



## **Guest Lecture Series of the Office of the Prosecutor**

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**“Perpetration by Hierarchical Organization”**

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I'm going to talk about the notion of indirect perpetration of mass atrocity through a hierarchical organization.

The Pre-Trial Chambers have relied on this notion in several cases, as a way of linking the intentions of the big fish to the acts of the small fry.

Its basis in your Statute is Art. 25(3)(a), which speaks of committing the crime "through another person."

This approach was first used in the Eichmann trial, and then theorized by Claus Roxin in his analysis of the Israeli court's judgment.

The Argentine Courts picked up on Roxin's theory when convicting the military juntas.

Peruvian courts first used it to convict the top Sendero Luminoso leader, Abimael Guzman, of terrorist acts.

That was the first use of the theory against a non-state actor, a rebel insurgency, and so is especially important for you to consider, given your pending cases against leaders of such groups.

And earlier this very month, a Peruvian court used a modified version of Roxin's approach to hold former President Alberto Fujimori responsible for orders to death squads, to kill political dissidents and suspected *Sendero* members.

As the ICC Pre-Trial Chambers understand it, following Roxin jot for jot, this approach requires prosecutors to show:

That the defendant exercised effective control over an organized and hierarchical apparatus of power, permitting him to know that his criminal orders would meet with automatic compliance, since any subordinate who objected would be replaced by another willing to comply.

This differs from superior responsibility, because it involves a defendant's acts, not omissions, not mere failure to exercise command in a responsible fashion.

There must have been acts of ordering inferiors to commit criminal harm, even if – as an evidentiary matter -- the existence of orders may be inferred circumstantially.

Though I'll inevitably focus on problems with Roxin's theory, it's important to begin by acknowledging its undeniable and legitimate sources of appeal.

It captures the fact that mass atrocity is never entirely spontaneous.

It requires organization, and in organizations some people exercise power over others.

When they turn criminal, their leaders pose a greater and special sort of social threat than represented by the sum of their individual members, in isolation.

Second, Roxin's theory lets the superior act not only through an innocent agent, but even a culpable one.

The closest analogue in the common law, by contrast, requires that the subordinate acted under duress (or perhaps deception), so that there's no knowing, voluntary act by the inferior intervening between the superior's order and the harm ultimately inflicted.

Yet Roxin's right that what's really at stake, morally speaking, is the mastermind's "control over the crime," as he puts it, not over the criminal, over this or that immediate physical perpetrator, who may come and go.

Another advantage to Roxin's take, from a prosecutor's perspective, is how it allows the pertinent point in time to be shifted backward, in light of whenever the "perpetrator behind the perpetrator" interceded.

It imagines, if you will, a village watchmaker who constructs a little clock, then winds it up and walks away, without looking back.

Only he has also attached that clock to a bomb, which detonates well after he's left the scene.

This is essentially the story that the Argentine courts sought to tell, with Roxin's theory, in convicting that country's military juntas in 1987.

On this telling, the juntas had – early on -- constructed an elaborate administrative system, described in detail by the court, for the political repression of perceived "subversives."

The institutional components of this system were assembled at the outset of military rule.

Beyond that point, there was no longer any need for individual junta members to intercede directly in its daily functioning in order to produce thousands of ensuing crimes, some of these years later, in the country's furthest hinterlands.

The temporal focus of legal analysis then shifts away from when and where the harm occurs to when and where the metaphorical "watch" was assembled and wound up.

It's enough for liability that the superior created or assumed control of a hierarchical organization whose junior members later committed the criminal acts at issue in the regular course of their duties, "the ordinary course of events," as the ICC Statute speaks in defining "intent."

Once prosecutors make out a *prima facie* case, the evidentiary burden may even shift to the defendant, on some accounts, requiring him to show that he could no longer control his forces.

The law of superior responsibility, by contrast, the ICTY – at least -- requires the prosecutor show that the accused continued to control his forces right up until the very moment when, and in the very situs where, they performed their wrongful deeds.

And it's true that control ebbs and flows, from one issue, place and period to another.

It can't be assumed to hold constant, once first established.

But if the question is whether a commander has lost control over his forces, the defendant is surely more likely to have such information than the prosecutor.

