The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain

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Abstract
In a number of cases before Latin American courts, the notion of indirect perpetration through organized structures of power has been applied after the Juntas Trial. These include several cases relating to crimes committed during the 1976–1983 military regime in Argentina, the case against General Manuel Contreras in Chile, the case against former national senator Alvaro Alfonso García Romero in Colombia and cases against former Shining Path leader Abimael Guzmán and former President Alberto Fujimori in Peru. As a result, although Spanish and Uruguayan courts continue being reluctant to apply it, the notion of indirect perpetration through organized structures of power has come to play today in a number of Latin American jurisdictions a key role in portraying the criminal liability of senior political leaders and high military commanders that make use of the organizations that they control to effect the commission of the crimes.

1. Introduction
On 9 December 1985, the Cámara Federal Nacional de Apelaciones en lo Criminal y Correccional de la Capital Buenos Aires (hereinafter ‘Buenos Aires Federal Court of Appeals’), issued its judgment in the so-called Juntas case.¹ The military...
commands of the three consecutive Argentinian Military Junta that had run the authoritarian military regime governing Argentina from 1976 to 1983 (each Military Junta was comprised of the Commander-in-Chief of the Army, the Navy and the Air Forces) were convicted. Although they had not physically abducted, tortured or murdered, the Buenos Aires Federal Court of Appeals found them liable as indirect perpetrators for the crimes committed by the members of the military service they commanded. This constitutes a landmark decision insofar as it applied for the first time ever the notion of indirect perpetration through organized structures of power as put forward by Claus Roxin in 1963.

At first, the idea was met with reluctance by Latin American and Spanish courts. This was mainly due to three reasons. First, the absence of any specific reference to the notion of indirect perpetration through organized structures of power in those few national penal codes that expressly provided for the general notion of indirect perpetration. Second, the belief that the scope of application of the notion of indirect perpetration was limited to situations in which superiors use innocent agents who are not fully criminally liable for the commission of the crimes. In situations in which crimes are committed by subordinates in execution of orders given by their superiors in the context of organized structures of power, subordinates are not mere innocent agents, but fully criminally responsible for their free decision to carry out the crimes. Therefore, the criminal liability of those superiors who order the commission of the crimes cannot amount to perpetration because they lack control over the crimes (superiors can never be certain about whether their decisions would be actually carried out by their subordinates). As a result, according to the traditional approach of Latin American and Spanish courts, in a scenario similar to the one referred to by Roxin, a mode of liability other than perpetration had to be applied — usually, instigation because superiors who give orders, once they have convinced their subordinates to commit the crimes, have no further involvement during their execution.

Third, the fact that the application of the notion of indirect perpetration has no impact on the penalty to be imposed on superiors, because in most Latin American Penal Codes (such as, in Argentina, Chile, Peru, Colombia or Uruguay), as well as in the Spanish Penal Code, the same penalty attaches to the modes of liability of instigation and necessary contribution (material assistance without which the crime would not have taken place) as to perpetration. However, over time, Latin American and Spanish courts have increasingly found that their traditional approach did not adequately reflect the nature of the superiors’ contribution to the crimes (planning and controlling the means through which the criminal activity is carried out) because it relegated them to a secondary role that does not correspond to their actual relevance. As a result, in the last ten years, the question has arisen as to whether the criminal liability of senior political and military superiors could be better encapsulated by notions of principal liability such as indirect perpetration through organized structures of power and co-perpetration based on joint control over the crime — according to this last notion, when a plurality of persons participate in the commission of a crime pursuant to a division of tasks in the execution of a common plan, those persons who share control over its implementation as a result of essential tasks (without performing them, the plan would be ruined) assigned to them are to be considered co-perpetrators (principals to the crime).

Moreover, as the notion of indirect perpetration is based on the superiors’ control over their subordinates’ will to their control over the organization, whereas the notion of co-perpetration requires a shared control between superiors and subordinates, the question has also arisen as to which of these two notions should be applied to senior political and military superiors who design systematic and widespread campaigns of criminality and order their subordinates to implement them.

Supporters of indirect perpetration emphasize that when crimes are committed through organized structures of power, superiors and subordinates do not enter into any agreement or common plan nor do they share control over the offences because the organization has a life on its own and subordinates merely implement automatically the superiors’ orders. In turn, supporters of co-perpetration highlight that superiors do not enjoy full control over the offences because the final decision about their commission always rests with those subordinates who freely and knowingly choose to join their superiors’ criminal plan by complying with their orders. As a result, superiors share with their subordinates the control over the offences, particularly when their involvement continues during the implementation of their criminal orders.

As will be seen throughout this section, Latin American and Spanish courts remain divided about this issue.

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2. National Case Law

A. Argentina

1. The Juntas Trial

As pointed out in the introductory section, the 9 December 1985 judgment of the Buenos Aires Federal Court of Appeals, constitutes a landmark decision, and insofar as it applied, for the first time, the notion of indirect perpetration through organized structures of power. According to the Buenos Aires Federal Court of Appeals, upon seizing power in 1976, the Military Juntas devised and set into motion an overall strategy in order to fight subversion by establishing an elaborate network of clandestine detention centres, where those kidnapped underwent interrogation and torture. The country was divided into a number of military zones, within which a regional commander was given complete autonomy over clandestine operations. Within each zone, middle-ranking officers of the three services of the armed forces cooperated in the abduction of suspected subversives. At the height of the campaign against subversion, the Supreme Court, whose members had been appointed by the military, repeatedly urged the military commanders to clarify the fate of the disappeared persons in a consolidated action on some 400 petitions for habeas corpus. Despite the many civilians who had been kidnapped, tortured and/or murdered (there were altogether between 18,000 victims according to official sources, and 30,000 victims according to other sources), not a single person was successfully prosecuted in either military or civilian courts. The military government at the time constantly denied that such crimes had ever taken place.

