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# On Functional Perpetration in Dutch Criminal Law. Some reflections sparked off by the Case against the former Peruvian president Alberto Fujimori

By Prof. Dr. Harmen van der Wilt, Amsterdam

## I. Introduction

In the case under scrutiny, the former president of Peru, Alberto Fujimori, has been convicted for his involvement in murder and serious assault. The Supreme Court qualified the offences as ‘crimes against humanity, as they had been committed within a pattern of gross and systematic violations of human rights.’<sup>1</sup> This special classification is interesting, as crimes against humanity belong to the subject matter jurisdiction of the International Criminal Court.<sup>2</sup> Fujimori’s capacity as former president of Peru would not have impeded the International Criminal Court from exercising jurisdiction.<sup>3</sup>

For several reasons, however, Fujimori could not have stood trial before the ICC. First of all, the Court lacks temporal jurisdiction, as the crimes have been committed in the early nineties, *id est* before the Statute entered into force (1.7.2002).<sup>4</sup> And even if we, for the sake of the argument, abstract from the obstacles deriving from the prohibition of retroactive application, it would be highly unlikely that the ICC would have considered the case to be admissible. After all, the Peruvian authorities have demonstrated to be perfectly capable and willing to carry out investigations and prosecute the former president.<sup>5</sup>

The potential concurrency between international and domestic jurisdictions triggers interesting questions as to the interaction and hierarchy between those jurisdictions. Should domestic jurisdictions faithfully coin the standards which have been developed at the international level? Or should international tribunals be equally receptive to and adopt concepts which emerge from national legal systems? To be sure, these options are not mutually exclusive. International crimi-

nal law will probably benefit from a free exchange of concepts and standards between international and domestic jurisdictions. Issues do not only arise at the level of the proper interpretation of the elements of crimes, but also in the context of the choice of modes of criminal responsibility and the assessment of justifications and excuses.<sup>6</sup>

This short essay will focus on the mode of individual criminal responsibility. The Peruvian Supreme Court has predicated Fujimori’s conviction on ‘indirect perpetration through control over another person’, or, to be more precise, through the control over an organization. Although Fujimori did not personally commit the crimes, his position at the apex of the Peruvian political and military apparatus ensured him that the crimes were committed by subordinate ‘cogs in the machine’.<sup>7</sup> The organization over which he exercised complete control and power, served him as a tool to accomplish his goals. Without having to order and steer the physical perpetrators personally, Fujimori could be confident that his decisions and orders would reach the lowest levels of execution through chains of command and lines of communication. He could find support in a large reserve of ‘willing executioners’. Even if some of them would refuse or resist, they could be easily replaced by other volunteers. By extensively quoting German doctrine, the Peruvian Supreme Court pledged allegiance to the *auctor intellectualis* of this famous *Organisationsherrschaftslehre*, Claus Roxin, who has developed and refined the concept.

As my German and Peruvian colleagues will discuss the elements of this doctrine and its application by the Peruvian courts in detail, I will focus on the kindred concept of ‘functional perpetration’ which has made headway in Dutch criminal law. Section 2 of this essay explores the genesis and nature of this doctrine. In section 3 I will investigate the similarities and distinctions between both concepts. I will try to demonstrate that, although ‘functional perpetration’ has definitely a different pedigree and *champ d’application* from the German concept, both concepts show remarkable resemblance when applied in the context of large state organizations which engage in international crimes. Finally, section 4 discusses whether the concepts of *Organisationsherrschaft* and functional perpetration are implicitly or explicitly incorporated in the Rome Statute and therefore may serve the ICC as useful and lawful devices to sustain the responsibility of political and military leaders. A short discussion of recent case law of the Pre Trial Chambers of the ICC will reveal that the doctrines can indeed boast upon a favourable reception.

<sup>1</sup> Corte Suprema de Justicia de la República ( Sala Penal Especial), 7 abril 2009, *In re* Fujimori, §§ 710-717; (Summary of the case in German by Prof. Kai Ambos).

<sup>2</sup> Rome Statute of the International Criminal Court, Article 7.