And the burden of production may be allocated accordingly.

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A commander who intentionally trains his troops to misbehave appreciates that they may commit atrocities even at times – perhaps especially when – they’re no longer under his direct control.

He knows that they will often enjoy considerable autonomy from him during field operations.

He’s also aware that they’ll then find more proximate guidance in his local commanders, who will sometimes have moral standards even less demanding than his own, according to some recent social science. (Jeremy Weinstein, William Reno).

For a rebel leader even to field such a force under these conditions falls within the law’s understanding of recklessness, perhaps even intent, in the sense of grasping the high probability that certain criminal acts will result in the ordinary course of events.

A political theorist, at least, would want to say that such a leader has “power-to” make possible the commission of crimes without necessarily having any “power-over” the immediate perpetrators, at the time and place of their wrongs.

And its power-to, power to get things done, bad things, that we’re really concerned with, that’s the gravamen of the wrong the law seeks to redress.

This kind of power is not zero-sum:

In fact, each participant in the criminal organization empowers the others.

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Why does Roxin expect that an armed group must be highly organized, in a linear hierarchy, in order to trace the conduct of those at the bottom to top leaders?

The answer lies in how a hierarchical organization provides an especially effective way of committing a crime “through another”.

To judge from his footnotes, Roxin draws his view of a hierarchical apparatus of power, as his key wording sometimes also translated, from the highly influential writings of fellow German Max Weber, in Weber’s account of the nature of “bureaucracy.”

Weber viewed bureaucracy as the most effective method of controlling large numbers of people, directing their multiple efforts and energies to a single goal.

It’s easy to see why.

The bureaucrat, on Weber’s account, is subject to a unified chain of command imposing strict subordination on him, even as it grants him similar supervisory powers over others.

The regulations governing his conduct are impersonal, consistent, and complete, leaving little room for discretion.

The rights and duties associated with particular positions are specified in advance, clarifying the scope of everyone's authority in relation to everyone else.

Directives are conveyed in writing, eliminating miscommunication between leaders and led.

Officials are trained in the precise skills required for their positions, which they may not appropriate.

Employees own none of the resources required for their tasks; private income therefore remains entirely separate from the organizational fisc.

Questions about the proper direction of public policy enter only at the apex of the administrative pyramid, insulating the rest of the organization from external political influence of any sort.

Every such feature of bureaucracy contributes to maximizing the superior's control over subordinates, minimizing their freedom to pursue goals of their own or their allies.

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But in their factual details, episodes of mass atrocity turn out to depart conspicuously from the rational orderliness, sanitized precision, and efficiency suggested by the bureaucratic account.

This is so even when the organization at issue is the state rather, rather than paramilitaries or insurgent groups.



Scholars of mass atrocity now stress the spontaneous initiative at lower echelons, albeit authorized, encouraged – but not necessarily “ordered” -- from above.

Roxin’s model doesn’t even fit his own model case.

Historians of the Third Reich now emphasize the informal character, and face-to-face nature of much Nazi killing, apart from the gas chambers.

Most killing was on death marches and mass shootings.

It really wasn’t so “industrialized,” so hyper-modern.

The scholarship observes the overlapping jurisdiction of various state agencies sharing responsibility for the Holocaust, requiring their leaders to compete for the Fuhrer’s favor through demonstrating the depth of their ideological commitment, as by exceeding formal orders, violating bureaucratic rules, circumventing official structures.

To similar effect, Joseph Kony’s authority over his child soldiers is more personalist, spiritualist, charismatic (in Weber’s terms)– and brutally coercive -- than formally hierarchical, cabined by any bureaucratic rules.

Your own filings to the Pre-Trial Chamber in the Darfur situation acknowledge, for that matter, how Sudanese President Al Bashir regularly issued criminal orders directly to a couple major Janjaweed leaders, ignoring his ordinary hierarchical chain of command.

In fact, your own filings assert that Harun, as Minister of Interior, also issued orders directly to the Janjaweed.

And when these orders were at odds with those received from the Sudanese military, the Janjaweed followed Harun's, though unlike the military, he had no "line" authority over them.