Under these circumstances, the Buenos Aires Federal Court of Appeals affirmed that it was not so important who had physically perpetrated the crimes. Indeed, the physical perpetrators were not as significant, since they played only a secondary role in committing the crimes. Individuals who controlled the system, controlled the will of the persons who were part of that system. As the control of the convicted military commanders was absolute — even if a subordinate refused to obey, he would automatically be replaced by another who would conform to their directives — the plan conceived by the convicted military commanders could not have been upset by the will of the physical perpetrators of the crimes, who simply performed a minor function within a gigantic machine. Moreover, as the military commanders of the three consecutive Juntas always retained the power to stop the crimes that were being committed when they deemed it necessary, they suddenly stopped all irregular operations and announced to the population that the war had ended. After that time, there were no further kidnappings, disappearances or torture. For the Buenos Aires Federal Court of Appeals, this was a case in which the instrument operated by the man behind the scene was the system itself, which he manipulates at his discretion, a system composed of interchangeable men. Thus, the control was not so much over a specific will but over an undetermined will. Regardless of who the subordinate officers happened to be, the criminal acts would have taken place anyway.

The application of the notion of indirect perpetration through organized structures of power by the Buenos Aires Federal Court of Appeals in the Juntas Trial was overturned, in a divided vote, by the Chamber of Cassation of the Argentine Supreme Court (hereinafter 'the Argentinean Supreme Court') in its 20 December 1986 judgment. According to the Majority, in light of the fact that the members of the Military Juntas did not intervene in the execution of the crimes, the starting point of the analysis should have been the approach to the notion of principal liability endorsed at that time by Argentinean case law. This was the formally objective approach, according to which principals to a crime are only those individuals who physically carry out the objective elements of the crime.

In the view of the Majority, the application of this approach led to the conclusion that those individuals who plan, prepare, direct, organize, instigate or, in any other way, contribute to the commission of the crime without physically part in its execution could not be principals. Moreover, the Majority emphasized that this did not mean that the said individuals were not principals.

9 For further details on the findings of the Buenos Aires Federal Court of Appeals, see Olásoo supra note 2, 128–129.

7 The judgment highlighted that the convicted military commanders issued general instructions calling for extraordinary measures to be used not against terrorists only, but against 'subversive elements' in general. See, for instance, Dir. 504/77 issued in April 1977 by General Roberto Eduardo Viola, then Head of the First Army Corps and later Head of the Second Military Junta, concerning the industrial front of the anti-subversive campaign, La Prensa, 23 July 1984, at 5. As a consequence, the crimes in question were not the result of the erratic, solitary and individual decisions of those who carried them out; they were part of an overall strategy devised by the Military Juntas in order to fight subversion. The implementation of this strategy involved a complex number of elements (men, orders, places, arms, vehicles, food, etc).

8 The Buenos Aires Federal Court of Appeals considered that the intervention of the military commanders of the three consecutive Juntas from the very top of the power structure was not limited to ordering unlawful activities. They also contributed actively to the commission of the crimes. As the Buenos Aires Federal Court of Appeals pointed out, the detention centres had to be financed and staffed centrally, and it was impossible for the military commanders not to be aware of their existence and activities. The physical perpetrators of the crimes would not have been able to commit these crimes unless they had had the necessary means to do so. These means were made available to them by order of the convicted military commanders.

10 As the Buenos Aires Federal Court of Appeals explained, the convicted military commanders' lack of knowledge of the existence of each criminal act and of the victims' identities is not relevant in determining their criminal responsibility. The orders referred generally to all 'subversive people', allowing ample freedom for the subordinates to determine who fell into that category and to act accordingly.

11 Argentine Supreme Court, judgment of 20 December 1986, at 1701 et seq. The reasons that prompted the Argentine Supreme Court to reject the application of the notion of indirect perpetration through organized structures of power in the 9 December 1985 judgment of the Buenos Aires Federal Court of Appeals are set out in the section on Legal Arguments, §§ 20 et seq. But see the separate opinion of Judges Petracchi and Bacqué, favouring the application of the notion of indirect perpetration through organized structures of power.
criminally liable, or were to be given a lesser punishment, as Article 45 of the Argentinean Penal Code, similar to other Latin American Penal Codes, provided the same penalty for perpetrators, instigators and necessary contributors. As a result of the reasoning above, the Majority of the Argentine Supreme Court overturned the conviction of the nine commanders of the Argentinean Military Juntas as indirect perpetrators and convicted them as necessary contributors, which had no impact on the length of the sentences imposed upon them.

2. Recent Practice

After the Juntas Trial, Argentine courts have progressively abandoned the formal objective approach to the notion of principal liability, and have instead embraced the approach based on the notion of control of the crime. In this new context, and in particular since the 18 May 2007 judgment of the Argentine Supreme Court in the Etcheolatz case, Argentinean courts have applied again the notion of indirect perpetration through organized structures of power to convict senior military commanders who were part of the higher echelons of the Argentinean military between 1976 and 1983.