<sup>3</sup> Compare Article 27 (1) of the Rome Statute: ‘This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government [...] shall in no case exempt a person from criminal responsibility under this Statute [...]’ See also: ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), ICJ Reports 2002, 14 February 2002, 3, § 61 and – in relation to the Special Court for Sierra Leone –: Prosecutor v. Charles Taylor, Decision on Immunity from Jurisdiction, Appeals Chamber, SCSL-2003-01-I-059, 31. May 2004, §§ 43-54.

<sup>4</sup> Rome Statute, Article 11.

<sup>5</sup> The principle of complementarity dictates that the Court is only to exercise jurisdiction, whenever a state appears to be unable or unwilling to genuinely to Carry out investigations or prosecution; see paragraph 10 of the Preamble, article 1 and article 17 of the Rome Statute.

<sup>6</sup> The present author has reflected on the issue in detail in: *Van der Wilt*, ‘Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court’, *International Criminal Law Review* 8 (2008), 229-272.

<sup>7</sup> *In re* Fujimori, §§ 745-748.

## II. On the origins and nature of functional perpetration in Dutch law

The concept of functional perpetration is largely a jurisdictional artifact, initially construed for economic offenses; it has not been codified in statutory law.<sup>8</sup> The gist of the concept entails that employers and managerial staff are capable of *procuring* economic offences by prompting others to execute the physical act. Functional perpetration reflects both social/economic developments in Dutch society after World War II and a – concomitant – different approach in criminal law doctrine towards *actus reus*. Economic growth, propelled by active governmental interference, implied corporate expansion with increasing functional diversification. A host of new legislation in the realm of safety regulations, fair competition and foreign trade, augmented the risk of economic offenses, while challenging the prevailing approach of ‘criminal perpetration’. The 19<sup>th</sup> century doctrine of ‘willed bodily movement’ appeared to be outmoded and inadequate,<sup>9</sup> as it ignored that employers and managers, rather than their subordinates, had both the power to accomplish those offences and reaped the benefits of ‘not sticking to the rules’.<sup>10</sup> Such new perceptions paved the way for the acceptance of a more abstract and teleological interpretation of human action in criminal law. Not the assistant at the counter who sold tainted meat to the customer, but the owner of the butcher shop should incur criminal responsibility for violation of the Food and Drugs Act. Not the truck driver who passed sleepless hours at the steering wheel of his lorry should be held accountable for breaching the regulations governing driving hours, but his boss. It was gradually taken for granted that this new approach did not overstretch the meaning of *actus*

<sup>8</sup> Although special legislation, like the Act on Fertilizers (1947), explicitly refers to the concept by providing that ‘selling’ includes ‘making someone to sell’, ‘offering’ includes ‘making someone to offer’ and ‘delivering’ includes ‘making someone to deliver’; see *van Woensel*, In de dadersstand verheven; Beschouwingen over functioneel daderschap in het Nederlandse strafrecht (‘Elevated to Perpetration; Reflections on Functional Perpetration in Dutch Criminal Law’), Arnhem, 1993, p. 84.

<sup>9</sup> In this sense G. A. *van Hamel* (revised by J.V. van Dijck), *Inleiding tot de studie van het Nederlandsch Strafrecht* (‘Introduction to the study of Dutch Criminal Law’), Den Haag 1927, p. 187; ‘De daad is eene spierbeweging die zich vertoont als uiting van de wil’ (The act is a muscular movement which demonstrates itself as an expression of the will’).

<sup>10</sup> As is well known, such ideas had been preceded by developments in German Legal doctrine, which equally questioned the validity of mechanistic theories of action, compare Hans Welzel’s *Finale Handlungslehre* (Studien zum System des Strafrechts, ZStW 58 (1938), 491.) For an English synopsis of Welzel’s views, see *Fletcher*, *Basic Concepts of Criminal Law*, Oxford/New York, 1998, pp. 52 (53); on Welzel’s influence on the structure of crime see also K. *Ambos*, *Toward a universal system of crime: Comments on George Fletcher’s Grammar of Criminal Law*, *Cardozo Law Rev.* 28 (2007) 2647, at 2649 et seq.

*reus*. On the contrary: depicting the indirect perpetrator as ‘merely’ a participant was considered as somewhat contrived.

