_Timor_-_Judgmts,_Indmts_&_Docs/Cardoso,_Jose/> Accessed in 10 november 2011; Case 2a/2004, judged 12 April 2005, < https://www.wcl.american.edu/warcrimes/wcro_docs/collections/spscet/ SPSC,_East_Timor_-_Judgmts,_Indmts_&_Docs/De_Deus,_Domingos_(Baboe_Letoen)/> judged in 10 November 2011; Case 34/2003, judged 27 April 2005, < https://www.wcl.american.edu/warcrimes/wcro_docs/collections/spscet/SPSC,_East_Timor_-_Judgmts,_Indmts_&_Docs/Pereira,_Francisco/> judged in 10 November 2011.

[64] F. ex.: Case SCSL-04-15-T, judged in 25 February 2009, < http://www.sc-sl.org/LinkClick.aspx?fileticket=Aokn UKBsH50%3d&tabid=215> Acesso em 10/11/11; Caso SCSL-04-14-A, julgado em 26/10/09, < http://www.sc-sl.org/LinkClick.aspx?fileticket=H53fWpjVx8k%3d&tabid=218> Acesso em 10/11/11.

[65] Case ICC-01/04-01/06. Cf. < http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> Accessed in 10 November 2011.

the control over the organization theory as a delimitative criterion of the authorship and of the criminal participation. More specifically, the Court affirmed the adoption of the figure of the authorship behind the author inside the modality of the mediate authorship by the referred precept, opening the international jurisprudence to the control over the organization theory. In the words of the Chamber:

> The use of the phrase "regardless of whether that other person is criminally responsible" in article 25(3)(a) of the Statute militates in favour of the conclusion that this provision extends to the commission of a crime no only through a innocent agent (that is, through another person who is not criminally responsible), but also through another person who is fully criminally responsible.[66]

A little later, the Pre-Trial Chamber III of the ICC hinted, though not expressly, the theory of mediate authorship by virtue of the organized apparatus of power in a decision of the request for arrest Bemba Gombo[67]. In that opportunity, the Court understood that would exist the minimal probative evidence in the sense that the charged person held the domain of the criminal fact depending on the position of authority held in the military organization MLC (Movement for the Liberation of Congo).

Still in relation to the Bemba case, it is important to highlight that the Pre-Trial Chamber II, in the confirmation decision of the accusations against the defendant, followed the position adopted in the case Lubanga to confirm the consecration of the control over the fact theory by the ICC Statute [68]. Furthermore, the Pre-Trial Chamber I, in the cases Katanga[69] and Omar[70], invoked expressly the mediate authorship theory in virtue of the control over the organization over the doctrine of the *joint criminal enterprise* in the cases of crimes practiced through organizes power structures.

It appears, therefore, that in the wake of the jurisprudence of some foreign courts[71], the International Criminal Court has been pacified towards profiling of objective-final theory, pioneered by Hans Welzel work in "Studien zum system des strafrechts"[72] and developed by

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[66] Case ICC-01/04-01/06, § 339.
[67] Case ICC-01/05-01/08, judged in 10 June 2008, § 78. Cf. < http://www.icc-cpi.int/iccdocs/doc/doc532280.pdf> Accessed in 10 November 2011.
[68] Case ICC-01/05-01/08, judged in 15 June 2009. Cf. < http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> Accessed in 10 November 2011.
[69] Case ICC-01/04-01/07, judged in 30 September 2008 30/09/08. Cf. <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> Accessed in 10 November 2011.
[70] Case ICC-02/05-01/09, judged in 04 March 2003. Cf. <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> Accessed in 10 November 2011.
[71] See Chapter 2 of this article.
[72] Translation: "*Studies on the system of criminal law*".

Roxin in his monograph "*Täterschaft und Tatherrschaft*"[73], including those related to the figure of the mediate authorship as a modality of the domain of the fact by virtue of the domain of the will. So, while that for the doctrine of *joint criminal enterprise*, the man behind and the direct executor would be co-authors with the fulcrum in the subjective element, for the control over the organization theory he would be the mediate author of the offense, without prejudice to the criminal liability of the immediate author.