A good example of this new trend is the 24 July 2008 judgment of the Córdoba Federal Oral Tribunal Num. 1, in which Luciano Benjamin Menéndez (former head of the Argentine Army Third Corps from 1975 to 1979), Hermes Oscar Rodríguez (former head of Intelligence Battalion Num. 141, which operated under the command of Menéndez) and six physical perpetrators (including the former head of the Special Operations Group OP3, who was under the direct command of Rodríguez, and five of his subordinates)

12 Art. 45 of the Argentinean Penal Code states as follows: "Those individuals who participated in the execution of the deed, or who provided to the perpetrator(s) an assistance or contribution without which the crime could not have taken place, will receive the penalty provided for those who committed the crime. The same penalty will be imposed on those who directly instigated the perpetrator to commit the crime. [authors' translation]."


14 See, inter alia, the judgment of La Plata Federal Oral Criminal Tribunal In von Wernich, 1 November 2007; the judgment of Córdoba Federal Oral Criminal Tribunal no. 1 in Menéndez Luciano Benjamín, Rodríguez Hermes Oscar et al., 24 July 2008; and the judgment of the Tucumán Federal Oral Criminal Tribunal in the Senator Vargas Aignasse case, 4 September 2008. In the latter judgment, the Tucumán Oral Federal Criminal Tribunal sentenced both accused to life imprisonment, finding that they were part of the higher echelons of the Argentinean military structure of power. It found that both accused had used their power to order the unlawful entry into the residence of Senator Vargas Aignasse, who was believed to be a member of a subversive group known as the 'Montoneros'. He was detained in his home in front of his wife and children and brought by force to a military centre where he was tortured. Subsequently, he was a victim of a forced disappearance. His captors pretended that he had been kidnapped by an unknown group while, in fact, he had been transferred to another military centre. See a commentary on the 4 September 2008 judgment of the Tucumán Federal Oral Tribunal in 114 Amario de Derechos Humanos (2008).

were convicted for kidnapping, torturing and murdering a number of civilians in execution of the anti-insurgency campaign launched by the Argentinean Military Juntas in 1976. According to the Córdoba Federal Oral Tribunal, the implementation of the overall anti-insurgency campaign was characterized by the wide discretion given to Operational Zone Commanders (such as Menéndez) to organize the repression in the areas under their command, as well as to Operational Zone Commanders' subordinates (such as Rodríguez, and the other six accused) to identify the victims. Although all accused played a role in the implementation of the campaign, Menéndez and Rodríguez contributed to the commission of the crimes in a way substantially different from the other six accused. While Menéndez and Rodríguez secured a strict control over the units under their command, gave orders and instructions to implement the anti-insurgency campaign within their sphere of authority, created the necessary conditions for the effective execution of such orders and supervised the results of their subordinates' activities, the other six accused jointly identified the victims and detained, tortured and killed them in execution of the orders given by Menéndez and Rodríguez. As a result, while Menéndez and Rodríguez were convicted as indirect co-perpetrators, the other six accused were convicted as direct co-perpetrators of the crimes.

However, the Argentinean courts' increasing application of the notion of indirect perpetration through organized structures of power has not always been followed in subsequent cases. For instance, the 12 August 2009 judgment of the San Martín Federal Oral Tribunal in the Floreal Avellaneda case applied the notion of co-perpetration based on joint control (as opposed to the notion of indirect perpetration through organized structures of power) to convict Santiago Omar Riveros (former head of the Military Institutions Command, who had operational control over the Villa Maríelli Police Station and the Campo de Mayo Infantry School), Osvaldo Jorge García (form previous head of the Campo de Mayo Infantry School), Exequiel Verplaetsen (former head of the Intelligence Area at Campo de Mayo Infantry School) and three of his subordinates who were physically involved in the commission of the crimes. They were all convicted for the unlawful detention and torture of Iris Avellaneda and her 15-year-old son Floreal Avellaneda, and for the latter's forced disappearance.

This case shares a number of features with the Luciano Benjamín Menéndez et al. case. In both cases, senior military leaders, mid-level military commanders and physical perpetrators were convicted for similar types of offences committed in furtherance of the overall anti-insurgency campaign designed in 1976 by the Argentinean Military Juntas to eliminate political opponents. Furthermore, in both cases, the notion of indirect perpetration through organized structures of power was expressly accepted with regard to the members of the said Military Juntas.

15 The body of Floreal Avellaneda was subsequently discovered at the Uruguayan coast, probably after having been dropped from an Argentine military plane.
Nevertheless, there is a fundamental difference in that the San Martin Federal Oral Tribunal, in the Floreol Avellaneda case, limited the application of the notion of indirect perpetration to the members of the Military Junta because they were the only senior military commanders whose contribution (in designing the overall campaign and setting into motion the Argentinian Armed Forces to implement it) did not take place at the stage of the execution of the crimes. According to the San Martin Federal Oral Tribunal, the other military commanders (Operational Zone Commanders, Area Commanders, Unit Commanders) participated in the implementation of the anti-insurgency campaign by (i) adjusting such campaign to the special circumstances of their zones and areas of responsibility; and (ii) planning the specific operations through which such campaign was to be carried out. In doing so, they had autonomy to decide how their subordinates should proceed with the detention, torture and forced disappearance of their political opponents. As a result, for the San Martin Federal Oral Tribunal, the involvement in the crimes of Riveros, García and Verplaetse (the commanders of the detention centres where the crimes took place) corresponded with a situation of division of essential tasks between them and those subordinates who physically committed the crimes, in which all of them were acting pursuant to a common plan in execution of the overall anti-insurgency campaign.  