The Dutch Supreme Court introduced the concept of ‘functional perpetration’ in the so called ‘Iron wire’-case.<sup>11</sup> In this case, the owner of a one man’s business stood trial for having completed – through his export manager – a forged form in order to obtain an export license for iron wire to Finland. The accused’ main defense was that he neither had completed or had sent the form, nor had exported the merchandise himself. The Supreme Court rejected the rather broad opinion of the Court of Appeal which had held that all administrative acts which had been performed by a subordinate in accordance with his general assignment within the enterprise, could be attributed to the owner of a one man’s business, irrespective of whether the latter was ignorant of those activities or not. Instead, the Supreme Court carefully drew the limits of ‘functional perpetration’, by emphasizing that “acts, such like these, as completing forms in violation of the law, sending those forms to the Import and Export Office and the export of merchandise, could only then be qualified as ‘acts of the accused’, if he had the power of decision whether those acts occurred or not, and if those acts belonged to the realm of activities which the accused, as appearing from the general course of daily events, accepted or used to accept.”<sup>12</sup>

The ‘power of decision’- and ‘acceptance’ standards have made an impressive career in Dutch criminal law, as they came to sustain the criminal responsibility for both legal entities and for those who are de facto in charge (*factual leadership*).<sup>13</sup> The power of decision connotes control and command over the acts, in the sense that the accused could have interfered in order to prevent them from happening.<sup>14</sup> A power to prevent and stop the acts obviously implies a certain consciousness of their (potential) occurrence, but the ‘acceptance’-standard which represents the subjective element or *mens rea* of the construction, does not require actual knowledge of the specific acts that are charged. It suffices that the accused was abreast of similar activities which were directly related to those constituting the basis of the criminal charge.<sup>15</sup>

<sup>11</sup> Supreme Court, 23 February 1954, NJ 1954, 378.

<sup>12</sup> *Ibidem*, translation by the author.

<sup>13</sup> Corporate (criminal) liability and criminal responsibility for those who execute a leadership position within a corporate entity were officially introduced in Dutch Penal Code in 1976.

<sup>14</sup> See B.V.A. Röling in his annotation of the ‘Iron Wire’-case. The standard is wider than ‘active instruction’, as the Supreme Court elucidated in a case in which a discotheque stood trial – as a legal entity – for having discriminated against Turkish customers. The latter had been refused entry by the gate keeper, Supreme Court, 14 January 1992, NJ 1992, 413.

<sup>15</sup> See, in connection with criminal responsibility of de facto leadership: Supreme Court, 16 December 1986, NJ 1987, 321 (Slavenburg(II) beschikking).

One of the most important questions – and obviously a crucial one for the purposes of this essay – is whether the concept of functional perpetration could find application outside the scope of economic crime. Could someone incur criminal responsibility as a ‘functional perpetrator’ of ordinary crimes, such as ‘theft’, ‘extortion’ and ‘murder’?<sup>16</sup> The Dutch Supreme Court answered the question in the affirmative in an interesting case on abortion.<sup>17</sup> The accused, a gynecologist, had been convicted for ‘having deprived a fetus of its life, by conducting the following acts: he had, as a gynecologist, examined the pregnant woman; he had hospitalized the woman and had assigned the assistant doctor to administer certain medication, in order to prompt the premature and lifeless birth of the fetus, which was intended and indeed occurred.’<sup>18</sup>

The case sheds an interesting light on the nature of functional perpetration. The first examples of functional perpetration in the realm of economic crime suggest a rather passive attitude. The ‘man in charge’ seems to connive, condone or fail to prevent offences, but does not actively pursue their commission. The functional perpetrator considers economic offences as ‘part of the game’, mirroring the dark side of commercial enterprise. Rather than actively countering them which would probably backfire on his profits, he chooses to condone their occurrence and close his eyes. From this perspective, functional perpetration connotes ‘crimes of omission’ and the *mens rea* concept of *dolus eventualis*.<sup>19</sup>