In this context, it is important to highlight that Kai Ambos also defends that the control over the organization theory is more adequate for the International Criminal Law. However, he admits the compatibility of the control over the organization theory with the doctrine of the joint criminal enterprise, with the eagerness to make unnecessary the use of subjective theory.[74] We understand that the viability of this conciliation results from its position that only the agent who integrates the dome of the power apparatus could be the mediate author by exercising the absolute domain *through* and *over* the organization, while the other agents would be criminal co-authors, because, having submitted themselves to their superiors, they would detain a perturbed domain of the fact *inside* the organization in relation to its on subordinates, or even just participants[75]. It is worth transcribing part of the lessons of Kai Ambos:

> No caso de que não se apresentem os pressupostos do domínio por coação ou por organização – como se pressupõe –, leva-se em consideração só uma co-autoria ou uma instigação. Deste modo, não se abandona a diferença estrutural entre autoria mediata e co-autoria (imputação vertical *versus* horizontal) e a co-autoria não se degrada a "uma espécie de forma mísera da autoria mediata", e, sim, leva-se em conta a circunstância de que por meio de um planejamento detalhado é possível um co-domínio da execução do ato.
> *[...]*
> Aqui, aqueles que tomaram parte no planejamento nem sempre poderão ser condenados como autores mediato em virtude do domínio da organização – pensando-se somente no caso *Eichmann* –, de modo que só uma responsabilidade em co-autoria compreende satisfatoriamente o conteúdo de injusto por eles realizado.[76]

[73] V. Spanish version: ROXIN, Claus. *Autoría y dominio del hecho en derecho penal*. Translation of German 7ª ed., 1999, de Joaquín Cuello Contreras e José Luis González de Murillo. Madrid: Marcial Pons, 2000.
[74] AMBOS, Kai. *A parte geral do direito penal internacional:* bases para uma elaboração dogmática. Tradução de Carlos Eduardo Adriano Japiassú e Daniel Andrés Raizman. Revisão de Pablo Alflen e Fabio D´Avila. Atualização de Kai Ambos e Miguel Lamadrid. Ed. brasileira reform. e atual. São Paulo: RJ, 2008, p. 205-211, 233 e 270.
[75] Ibid. p. 222; Id. Dominio por organización. Estado de la discusión. Tradução de Ezequiel Malarino. *Revista Brasileira de Ciências Criminais*, vol. 15, nº 68, 2007, p. 90-96.
[76] Id. *A parte geral do direito penal internacional:* bases para uma elaboração dogmática. Tradução de Carlos Eduardo Adriano Japiassú e Daniel Andrés Raizman. Revisão de Pablo Alflen e Fabio D´Avila. Atualização de Kai Ambos e Miguel Lamadrid. Ed. brasileira reform. e atual. São Paulo: RJ, 2008, p. 222-223.

Similarly, the Appeal Chamber of the ICTY in the case Vasilejivic, judged on 25 Februar, 2002, addressed the joint criminal enterprise as consistent with the domain theory of the fact[77]. Thus, despite not making explicit reference to the organization's domain, it appears that the court has adopted, to some extent, Kai Ambos argument.

Meanwhile, Claus Roxin in its approach to the concurso de pessoas in light of the objective-subjective theory, does not consider the viability of joint criminal enterprise, because he believes that all agents holding power of command within the autonomous organized apparatus could be charged criminally as mediate authors, regardless their hierarchical position, providing in a chain of mediate authors. That is, once it is established that the agent, albeit subordinate to the command above, has the control over a portion of the organization, urging it automatically depending on the fungibility of his subordinates, would remain the domain of the willingness characterized through the control over the organization. [78]

In the wake of Roxin's thought, it should be noted that the Appeal Chamber of ICTY, at the time of the trial of the case Stakic on 22 march 2006, countered the doctrine of joint criminal enterprise to the domain of the fact theory[79]. This time, it seems that the ICTY, as stated by the ICC and at discordance with the position of Kai Ambos, has espoused the subjective view of the joint criminal enterprise, which is why the recent court preferred to follow the objective-final theory, including the figure of mediate authorship.