B. Chile

The notion of indirect perpetration through organized structures of power was first applied in Chile by the 12 November 1993 first instance judgment of an investigating judge of the Chilean Supreme Court in the case against General José Manuel Contreras, former head of the Chilean intelligence agency under the Pinochet regime known as DINA, and his chief of operations, Colonel Espinosa. They were both convicted for the killing of Orlando Letelier, foreign affairs minister in the Chilean government of Salvador Allende. At the time of his murder, Letelier was in exile in Washington DC, where he was a member of the Institute for Political Studies and played a key role in promoting international opposition against the Pinochet regime.

According to the judgment, Contreras, who had total control over the DINA (which was militarized in 1974) made the decision himself to kill Letelier, and put his chief of operations, Colonel Espinosa, in charge of creating the necessary conditions for his killing (including the implementation of espionage activities for several months). Ultimately, Mr Townley, a de facto DINA agent, was entrusted with the mission to kill Letelier. He was sent to the United States, where he complied with his mission by detonating a bomb placed inside Mr. Letelier's car on 21 September 1976.

The judgment addressed at length whether, in light of Articles 14–16 of the 1874 Chilean Penal Code, Contreras and Espinosa were to be considered principals or accessories to Letelier's murder. In this regard, it is important to highlight that, according to Article 15, perpetrators (principals) were those who took part in the execution of the crime, whether directly and immediately or by foreclosing or attempting to foreclose the prevention of the crime, those who forced or induced a third person to commit the crime and those who, acting in concert, facilitated the means of the crime or were present while the crime was being committed.  

According to the judgment, in order to determine whether Townley acted pursuant to an order, an act of instigation or an agreement, it was necessary to take into account the following factors: (i) as a de facto agent, Townley was part of the hierarchical military structure of the DINA; (ii) Townley and his family lived under the protection and control of the DINA; and (iii) a sense of loyalty towards the DINA had strongly grown in Townley. As a result, even if Townley could not be legally compelled to comply with the order to murder Letelier, the authority and influence of the director of the DINA placed Townley in a situation in which he was inevitably forced to carry out the killing. The judgment emphasized that the existence of an agreement would have presupposed a deliberate decision by Townley, requiring a level of freedom and independence higher than the one Townley enjoyed after receiving the order to murder Letelier. In turn, the notion of instigation would have required an act of persuasion without the coercive nature of the order to kill received by Townley from the DINA's director through the DINA's chief of operations. As a result, the judgment underscored that the facts in this case showed the type of control of subordinates' will that superior organized structures of power enjoy. In these organizations, superiors use their powers to give orders and secure their implementation by interchanging the executioners as they wish. Hence, any resistance or opposition by subordinates has no impact on the execution of the crime.

In light of the above-mentioned, and given the hierarchical proximity between the DINA's director and his chief of staff and the lack of any other element showing that Coronel Espinosa was dependent on then Coronel Contreras, the judgment convicted both of them as indirect co-perpetrators who had agreed to use their subordinates in the DINA to effect the murder of Letelier.

Some Chilean authors have criticized this judgment because it departed, in their views without good cause, from pre-1993 Chilean case law, according

17 Authors' translation. The original version in Spanish of Art. 15 of the 1874 Chilean Penal Code reads as follows: '(1). Los que toman parte en la ejecución del hecho, sea de una manera inmediata y directa, sea impidiendo o procurando impedir que se evitaría; (2) Los que fueron o indujeron directamente a otro a ejecutarla; y (3) Los que, concertados para su ejecución, facilitan los medios con que se lleva a efecto el hecho o lo previenen sin tomar parte inmediata en él.'
to which the notion of indirect perpetration was only applicable to those situations in which the physical perpetrators were not criminally liable. For these authors, when, as in the present case, the level of impact by a superior did not amount to subjugating the physical perpetrator’s will, one could only apply the notions of instigation or necessary contribution, for which the same penalty as for (indirect) perpetration applied under the 1874 Chilean Penal Code. As a result, had Contreras and Espinoza, respectively, been convicted as instigator (Contreras) and necessary contributor (Espinoza), their wrongdoing would have been adequately reflected. According to these authors, the notion of indirect perpetration through organized structures of power only reached some level of acceptance in Chilean case law years later, as shown by the 21 September 2007 Chilean Supreme Court decision granting the Peruvian extradition request in relation to former Peruvian president Alberto Fujimori. In this case, the Chilean Supreme Court referred expressly to the possible application of the notion of indirect perpetration through organized structures of power.

C. Colombia

The Colombian Supreme Court made, for the first time, reference to the notion of indirect perpetration through organized structures of power in its judgment dated 7 March 2007 in the Machuca case, its judgment dated 8 August 2007 in the Yamid Amat case, and its judgment dated 12 September 2007 in the Gabarra case. The Colombian Supreme Court did not, however, apply the notion of indirect perpetration, but instead applied the notion of co-perpetration. By doing so, the Colombian Supreme Court followed its traditional approach to the distinction between the notions of instigation (determinación or autoría intelectual), indirect perpetration (autoría mediata) and co-perpetration (autoría material impropia), to which Article 23 of the 1980 Colombian Criminal Code and Articles 28 and 29 of the new 2000 Colombian Criminal Code attach the same penalty.