The case of the gynecologist demonstrates that such a picture of functional perpetration is slightly misleading. In the present author’s view, the omission version of functional perpetration rather indicates the utter limits of the concept. The characteristic feature of functional perpetration is that the accused, *by virtue of his function and his authority over others*, is capable of prompting others to commit crimes. De Hullu points out that, in the case of the gynecologist, modes of participation, like perpetration by means of another person, incitement or co-perpetration, could easily have sustained the conviction of the accused.<sup>20</sup> Van Woensel highlights in particular the close relationship between functional perpetration and perpetration ‘by means of another person’.<sup>21</sup> The major distinction between the two concepts is that Dutch criminal law requires that, in case of perpetration by means of another person, the immediate and physical perpetrator lacks criminal

responsibility, because of his age, he acts under excusable duress or is misguided (by error of law or of fact). From this perspective, functional perpetration serves as an expansion of criminal responsibility, covering both the man behind the screens and the guilty physical perpetrator. Wielding power over subordinates suggests a hierarchical relationship within a structured organisation.<sup>22</sup> It depends on the specific aims and objectives of the organization and the power of leaders within that organization to materialize those objectives through other persons whether those leaders can be qualified as functional perpetrators. Those are exactly the features of functional perpetration which make a rational comparison with *Organisationsherrschaft* useful and feasible.

### III. Functional Perpetration and Organisationsherrschaft: Distinctions and Similarities

The previous section has made it abundantly clear that the concepts of *Organisationsherrschaft* and functional perpetration do not fully correspond. Different from *Organisationsherrschaft*, functional perpetration is not predicated on a rigid command structure; it rather presumes the *potential* to steer – and correct – the conduct of subordinates. Furthermore, the organization in which or through which the functional perpetrator acts, need not have strayed from the Righteous course; offences may just be incidents in a corporation which pursues lawful goals by lawful means, a corporation even with an unblemished reputation. Thirdly, functional perpetration does not require that the physical perpetrator serves as fungible tool in the hands of the man behind the scenes; the former may be a relatively autonomous agent.<sup>23</sup> The only conditions are that the offences have been committed within the scope of the organization’s daily business and that the employer or boss could have intervened to stop his subordinate from persisting in the evil. A hotel owner, for instance, cannot be held criminally responsible for the bell-boy’s indecently assaulting the waitress. Finally, and this is to a certain extent the mirror image of the previous aspect, the physical perpetrator need not be a ‘willing executioner’ himself; he may simply be ignorant of the fact that he acts unlawfully, or lack the quality which is required for the commission of the crime.<sup>24</sup> In this sense, functional perpetra-

<sup>16</sup> See Van Woensel (Fn. 8), p. 83-88 and de Hullu, *Materieel strafrecht; over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (‘Substantive law; on general concepts of criminal responsibility in Dutch law’), Deventer, 4th ed. 2009, pp. 159-161.

<sup>17</sup> Supreme Court, 20 May 1990, NJ 1991, 217.

<sup>18</sup> Ibidem, translation by the author.

<sup>19</sup> In his interesting and well-informed contribution on the topic, E. Gritter defends this too narrow approach of ‘functional perpetration’ as an ‘Uneigentliches Unterlassungsdelik’t’, Gritter, in: Van der Neut/Keulen (Ed.) *Daderschap en Deelneming* (‘Perpetration and Participation’), Deventer, 2007, pp. 22-24.

<sup>20</sup> De Hullu (Fn. 16), p. 160.

<sup>21</sup> Van Woensel (Fn. 8), pp. 107-139.

<sup>22</sup> Compare also De Hullu (Fn. 16), p. 159 who does not consider the nature of the crime to be decisive, but rather the factual context of whether an organisation with a certain hierarchical structure was involved in the crime.

<sup>23</sup> Ambos has criticized the element of ‘fungibility’ in view of increasing specialization within modern bureaucracies. He correctly points out that an accused need only to demonstrate that his skills are indispensable, in order to escape responsibility under the heading of *Organisationsherrschaft*. Ambos, in: Nollkaemper/van der Wilt, *System Criminality in International Law*, 2009, pp. 145 (146).

<sup>24</sup> In the classical ‘Milk and Water’-case (Supreme Court, 14 February 1916, NJ 1916, 681) the accused stood trial for having delivered – through another person – adulterated milk. The physical perpetrator, the accused’ servant, did not know that he delivered adulterated milk, nor was he allowed to

tion and perpetration by means of another person overlap to a large extent.