So we face the question of whether bureaucracy – something close to its ideal-type -- is necessary for superiors to be able to exercise the kind and measure of control that the law of acting "through another" requires prosecutors to prove.

How far, and in what ways, may the facts depart from this theoretical notion for prosecutors still to employ the law on perpetration through an hierarchical organization to hold leaders criminally responsible for their followers' acts?

Apart from mass atrocity, Weber's picture bears little relation to the human experience of combat, as historians and social scientists describe it – even conventional combat, much less irregular, insurgency warfare.

The law of superior responsibility, at least, admits that *de facto* power often deviates from the *de jure* authority.

To acknowledge that the two are not identical is to say that the official hierarchical structure of a formal organization sometimes does not correspond entirely to the actual conduct of operations.

Prosecutors must show the defendant had "effective control."

Why would that term of art mean anything different here, in applying Roxin's approach, than this same term came to mean in connection with superior responsibility, at the ICTY?

That demanding requirement much contributed to several prominent acquittals, which in turn led ICTY prosecutors to their heavy reliance on joint criminal enterprise.

In JCE, there's no "control" requirement, not even any consensus that the defendant's contribution to wrongs by other enterprise members must be "substantial."

Roxin's theory appeals to the Pre-Trial Chambers, I assume, as a response to the problems with JCE, its dangerous over breadth, especially.

But his approach returns us to much the same predicament we started with, the problem that led to the shift from superior responsibility to JCE in the first place.

So one has to ask if there's any reason why the Trial and Appeals Chambers here should read the "effective control" requirement in Roxin's theory any differently than the ICTY now understands that wording in the law of superior responsibility.

Otherwise, you're left with little response to the challenge recently posed in court by Katanga's counsel:

"We submit that under the notion of indirect perpetration, it's hardly possible that a 24-year old boy can actually have sufficiently tight control over 1000 persons."

Unless there's good reason to read the control requirement differently in this context, the recent revolt of the "civil lawyers," if you will, against early ICTY dominance by us common lawyers, will yield little of value here.

And by the way, Roxin's theory is accepted only in Germany and those civil law countries most influenced by Germany.

That's by no means a majority of the civil law world.

To certain German lawyers, like my friend Kai Ambos, Roxin's theory is attractive in the bright-lines and crisp borders it promises for readily distinguishing culpable from innocent.

This first seems in stark contrast with the much hazier lines drawn by common law doctrines of conspiracy and racketeering, on which JCE was first constructed.

But that precision is only in Roxin's theory itself, not in the complex facts to which it must be convincingly applied.

Common law approaches seem imprecise on their surface, in their theory.

But this is only because the real world they must conceptualize is one of a shared responsibility that's ever-shifting in its contours and so inevitably hard to establish empirically.

Better to admit and honestly confront this muddiness, we common lawyers tend to think, than to exchange it for a mechanical jurisprudence of fictive legal concepts.

Mass atrocities differ relevantly from one another, requiring concepts that accommodate factual variation and the moral nuances such facts reflect.

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Even in regular armies military superiors don't lightly presume the "strict subordination" that defines the ideal-typical military bureaucracy, epitomized for Weber by the Prussian army, in which he had served.

Officers do not assume that their orders – lawful, much less criminal – will invariably be obeyed, given the serious risks these often pose for inferiors implementing them.

For that matter, subordinates in *all* large organizations routinely subvert the goals of their superiors when inconsistent with their own.

But in Roxin's model, all power flows from top to bottom.

Managers need never struggle to maintain control in the face of resistance;

organizational goals are set from on high and accepted by all below.

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For the last century, however, organization theory has greatly qualified this model, documenting and seeking to understand the many departures from it.

Managers today spend as much time working outside the chain of command as they do working through it, scholars find.

If Roxin's approach to effective control were wedded to Weber's outdated model of how organizations work, it would offer the law little in understanding how people share responsibility for mass atrocity.

It would be easy for defense counsel to show, in many cases, that their client lacked the degree or type of control over inferiors posited in an ideal, hierarchical bureaucracy.

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Even if he was wrong in important ways about how Hitler organized the Holocaust, Roxin devised his novel approach with only that experience, the Third Reich, squarely in mind.