According to the traditional approach of the Colombian Supreme Court, instigators are those persons who, through instigation, mandate, induction, coercion, order, agreement or any other feasible means, effect the commission of the crime by another person who is criminally responsible as a direct perpetrator of the crime. Hence, the notion of instigation requires a type of communication between the instigators and the physical perpetrators, which allows the latter to decide, even if in a precarious situation, whether or not to carry out the crimes proposed by the instigators. The final decision about the commission of the crimes is not taken by the instigators, but by the physical perpetrators. The notion of instigation can be distinguished from the notion of indirect perpetration in that indirect perpetration requires that the persons who physically commit the crimes are not in a position to decide whether to commit the crimes because: (i) their roles as physical perpetrators have been imposed upon them by the indirect perpetrator and (ii) they are not aware of the real dimension of their roles. Finally, the notion of co-perpetration requires that a plurality of persons, acting in a concerted manner, implement a common criminal plan in accordance with the principle of division of tasks. There is, however, no need for the co-perpetrators to have entered into a previous agreement. In this scenario, as long as it can be shown that a person made a contribution during the stage of the execution of the crimes, that person becomes automatically a co-perpetrator, regardless of the relevance of his contribution; there is no need for such contribution to be of an essential nature.

I. The Machuca Case

A good example of the application of the broad notion of co-perpetration is the Machuca case. The events of this case occurred on 18 October 1998 in the village of Machuca, located in the Segovia-Antioquia area. In order to harm the Colombian oil infrastructure and economy, several members of the Cimarron Company of the National Liberation Army detonated a bomb in the Cusiana-Coveñas oleoduct, causing its destruction and the spill of a considerable amount of oil. As the explosion took place on a hill, the oil descended down the hill to the Machuca village, destroying numerous houses and causing the death of over a hundred villagers. Although the prosecution could not identify the physical perpetrators of the bombing, it prosecuted seven members of the National Liberation Army Central Command as well as the three field commanders in charge of the Cimarron Company.

In its judgment dated 7 March 2007, the Colombian Supreme Court convicted all accused as co-perpetrators of the crimes. In convicting them, the
Colombian Supreme Court found that those responsible for the Machuca tragedy belonged to a hierarchical criminal organization that acted outside the law. Within its hierarchical structure, the members of the National Liberation Army Central Command were in charge of designing and publicizing the overall policy of the disruption of the oil supply that went from Caño Limón to the United States. Units operating in the field, such as the Cimarron Company, were given ample autonomy to plan those specific operations through which the overall policy was to be implemented. The Central Command retained the power to discipline those physical perpetrators who made mistakes in the execution of the overall policy.

For the Colombian Supreme Court, the physical perpetrators of the Cimarron Company freely and knowingly decided to carry out the bombing as a way of contributing to the implementation of the overall campaign of disruption of the Colombian oil supply. They did so out of their ideological conviction and not because they were lied to or because they were used as tools by the Central Command. The Central Command had no control over their will. Under these circumstances, it was not possible to resort to the notion of indirect perpetration. Moreover, the notion of instigation could not apply because this was not just a case in which the crimes were committed in the implementation of superiors' instructions. On the contrary, in the view of the Colombian Supreme Court, this was a case in which a plurality of persons, acting freely and sharing the overall policy of oil supply disruption designed by the Central Command, made their contribution to the commission of the crimes in a coordinated manner in accordance with the principle of division of tasks. As a result, the members of the Central Command, the commanders of the Cimarron Company and the physical perpetrators who bombed the oleoduct near Machuca were co-perpetrators insofar as they were all part of the same joint criminal enterprise.

2. The Case against Former National Senator García Romero

The Colombian Supreme Court partially overcame its reluctance to apply the notion of indirect perpetration through organized structures of power in its 23 February 2010 judgment in the case against the former national senator Alvaro Alfonso García Romero, co-founder of the paramilitary group known as Frente Héroes de los Montes de María.26 According to the Colombian Supreme Court, this paramilitary group had a strong hierarchy and organized structure of power, which operated in the department of Sucre, in the north of Colombia. Its high-level commanders designed specific operations, and an ample number of subordinates (their number was soon in the hundreds) implemented them. The instructions given by the high-level commanders of the group were detailed, and the discretion enjoyed in their implementation by the field commanders and low-level members of the group was very limited (far less than in some guerrilla organizations such as the National Liberation Army referred to above). The numerous meetings and continuous radio and phone communications between the high-level commanders of the group and its field commanders allowed the former to keep a tight control over the development of the group's operations. The ultimate strategy of the paramilitary group aimed to secure the military control over the territory in which they operated. They protected businessmen and cattle traders in the areas in which they operated because this allowed them to raise financial support, to eliminate anyone they considered to be assisting the guerrilla and to take over the land that was left behind by the numerous villagers who fled the area from the paramilitary group. At a later stage, the strategy of the paramilitary group was extended to secure control over the local and regional governments in the territories in which they operated. In order to achieve this goal, the group supported candidates in local and regional elections.