In summary, we may conclude that functional perpetration is a broader and arguably more flexible concept than *Organisationsherrschaft*, lacking the latter's rigid and precise requirements. This should come as no surprise, in view of the concepts' different social pedigrees. Whereas *Organisationsherrschaft* has been developed in order to identify individual responsibilities within a delinquent state apparatus, engaged in system criminality, the Dutch concept of functional perpetration has emerged from the more 'innocent' cradle of economic crime. *Roxin* has made an impressive effort to disentangle the web of communications, command structures and functional responsibilities within a complex state bureaucracy of the Weberian type and has succeeded to translate those social artifacts in normative terms of criminal law.<sup>25</sup> Functional perpetration, on the other hand, has been the reaction of criminal legal doctrine in recognition of the fact that economic enterprising inherently entails risks for the environment, public health and consumers' interests and increases the opportunities for offences which harm those very interests. By moving criminal responsibility upwards the hierarchy of the organization, functional perpetration instills the managers and captains of industry that a proper course of events within the boundaries of law is within their power and control and deters them from turning a blind eye to unlawful conduct.

In spite of these differences, the present author argues, first, that functional perpetration, when applied in the context of system criminality, may serve useful purposes to identify those who bear the greatest responsibility as well.<sup>26</sup> And, second, that the concept, when employed in that specific context, bears surprising resemblance to the doctrine of *Organisationsherrschaft*.<sup>27</sup> Let us shortly recapitulate the essential similarities between the concepts.

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examine the composition of the milk. The accused was convicted as a perpetrator by means of another person, but the Supreme Court qualified the offense as 'delivering full milk, if a substance has been added': a perfect example of 'functional perpetration' *avant la lettre!*

<sup>25</sup> Compare his perceptive comments on the Eichmann-case, in which he argues that Eichmann's retort that the 'Endlösung' would have been carried out anyway, even without his efforts, and that he had made a 'senseless sacrifice' did not relieve him from individual responsibility; *Roxin*, *Täterschaft und Tatherrschaft*, 6<sup>th</sup> ed. 1994, pp. 246-248.

<sup>26</sup> I have defended this position in a number of previous publications, see: *Van der Wilt*, *Het kwaad in functie*, ('Evil in function') Inaugural address on the occasion of the acceptance of the office of professor ('*Ordinarius*') at the University of Amsterdam, 2005, pp. 20-25; *Id.*, 'Joint Criminal Enterprise; Possibilities and Limitations', *Journal of International Criminal Justice* 5 (2007), 91 (102-107) and *Id.*, in: *Nollkaemper/van der Wilt*, *System Criminality in International Law*, 2009, pp. 176-181.

<sup>27</sup> The connection between functional perpetration and *Organisationsherrschaft* has been recognized in:

Both *Organisationsherrschaft* and functional perpetration presuppose and even require the existence of an organization. Although in the case of functional perpetration the organization mainly serves to link up the physical with the indirect perpetrator and provides the context which facilitates and encourages the commission of crimes, nothing in the concept precludes a more active use of the organization as a tool to commit crimes on a structural and permanent basis. The second common ground which the concepts share is that they both require a hierarchically structured organization. Because the 'man at the top' exercises power and control over his subordinates, he can be sure that his plans are executed. Again, in case of functional perpetration the power relationship connotes the possibility of intervention in order to stop employees from indulging in crime. However, the political or military leader can equally employ his power over others more actively, directing their wills and resources towards the accomplishment of his intentions. The cases of the gynecologist and the farmer, delivering adulterated milk, provide examples in kind.

But the most conspicuous and fertile element is the idea that function and crime are interwoven. Diversification of functions and the abundance of specialized skills are of vital importance to modern state bureaucracies, also, and perhaps especially, for those which engage in systemic crime.<sup>28</sup> The individuals may be dispensable, but the functions are certainly not. In other words, the functionaries are pivotal to the working and the success of the system. Each and every level requires specific skills and expertise. Obviously, the rank and file should consist of physically strong and unfaltering persons who are not too much troubled by bad consciences. At the mid-level we find the typical *Schreibtischtäter*, punctual

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*Noyon/Langemeyer/Rommelink* (Ed.), *Het Wetboek van Strafrecht, losbladig commentaar*, (The Penal Code: A loose-leaf commentary), 2005, Part I, Note 19 at Article 47. After having considered that, in case of crimes against life or property, where the psycho-physical aspects are dominant, the application of modes of perpetration will probably survive, the authors add a remarkable caveat in a footnote: "As soon as we are dealing with the commission of such crimes in the realm of politics and crimes against humanity, however, the abstraction of 'de facto' action again increases. One might recall the term 'Schreibtischmord'. In such cases, the loss of 'Tatnähe' is compensated by the large power over the apparatus, which is at one's disposal" (translation by the author).