In this context, it should be noted, though, that the Board of ECCC's Pre-trial in the case Kaing, also addressed the praetorian construction of the joint criminal enterprise as a subjective theory. The court, nevertheless, has not signed on positioning around the *correction* of this type of criminal liability. [80]

Before all the above, it is possible that the Roxin theory of the control over the organization is acquiring growing importance in international criminal law, both indirectly, considering the jurisprudence of foreign courts, or directly, with its adoption by the

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[77] Case IT-98-32-A. Cf. < http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf> Accessed in 10 November 2011.

[78] ROXIN, Claus. *Autoría y dominio del hecho en derecho penal*. Tradução da 7ª ed. alemã, 1999, de Joaquín Cuello Contreras e José Luis González de Murillo. Madrid: Marcial Pons, 2000, p. 275-276; MUÑOZ CONDE, Francisco. Problemas de autoría y participación en el derecho penal económico, o ¿cómo imputar a título de autores a las personas que sin realizar acciones ejecutivas, deciden la realización de un delito en el ámbito de la delincuencia económica empresarial? *Revista Penal*, nº 9, 2002, p. 59-98; SCHÜNEMANN, Bernd. Cuestiones básicas de dogmática jurídico-penal y de política criminal acerca de la criminalidad de empresa. *Anuario de Derecho Penal ciencias penales*, vol. 41, nº 2, 1998, p. 529-558.

[79] Case IT-97-24-A. Cf. < http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf> Accessed in 10 November 2011.

[80] Case 001/18-07-2007-ECCC/OCIJ (PTC 02), judges in 05 December 2008. Cf. <http://www.eccc.gov.kh/english/cabinet/courtDoc/198/D99_3_42_EN.pdf> Accessed in 10 November 2011.

International Criminal Court . This fact comes with robust and progressive host of the theory of the domain of the fact, as a criterion of demarcation of authorship and criminal participation.

4. CONCLUSION

This article sought to address the tormenting question about criminal responsibility of hierarchical superiors who determine the criminal offense through the organized power structure guided by them. As it was demonstrated, two theories emerge most prominently in the outline of international criminal law with subsidies for the resolution of the matter, namely the *joint criminal enterprise* and the control over the organization.

To the praetorian construction of the *joint criminal enterprise,* the chief of the organization should be held responsible as a co-author along with the direct executor of the crime, once evidenced its participation in a joint criminal enterprise. Notice that this doctrine is being adopted by International Courts, notably the ICTY, under an optical predominantly subjective.

In turn, the control over the organization theory advocates that the man behind should be imputed as the mediate author of the crime which was determined by him when there are proven requirements that characterize this type of control over the fact in virtue of the control over the organization, without prejudice to the responsibility of immediate executor. Such construction is a corollary of the objective-subjective theory which delimitates the authorship and the criminal involvement and focuses on the vertical structure of the relationship between the hierarchic superior and the executor.

Finally, it was presented an intermediate position that reconciles the doctrine of joint criminal enterprise with the figure of the mediate authorship. Accordingly, Kai Ambos, espousing the objective-subjective theory teaches that only the man of the dome of the power structure could be responsible as a mediate author of the offense determined by him, although highlighted the detention of the control over the organization. The other agents that are in middle tier should be charged as co-authors in the light of the functional domain of the fact and of the joint criminal enterprise, or as participants, if the given contribution was considered incidental.

It is disagreed, however, that placement of compatibilizer Kai Both because, in the wake of the teachings of Roxin, we understand that all agents holding power of command within the

autonomous power structure can be blamed as perpetrators mediate, even those who occupy a intermediate rank, although it concretely demonstrated mastery of at least part of the organization. Thus, once the domain theory perfilhada fact as delimitativa authored and criminal involvement, envisions to be the author of office figure more suitable for the attribution of criminal superiors who, through the structure of automatic operation, determine the practice criminal offense to be made directly by the frontrunners, with the success of the criminal enterprise ensured especially by fungibility of performers.

As shown above, the control over the organization theory has received shelter by various foreign courts, albeit not uniform, since there are many controversies about their requirements setters. Moreover, in view of supranational jurisprudence, it appears that the doctrine of joint criminal enterprise can be considered part of customary international law because of the strong reception it received, especially by the ICTY. Recently, however, the Roxin construction is also gaining importance in that harvest, given the express consecration of the mediate authorship because of organized apparatus of power by the ICC over the joint criminal enterprise.

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