The Macayepo massacre was an operation carried out by several hundred members of the paramilitary group and consisted of multiple killings that took place between 9 and 16 October 2000 in several villages in the area of Carmen de Bolívar (including Macayepo) as well as the massive displacement of their population. According to the Colombian Supreme Court, García Romero was convicted as an indirect perpetrator of the massacre because: (i) he had control (which he shared with its senior military commanders) over the paramilitary group; (ii) the massacre was a normal activity of the paramilitary group that he had co-founded, and which he supported and advised; and (iii) he contributed to the success of the operation by securing that the anti-guerrilla battalions of the First Brigade of the Navy Infantry were sent away by the Brigade’s Commander so as to avoid any possible interference with the killings and mass displacement.27

26 According to the Colombian Supreme Court, in the mid-1990s, and possibly earlier, illegal armed groups started operating without much coordination under the name of fuerzas de autodefensa in the department of Sucre. In 1996, the groups started being coordinated by paramilitary commander Salvatore Mancuso, who was given the task of unifying the different armed groups of fuerzas de autodefensa in the northern part of the country under Carlos Castaño, head of the broader organization known as Autodefensas Unidas de Colombia. Around the same time, some of the wealthier cattle traders of Sucre took the initiative to create an armed group of fuerzas de autodefensa to provide security to the center and north of the Department of Sucre. As a result, there were several meetings between paramilitary commanders (such as Salvatore Mancuso), local and regional politicians, and cattle traders of northern and central Sucre. In this context, a meeting was held in 1997 at the Hacienda Las Canarias, where an agreement was reached between the former national senator Alvaro Alfonso García Romero, the paramilitary leader Salvatore Mancuso, and cattle traders Miguel Nata Amín, Joaquín García Rodríguez and Javier Piedrahíta, to create a paramilitary group, subsequently known as Bloque Héroes de los Montes de María. After agreeing on how the group would be financially and materially supported, Rodrigo Mercado Peluffo, alias Cadenas, was appointed commander of the group. Due to his participation in this meeting, his subsequent financial support to the paramilitary group and his material contribution to some of its operations, García Romero was convicted by the Colombian Supreme Court as a co-perpetrator of the crime of membership in a criminal organization (concurso para delinquir agravado).

27 According to the Colombian Supreme Court, in a taped conversation between García Romero and his close aid, Joaquín García, the latter informed the accused about the operation the day
Nevertheless, it is noteworthy that, in the same 23 February 2010 judgment, the Colombian Supreme Court convicted García Romero as an instigator (and not as indirect perpetrator) for ordering the killing of Georgina Narváez. According to the Colombian Supreme Court, García Romero ordered members of the paramilitary group to kill her on 27 October 1997 after he had reached the conclusion that, given the poor electoral results obtained by 'his candidate' (Morris Taboada), Taboada could only become the Governor of the department of Sucre if the votes in the town of San Onofre were recounted and Georgina Narváez (the woman who had taken note of the votes in the first recount) was killed.

It must be highlighted that, in contrast to the murder of Georgina Narváez where García Romero gave the order to kill, in the Macayepo massacre García Romero did not appear to have participated in the design of the operation (he was informed about it by his close aide Joaquín Garcia the day before its commencement) nor in the setting into motion of the operation (his contribution consisted of using his influence with the Commander of the First Brigade of the Navy Infantry to avoid the disruption of the operation by the Colombian military). As a result, it appears that the Colombian Supreme Court’s consideration of García Romero as an instigator of the killing of Georgina Narváez is based on its traditional approach to the notion of instigation, according to which, such a notion is applicable whenever the accused prompts a fully responsible person to commit a crime without intervening during its execution. Nevertheless, this is precisely the type of situation that the notion of indirect perpetration through organized structures of power is designed to cover: when superiors use their organizations to secure the commission of the crimes.

Furthermore, according to the Colombian Supreme Court, due to the fact that García Romero made a contribution during the execution of the operation in the Macayepo village and surrounding areas (ensuring no disruption to the operation by the Colombian military), the notion of instigation was no longer applicable in relation to his responsibility for the Macayepo massacre. Only before its commencement and emphasized the need to get the counter-guerrilla battalions of the Colombian military out of the relevant area. In the said conversation, García Romero agreed to talk early the next morning to the Commander of the First Brigade of the Navy Infantry. The orders subsequently received by the counter-guerrilla battalions showed that they were sent away from the area in which the massacre was taking place, which prevented them from stopping the paramilitary operation. Only after hundreds of paramilitary attackers left the area where they had committed the massacre, did the Commander of the First Brigade of the Navy Infantry order the anti-guerrilla battalions under his command to move back to the relevant area in order to locate and detain the alleged perpetrators (this was known as ‘Operation Calmness’).

28 According to the Colombian Supreme Court, García Romero gave the order to kill Georgina Narváez and offered an amount of $2,500 (US dollars) to have it done as soon as possible. The order was transmitted by Joaquín García (García Romero’s close aide) to Salomon Peris (who was in charge of the military operations of the paramilitary group), who passed it on to Danilo (the commander of the field unit based in the town of San Onofre). The victim was shot down a few days afterwards by two unknown individuals on a motorcycle.

D. Peru

1. The Shining Path Case

The notion of indirect perpetration through organized structures of power was applied for the first time in Peru by the Peruvian National Penal Chamber in its 13 October 2006 trial judgment, which was subsequently confirmed by the Peruvian Supreme Court. These judgments were issued in the case of Abimael Guzmán, the founder and leader of the Maoist guerrilla organization, Sendero Luminoso or the Shining Path, and some of his closest aides (his wife Elena Iparraguirre, Laura Zambrano and María Pantoja) in relation to the Lucanamarca massacre of 3 April 1983.