So his account sought legally to conceptualize conduct by civil servants within a legal and political system completely subordinated to a unitary, totalitarian executive.

In such a public administration, an official superior can reasonably expect his directives to be carried out "in the ordinary course of events."

For he knows this system to be highly centralized, effective, and implacably committed to disregarding any trifling obstacles that might be thrown up by international law, from outside the organization.

German courts after the 1990 reunification ascribed similar knowledge to former leaders of the Democratic Republic who had issued standing, “shoot to kill” orders for Eastern border guards.

On these facts, Roxin’s theory again made good sense.

But where the state is not so all-powerful, has in fact collapsed almost altogether, these same legal presumptions are no longer so eminently sensible -- surely not in the same way.

This has not prevented the Pre-Trial Chambers from finding Roxin’s theory congenial for conceptualizing mass atrocities occurring in “failed states” of central Africa.

It might first seem that *ipso facto* there could not exist any “ordinary course of events” in conditions approximating anarchy.

Often one would be unable confidently to predict the consequences of one’s own efforts whenever these required the cooperation of others, such as the compliance of *de jure* subordinates.

Though the state may have failed, however, the rebel groups opposing it often assuredly have not.

In fact, the leader of such an armed group almost certainly exercises greater control over the impressionable children in his junior ranks than did Eichmann in relation to the camp guards who would murder those he ordered sent to Auschwitz.

The African rebel leader can come to enjoy such overwhelming power precisely because the official state apparatus has lost its monopoly of force over portions of the country's *de jure* territory.

State failure is even essential to the ability of rebel groups to do the sort of international trade -- in contraband, generally -- by which they support themselves.

A functioning state would either shut down such trade, or monopolize it for itself.

This mafia-like racketeering increasingly becomes the principal *raison d'être* of many rebel groups.

Political economists speak here of "low barriers to entry," entry into belligerency, in places like Somalia, for instance, where there's been no real central government for over fifteen years.

So it's plausible that a single legal theory might encompass mass atrocities conducted both by totalitarian states and by insurgent groups within failed states.

The Pre-trial Chambers here hint that leaders may secure automatic compliance by means other than a formally structured hierarchical organization.

Abducting minors and subjecting them to punishing training regimes, where they're taught to shoot, pillage, rape, and kill without discriminating civilians from combatants, may be just as an effective a means for ensuring commission of such acts, for "control over the crime."



Formal organization on the Western bureaucratic model is sometimes unnecessary to coordinate an effective fighting force whose members are already united by years of the intimate interaction.

This may involve growing up together in a single village or nearby villages of common tribal affiliation.

The high measure of trust among these fighters permits lines of *de facto* authority to shift quickly in reaction to immediate contingencies without compromising operational capacity.

Detailed orders from superiors become dispensable in combat because organization arises instead from this intense camaraderie and other intangible elements of “social capital,” as some scholars call it.

Such men behave at work in ways as decentralized as at play, where -- observes one contemporary legal expert -- “they make football passes blindly because they always know where the other players will be.”

Leading experts in military law continue to describe the sources of its stunning efficacy, in contests with Western armies, as “mystical” and “spiritual.”

Such stuff upsets the legal categories through which we assign responsibility to individuals.

This cooperation without coercion -- informal, non-hierarchical, but devastatingly effective -- is what we Westerners clumsily call “unit cohesion.”

Cohesion of this sort isn't present in all insurgencies, by any means.

It's most apparent in those whose members sign up voluntarily from a surrounding civilian population, and are motivated less by greed than by social grievances to which the movement speaks.

Members join to defend their communities, against the state's violence, aimed at such communities.

Examples include Uganda's National Resistance Army, in the 1980s, the lowland branches of Peru's *Sendero Luminoso*, and some rebel groups in Nigeria, in the late 90s.

These are not the kind of rebel groups that often commit crimes against humanity.

When individual members commit war crimes, they're generally punished by disciplinary procedures within the insurgent organization itself.

So leaders of these rebel groups are not likely to find themselves before the ICC.

#### SHOW DIAGRAM OF TYPES OF ARMED GROUPS

By contrast to such "democratic" rebel groups, the Lord's Resistance Army in Uganda can't take advantage of preexisting social ties among its members because there're few.