<sup>28</sup> It is remarkable that the Peruvian Supreme Court has noticed this crucial element in *Organisationsherrschaft*/ functional perpetration. The passage deserves full quotation (§ 726): "Demzufolge ist ein wichtiges Merkmal dieser Form hierarchisch organisierter Strukturen, das zugleich ihre strikte Vertikalität hervorhebt, die "Rollenzuweisung". Dieser Ausdruck erweist sich als anschaulicher als jener der gegenwärtigen Strafrechtslehre, um das Verhältnis zwischen der strategischen Ebene und dem Vollstrecker zu beschreiben; ein Verhältnis, das auf eine *Arbeitsteilung* oder *Funktionsverteilung* Bezug nimmt" (translation by Ambos/Huber, in this issue; emphasis added).

but unimaginative, fused with his function which he often considers as a vocation. Finally, at the top level reside the leaders who combine charismatic qualities with strategic insight and organizational skills. At each level ‘functionaries’ take pride in their skills and accomplishments, but the greatest respect is owed to the political and military leaders, precisely because high intelligence and personal charisma are scarce talents among human kind (especially when combined in one individual). Obviously, the leader’s prestige reinforces the authority and control he wields over his men.

For (international) criminal law, dealing with system criminality, it is crucial to take the function of the accused as point of departure for the determination of his guilt. For one thing, his function perfectly captures his contribution to the crime and sheds a clear light on the *actus reus*. From this perspective, the crime is the shadow of his function. But apart from this, his function may be indicative of the accused’ position within the hierarchy and the relations he has with others within the system.

It is an accepted principle of criminal law that the sentence should reflect the measure of guilt and responsibility. In this respect the concepts of *Organisationsherrschaft* and functional perpetration offer sufficient opportunities for careful distinction. The political and military leadership does not only incur criminal responsibility for the international crimes, but also for the creation and preservation of the illegal system as such.<sup>29</sup> The mid-level man who copies his superior’s mode of operation by making use of fungible executioners doing the dirty work, bears no responsibility for the system as such, but is liable for the international crimes over which he exercises control.<sup>30</sup> Perhaps it is a bit contrived to hold the mid level man responsible on the basis of *Organisationsherrschaft*. After all, the concept connotes dominion of the will over persons and events, whereas the mid level man is fully dependent on the decisions of *his* superiors.<sup>31</sup> It demonstrates

<sup>29</sup> Vest, *Humanitätsverbrechen – Herausforderung für das Individualstrafrecht?*, ZStW 113 (2001), 493: “Entsprechend unterscheidet sich seine Verantwortung für Aufbau, Organisation und Aufrechterhaltung der verbrecherischen Institution als solcher, die als Organisationsherrschaft zu bezeichnen ist”.

<sup>30</sup> Vest (Fn. 29), 494 makes a useful distinction between „*Organisationsherrschaft innerhalb des Apparates*“ and „*Organisationsherrschaft über den Apparat*“: “Sie (id est: the former) steuern “nur” ein Teilgeschehen, indem – und solange – sie das Funktionieren der Institution modifizieren”.

<sup>31</sup> Compare *Ambos* (Fn. 23), p. 153 who first acknowledges that “the possibility of an *Organisationsherrschaft* at different hierarchical stages has been recognized and that this control itself grows and accumulates with increasing power of decision-making and the availability of personnel resources”. Later on, however, he qualifies this point of view by adding that “From all this it follows that the doctrine of *Organisationsherrschaft* can only convincingly be applied to men in the background, whose orders and instructions cannot without any further ado be revoked or cancelled, i.e. those who, in

the need of a flexible approach, in which concepts of criminal responsibility are juxtaposed and fine tuned to the specific relation between the perpetrator and the crime and between the perpetrators *inter se*.<sup>32</sup>

Functional perpetration, being a broader concept than *Organisationsherrschaft* as it lacks the latter’s rigid and precise requirements, may cover a wider array of indirect perpetrators at different levels, but equally does not obviate the application of modes of participation whenever these are more appropriate in a specific situation.