According to the National Penal Chamber, the Permanent Direction Committee and the Central Committee of the Shining Path held ultimate control over the functioning of the organization and had the power to take necessary disciplinary measures when the intermediate committees and field units
did not comply with their instructions. Their members presided over the meetings with the intermediate committees, which in turn were in contact with the units in the field. Operations, such as the one in the Lucanamarca area, were only launched in execution of orders that reflected the decisions taken by the Permanent Direction Committee and the agreements reached in the Central Committee. Hence, it was the competence of the Permanent Direction Committee and the Central Committee to decide about specific actions in local areas and to determine when, where and against whom the operations had to be carried out. The orders were transmitted by the members of the Permanent Direction Committee and the Central Committee to the contact points in the intermediate committees, who were entrusted with planning the logistics of the operation. Subsequently, the intermediate committees transmitted detailed instructions on how to execute the operations to the field units. As president of the Permanent Direction Committee, the Central Committee, and the Political Bureau of the Shining Path, Guzmán exercised control over the organization. As a result, he was convicted as an indirect perpetrator.

In applying the notion of indirect perpetration through organized structures of power, the National Penal Chamber and the Peruvian Supreme Court highlighted that the definition of perpetrator contained in Article 100 of the 1924 Peruvian Penal Code ("those who take part in the execution of crime") did not exclude per se the notion of indirect perpetration through organized structures of power. Moreover, the Peruvian Supreme Court highlighted that the said notion had been embraced by Article 23 of the new Peruvian Penal Code of 1991, which defines perpetrators as including "those who commit the crime as an individual, through another person or joint with others."

Guzmán’s defence claimed that the notion of indirect perpetration through organized structures of power could not be applied because the Shining Path was not a state-sponsored organization, and therefore, its members did not have a duty to comply with the orders of the Shining Path’s leadership. This, it argued, prevented the transfer of responsibility up to the highest echelons of the organization. However, the National Penal Chamber and the Peruvian Supreme Court pointed out that the application of the notion of indirect perpetration through organized structures of power was never limited to state-sponsored organizations because, according to Claus Roxin, it is mainly suitable for situations in which the relevant organization acts outside the legal order.

Guzmán’s defence also argued that the notion of indirect perpetration could not be applied in this case because the requirement that the physical perpetrators be interchangeable members of the Shining Path was not met. According to Guzmán’s defence, not all the members of the Shining Path had the necessary skills to kill with machetes and axes, and hack babies, women and elderly people, as it had happened in Lucanamarca. In this scenario, the interchangeability requirement did not depend on how many formal members an organization had, but on how many of them had the necessary expertise and experience to execute Lucanamarca-like operations. Given the limited specialized members of the Shining Path who could carry out this type of operations, the defence claimed that Guzmán did not have control over the organization nor over the will of the physical perpetrators of the massacre.

The Peruvian National Penal Chamber rejected the defence’s arguments because, in its view, Guzmán’s control over the will of the physical perpetrators was not based on the interchangeability of the members of Shining Path. Indeed, the reasons that could lead the original addressees to refuse compliance with the superiors’ orders could, in principle, also be shared by the other members of the organization. As a result, for the Peruvian National Penal Chamber, the interchangeability of the members of an organization only increases the probability that orders will be executed; it does not secure automatic compliance with the orders. In the view of the Peruvian National Penal Chamber, it is the physical perpetrators’ favourable attitude to comply with the unlawful superiors’ orders, and not their fungible nature, that gives

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32 In an interview given by Guzmán to El Diario (a pro-Shining Path newspaper based in Lima) in July 1988. Guzmán acknowledged his responsibility in the massacre as follows:

In the face of reactionary military actions... we responded with a devastating action: Lucanamarca. Neither they nor we have forgotten it, to be sure, because they got an answer that they didn’t imagine possible. More than 80 were annihilated, that is the truth. And we say openly that there were excesses, as was analysed in 1983. But everything in life has two aspects. Our task was to deal a devastating blow in order to put them in check, to make them understand that it was not going to be so easy. On some occasions, like that one, it was the Central Leadership itself that planned the action and gave instructions. That’s how it was. In that case, the principal thing is that we dealt them a devastating blow, and we checked them and they understood that they were dealing with a different kind of people’s fighters, that we weren’t the same as those they had fought before. This is what they understood. The excesses are the negative aspect.... If we were to give the masses a lot of restrictions, requirements and prohibitions, it would mean that deep down we didn’t want the waters to overflow. And what we needed was for the waters to overflow, to let the flood rage, because we know that when a river floods its banks it causes devastation, but then it returns to its riverbed.... [The main point was to make them understand that we were a hard nut to crack, and that we were ready for anything, anything.]

The English translation of the full interview is available at http://www.biotbe.org/peru-pcp/docs/en/interview.htm (visited 20 June 2010). Subsequently, on 30 September 2002, Guzmán acknowledged again his responsibility for the Lucanamarca massacre before the Peruvian Truth and Reconciliation Commission: ‘We, doctors, reiterate that we will not avoid our responsibility for the Lucanamarca massacre. I have mine, I’m the first one responsible, and I will never renounce my responsibility that wouldn’t make any sense! The full report of the commission on the Lucanamarca massacre is available in Spanish at http://www.cverdad.org.pe/ pdf/COMO%20VII/Casos%20Ilustrativos-UDE2.6.%20LUCANAMARCA.pdf (visited 20 June 2010).