Almost all members were abducted as children, from many, diverse locales, so they have much less in common.

On the other hand, they do grow up within the armed group, and get socialized to its norms of conduct, from a much earlier and more impressionable age than regular army soldiers, entering at age 20.

Or there's the Revolutionary United Front in Sierra Leone, whose recruits, assembled in Freetown, were often "voluntary," but economically and socially marginal, with few other options.

They're uprooted, urban youth from all over the country – Karl Marx's "lumpen elements."

These children are so deracinated, they often obey orders to kill their own tribe, as do Acholi members of the DRC's Lord's Resistance Army.

The rebel movements that commit most civilian abuses, social scientists find, are those funded from contraband trade – in drugs, diamonds, or by foreign sponsors, for whom they serve as proxies in inter-state conflicts.

Virtually every major rebel group in Africa has been supported and equipped by official leaders in a neighboring state, which makes all this look almost more like co-perpetration through a JCE of allied states and rebel movements.

These rebel groups, like RENAMO in Mozambique, and others in Angola, Burundi, and Colombia, mistreat civilians because they're not dependent on the good will and support of local communities for survival.

Unlike the image of Fidel or Che in Cuba, they don't merge easily back into the civilian communities from which they came, between attacks on government forces.

Their violence against those communities makes this difficult, often impossible.

They also tend to be highly centralized, because subordinates are not deeply committed to any ideological program, inclined instead to seek individual booty, or simply to flee.

So leaders of such groups do adopt a military model of organization little different from the regular armies they fight, scholars say.

Hence, the structure of the military wing of Charles Taylor's National Patriotic Front of Liberia.

The Sudanese Janjaweed approximates this model as well, on most accounts.

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Fungibility.

As a practical matter, showing the fungibility of subordinates, as Roxin's approach requires of prosecutors, may often prove difficult.

Yes, child soldiers are eminently replaceable on short notice.

They don't require much training if they're sent into battle with no effort to minimize lethal risks to them – in fact, given little encouragement to take the most basic measures of self-protection, as in the Lord's Resistance Army.

But in most other kinds of armed groups, there may be few if any competent replacements for a particular member, in which case the theory collapses, as the ICC Pre-Trial Chamber acknowledges.

For each of the planes hijacked on 9/11, there was only one member in each team fully trained to fly a large jetliner.

Efficient organizations don't make a general practice of hiring people to just, like, hang around until they're needed, to fill in for someone else who suddenly develops a "conscience."

And many organizations have at least one member in the hierarchical chain who's considered "irreplaceable."

Does this too mean Roxin's theory bars conviction in any such a case?

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In any event, it's not clear why fungibility should be given such importance in the first place.

Yes, the inter-changeability of employees – all of us – is a key feature of bureaucracy, on Weber's account.

And fungibility appeals to the once-popular notion of people as ‘gears’ or ‘cogs’ in an administrative machine.

Roxin apparently drew these metaphors from Hannah Arendt, in her own account of the Eichmann trial, just a year earlier.

The Pre-trial Chambers here recently endorsed this terminology because of how it allows us to infer that the superior knows his orders will be obeyed “almost automatically.”

But in assessing the superior’s misconduct, the capacity to switch subordinates between positions is not really the most relevant type of control, morally speaking:

Because the power to assign persons to positions within an organization need not entail a high degree of control over their subsequent conduct, which is what’s really at stake in these cases.

And a leader may be able to exercise such control without being able to replace key subordinates.

That’s rightly stressed by the Peruvian court convicting Fujimori a couple weeks ago, in abandoning any showing of fungibility.

What’s more important is that the superior knows he has inferiors who are “predisposed” to obey his orders, lawful or otherwise.

He knows their mental state is one of “heightened readiness,” in the court’s words, to obey his commands, and that they may act “from conviction.”

The leader simply “takes advantage of” their predisposition to do whatever he authorizes, writes the Peruvian court.

Citing German and Latin American legal thought, the Peruvian judges speak not of formal hierarchy or bureaucratic organization, but instead – in their words, of “collective psychology” such that “millions of people may potentially serve as obedient instruments” of the defendant.

The court speaks of controlling others by “conditioning” them, not replacing them.