#### IV. A Future in International Criminal Law?

In the previous section I have tried to demonstrate that functional perpetration bears close conceptual affinity to *Organisationsherrschaft*, at least when applied in the context of large state apparatus which engage in systemic crime, and that the Dutch concept, like its greater nephew, has great potential to establish responsibility for high level and mid level indirect perpetrators.

The final issue which has to be addressed is whether these concepts stand a real chance of being used and applied by the International Criminal Court and international criminal tribunals. This question requires immediate qualification. Obviously, it would be presumptuous to claim that a parochial concept as functional perpetration should be accepted ‘lock, stock and barrel’ by international criminal tribunals. Rather I intend to explore whether *Organisationsherrschaft* and its Latin American equivalents have made inroads in international criminal law, arguing that the kindred concept of functional perpetration may sustain their further reception.

The critical test to which those concepts are exposed is whether they have a solid foundation in the normative framework of international criminal law. By their very nature, concepts of criminal responsibility cannot meet the exacting and precise demands that the *nullum crimen*-principle imposes on the elements of crimes.<sup>33</sup> However, as expounded by the ICTY’s Appeals Chamber in the *Tadić*-case, the kindred principle of *nulla poena sine culpa* requires the concept to be firmly established in customary international law and, in addition, that it falls within the ambit of the Statute.<sup>34</sup>

this sense, can rule and control without any interference (from above)” (154).

<sup>32</sup> In the same vein, *Ambos* who favours qualification of the mid level man as *indirect* perpetrator with regard to crimes which took place under his control ( but *not* in respect of the whole chain of events) and *co-perpetrator* on the basis of functional division of power.

<sup>33</sup> Compare Article 22 of the Rome Statute.

<sup>34</sup> For the discussion of this requirement: Prosecutor v. *Tadić*, IT-94-1-A, 15 July 1999, §§ 185-187. The Appeals Chamber held that the notion of common design (Joint Criminal Enterprise) complied with this requirement (§ 220). For a critical appraisal of this point of view, see *Boot*, *Nullum Crimen Sine Lege* and the Subject Matter Jurisdiction of the International Criminal Court, 2002, p. 302. See also Prosecutor v. *Stakić*, IT-97-24-A, 22 March 2006, in which the Appeals Chamber

For *Ambos*, it is self-evident that *Organisationsherrschaft* meets these required standards: “In fact, unlike JCE, it finds a legal basis in the term ‘committed’ in Article 7(1) ICTY Statute, since ‘commission’ in this sense means that a person ‘participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others’. This includes, as indirect commission, perpetration by means and as such *Organisationsherrschaft*.”(emphasis in original)<sup>35</sup>

In a similar vein, one might argue – and perhaps even more convincingly – that Article 25, s. 3 (a) of the Rome Statute, at least implicitly, encompasses *Organisationsherrschaft*, as this provision includes ‘perpetration through another person’ under the definition of ‘commission’.

The interesting question was whether Trial Chambers of the International Criminal Court would be prepared to expand ‘perpetration through another person’ to cover ‘commission by means of an organisation’ as well. Recent case law of the Pre Trial Chambers revealed that they were indeed susceptible to the possibilities of *Organisationsherrschaft*.<sup>36</sup> The Pre-Trial Chamber had explored the concept for the first time in *Lubanga*, but had ultimately opted for ‘co-perpetration’.<sup>37</sup> However, in the *Katanga*-case, the Pre Trial Chamber embraced and applied the doctrine whole-heartedly. It explicitly acknowledged that the most serious international crimes almost inevitably concerned collective or mass criminality. And it added that “prior and subsequent to the drafting of the Statute, numerous national jurisdictions relied on the concept of perpetration through control over an organization in order to attribute principal responsibility to ‘leaders’ in respect of those crimes.”<sup>38</sup>

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censured the Trial Chamber for employing co-perpetration, a mode of liability which it considered no valid law within the jurisdiction of the Tribunal (§ 62).

<sup>35</sup> *Ambos*, Joint Criminal Enterprise and Command Responsibility, in: Journal of International Criminal Justice 5 (2007), 182 and *Ambos* (Fn. 23), pp. 143 (144).