Notice how readily this new language, this reinterpretation of “acting through another,” fits the situation of many African child soldiers, who fight in disorganized ways for rebel movements like the LRA.

Though the Fujimori court often cites ICTY and ICTR jurisprudence, it conspicuously makes no mention of the ICC Pre-Trial Arrest Confirmations in Katanga or Lubanga -- the most recent, prominent international jurisprudence on Roxin’s approach.

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In stressing fungibility, Roxin’s approach also ignores the latitude inferiors often enjoy in determining their victims’ fate.

The moral relevance of *this* type of control, or lack thereof, is clear.

In Argentina's Dirty War, for instance, junior officers were eminently interchangeable by their superiors.

But those at the lowest echelons exercised great discretion over what to do with their captives after interrogation.

If a junior officer who murdered a particular detainee could just as readily have freed her -- without fear of rebuke from above -- then a fact-finder could easily conclude that the junta members lacked the relevant control necessary for perpetrator liability.

Such complexities persuaded a couple Argentine Supreme Court Justices to reject Roxin's theory, in fact, convicting the juntas, instead, as accessories.

That effectively made the junior ranks the principals, the perpetrators -- with the stiffer punishment that entails -- a conclusion that much antagonized them, partly prompting a violent uprising to demand an end to their prosecution!

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The Pre-Trial Chambers here also understands Roxin's method to classify the "mastermind" as a true principal only if it's he who "essentially decides whether and how the offense will be committed."

In Argentina, at least, questions of "how" and even "whether" were answered almost entirely by the lowest subordinates.



You could say that such authority was implicitly delegated to them by their superiors.

And we might want to hold the superiors accountable for an act of irresponsible delegation.

But often such decentralization, as in some African rebel insurgencies, is less a matter of voluntary delegation from above than simple usurpation by local commanders, from below, with agendas of their own.

There may simply be an implicit understanding – call it an “agreement,” if you like, or “connivance,” perhaps – that top leaders will not *strenuously* object if local forces compensate themselves for their efforts on the movement’s behalf through pillage of civilian property, sexual abuse of civilian women, even settling personal vendettas.

That’s not affirmative delegation of control, exactly.

It wouldn’t fit neatly within Roxin’s model of organizational hierarchy, and so threatens to leave the leaders unreachable by his approach.

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A final question:

One way that Roxin’s theory can fail is if the defendant shares control over the crimes with others outside the hierarchical organization he dominates.

What if, as most area-experts say, Al Bashir was not in “total control,” as your filings allege?

What if the agreement or mere acquiescence of other Sudanese Arab leaders, in Khartoum and the Janjaweed, was “essential” – in the Chambers’ words, – to the commission of the Darfur crimes?

After all, even in totalitarian regimes, power generally resides more in informal workings of the ruling party – Soviet or Nazi, for instance – than in the formal functioning of the administrative civil service.

If such regimes get institutionalized, the power of a leader – who’s often just *primus inter pares* -- from getting his way on everything is often limited by others heading the ruling party.

Often, for mass atrocity to work, what is required are political alliances and coalitions.

These are not legal terms, of course, but criminal law can’t afford to ignore them, to do its own job properly.

Consider the chart, at this point...

Within a military junta, A may be head of the Army.

B is head of the Navy.

The two organizations, controlled by each defendant, cooperate in disappearing thousands of people in Argentina.

Or A is Katanga and B is a leader of another tribal group.

Their forces collaborate to attack the village of Bogoro.

Each force responds only to orders from its own chieftain/warlord.

You could say this is co-perpetration by relative equals, emphasizing the horizontal dimension of relationships.

But you could also try to incorporate the vertical dimension, the way A and B each separately dominate his respective organizational hierarchy.

For that too is necessary for the atrocity to occur.

Why should international criminal law have to stick rigidly to existing, over simplistic models of how the world works: either sideways or top-down, never both?

Isn't there a way to combine the two approaches, to capture more of the morally relevant facts in the trial record?

Let's call it "cross-co-perpetration," perhaps.

I trust that several of you here today, in both Chambers and the OTP, and thinking along just these lines in connection with several of your pending cases.

I welcome your comments and criticisms.