<sup>36</sup> Pre-Trial Chamber I, Decision on the Confirmation of Charges, *Lubanga*, ICC-01/04-01/06, 29. January 2007, §§ 327-367; Pre Trial Chamber I, Decision on the Confirmation of Charges, *Katanga and Chui*, ICC-01/04-01/07, 30. September 2008, §§ 477-518; Pre Trial Chamber III, Warrant of Arrest for Jean Pierre Bemba Gombo Replacing the Warrant of Arrest of 23 May 2008, ICC-01/05-01/08, 10. June 2008, §§ 21-24 and Pre Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05 – 01/09, 4. March 2009, §§ 209-223.

<sup>37</sup> *Lubanga* (Fn. 36), §§ 94-96. For a careful comment on substantive law aspects of the case, including *Organisationsherrschaft* and co-perpetration, see: *Weigend*, Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges, Journal of International Criminal Justice (2008), 471-487.

<sup>38</sup> *Katanga and Chui* (Fn. 36), § 502.

The Pre Trial Chamber painlessly followed suit: “In sum, the acceptance of the notion of ‘control over an organized apparatus of power’ in modern legal doctrine, its recognition in national jurisdictions, its discussion in the jurisprudence of the *ad hoc* tribunals which, as demonstrated, should be distinguished from its application before this Court, its endorsement in the jurisprudence of the Pre Trial Chamber III of the International Criminal Court but, most importantly, its incorporation into the legal framework of the Court, present a compelling case for the Chamber’s allowing this approach to criminal liability for the purposes of this Decision.”<sup>39</sup>

Abundantly quoting *Roxin* and other – German and Latin American – leading scholars in criminal law, the Pre Trial Chamber discussed the several – objective and subjective – elements of the doctrine. Prompted by the specific circumstances of the case, the Chamber managed to introduce some creative solutions. First, it applied simultaneously the concepts of indirect perpetration (*Organisationsherrschaft*) and co-perpetration. *Katanga* and *Chui* exercised a large measure of control over their respective contingents of child soldiers, based on ethnical affiliations. However, they wielded no absolute power over the other’s organization, as some members accepted only orders from leaders of their own ethnicity.<sup>40</sup> As they could only accomplish their goal – the attack of an unprotected village – by joining forces and they realized that they were mutually dependent on the mobilization and assistance of each other’s loyal supporters, they could be qualified as ‘co-perpetrators’. The Chamber forged a construction with a horizontal and a vertical component: “[...] through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of ‘senior leaders’ adequately.”<sup>41</sup> Obviously, this approach calls to mind the discussion on the juxtaposition of concepts in the previous section.

Secondly, the Chamber has recognized that the original requirements of *Organisationsherrschaft* – like the element that the physical perpetrators should be replaceable – bear the seal of the modern bureaucracy paradigm from which it derives. The Chamber has acknowledged that automatic compliance with the leader’s orders may be accomplished by other means than through the fungibility of subordinates: “An alternative means by which a leader secures automatic compliance via his control of the apparatus may be through intensive, strict and violent training regimes. For example, abducting minors and subjecting them to punishing training regimens in which they are taught to shoot, pillage, rape and kill, may be an effective means for automatic compliance with leaders’ orders to commit such acts.”<sup>42</sup> Such a flexible approach, geared to the specific circumstances, may prove the versatility of the concept and its resilience against the wear and tear of time.

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<sup>39</sup> *Ibidem*, § 510.

<sup>40</sup> *Katanga and Chui* (Fn. 36), § 493.

<sup>41</sup> *Ibidem*, § 492.

<sup>42</sup> *Katanga and Chui* (Fn. 36), § 518.

*Alea jacta est!* Of course we will have to wait whether the Trial Chambers will share the Pre Trial Chamber's point of view. But the latter's considerations on the solid foundations of *Organisationsherrschaft* in international criminal law are rather convincing. Furthermore, the Pre Trial Chamber appears to corroborate the concept's special qualities in dealing with the intricate problem of system criminality. Power, influence and authority of political and military leaders all converge in the functions those leaders hold within large organizations. By taking that function as point of reference, the concepts of *Organisationsherrschaft* and functional perpetration are adequate instruments to portray the responsibility of those less visible perpetrators. And they serve courts as useful tools to fairly mete out punishment commensurate to the measure of guilt.