33 Authors’ translation. The original Spanish version of Art. 100 of the 1924 Peruvian Penal Code provides that perpetrators are those ‘que tomaron parte en la ejecución del hecho punible.’

34 Authors’ translation. The original Spanish version of Art. 23 of the 1991 Peruvian Penal Code provides that a perpetrator is ‘el que realiza por sí o por medio de otro el hecho punible y los que lo cometen conjuntamente serán reprimidos con la pena establecida para esta infracción que tomaron parte en la ejecución del hecho punible.’
superiors' control over their organizations. In this scenario, if the initial addressees of the superiors' orders refuse to comply with them, other members of the organization will replace them in the implementation of the orders because the replacements, like most members of the organization, are willing (have a favourable attitude) towards the execution of the superiors' orders. Hence, while the interchangeability of the executioners within the organization increases the probability of compliance with superiors' orders, the superiors' control over the organization is based on the favourable attitude of its members to comply with their orders. As a result, according to the Peruvian National Penal Chamber, the key requirement for the application of the notion of indirect perpetration through organized structures of power is the existence of this type of attitude among the membership of the relevant organization. For the Peruvian National Penal Chamber, this requirement was met in the case of the Shining Path as its members were ideologically motivated, had a high level of political and military education and shared a common vision of the State and society at large. Under these circumstances, Guzmán effected the commission of the Lucanamarca massacre by using the hierarchical structure of the Shining Path and by profiting from the willingness of its members to follow their leader's orders.

The Peruvian Supreme Court departed from the interpretation of the Peruvian National Penal Chamber in that it underscored that the superior's control over an organization was based on its hierarchical structure and the interchangeability of its members. As a result, the Peruvian Supreme Court considered the fungible nature of the members of the organization a key requirement of the notion of indirect perpetration. Nevertheless, when analysing the interchangeability of the members of the Shining Path, the Peruvian Supreme Court focused on the successive interchangeability of its members. It emphasized that, if a member of the Shining Path did not comply with an order of the Permanent Direction Committee, another member would replace him. This is what occurred with the order to kill Felip Santiago Salaverry, which was executed after six attempts. The problem with this approach is that most organizations fulfill a 'successive interchangeability' criterion because, whenever one of its members refuses to comply with a superior's order, there will always be another member who can attempt to execute it at a later stage. As a result, this approach deprives the 'interchangeability criterion' of any value to distinguish between those cases in which superiors have a real control over their organizations and those cases in which they do not have such control.

35 As a result, the Peruvian Supreme Court did not address the issue of how the physical perpetrators of the Lucanamarca massacre were fungible members of the Shining Path at the time of the massacre. As noted above, it focused its analysis on the notion of 'successive interchangeability'. Moreover, it highlighted the evidence showing that Guzmán secured the commission of the massacre by using the hierarchical structure of the Shining Path and profited from the willingness of its members to renounce their own identity and follow their leaders' orders. However, such evidence only shows that, as required by the National Penal Chamber, Shining Path members had a favourable internal attitude towards the execution of orders issued by their leader Abimael Guzmán. The same conclusion is reached by I. Meiri, 'El Caso Peruano', in Ambos (ed.), supra note 13, at 144. For a different evaluation of the case's fact situation, see the dissenting opinion of Judge Villa Stein.


37 See, for instance, the judgments of the Spanish Supreme Court of 2 July 2004 (Bombing of Hipercor supermarket case), of 1 October 2004 (Sellosino case) and of 17 July 2008 (Bombing of Atocha train station case). For an analysis of the impact of the notion of indirect perpetration through organized structures of power on the case law of the Spanish Supreme Court, see A. Gil Gil, 'La autoría mediata por aparatos jerarquizados de poder en la jurisprudencia española', 53 Anuario de Derecho penal y Ciencias penales (2008) 53-88. See also E. Boscaglino Zapater, 'La teoría del dominio del hecho en la jurisprudencia del Tribunal Supremo', in La Ley (2008); A. Gil Gil, 'El Caso Español', in Ambos (ed.), supra note 13.

38 The reluctance of Spanish courts to apply the notion of indirect perpetration through organized structures of power is in contrast with the support given to such notion by a number of those Spanish authors who have focused their work on the analysis of modes of liability in (international) criminal law. See, in particular, P. Paredo.
After the death of Spanish dictator Francisco Franco in 1975, there have only been a handful of cases in Spain in which it could be argued that the relevant crimes were committed through organized structures of power. The 23 February 1981 attempted coup d'état was dealt with in the 22 April 1983 judgment of the Penal Chamber of the Spanish Supreme Court. In this case, the Spanish Supreme Court did not apply the notion of indirect perpetration through organized structures of power because such a notion was not sufficiently known by the Spanish magistrates in the early 80s. Moreover, at that time, in the Spanish Penal Code and the Spanish Code of Military Justice, there were several provisions dealing specifically with the criminal liability of military commanders who could attempt a coup d'état.

In the so-called 'Marey Case', which was dealt with in the 28 July 1998 judgment of the Spanish Supreme Court, the former interior minister and other high-ranking officials of his ministry were convicted for kidnapping an alleged member of the terrorist organization ETA. In this case, the reason for not resorting to the notion of indirect perpetration through an organized structure of power was that the Spanish Supreme Court considered that the charged crime (the kidnapping of alleged ETA member Segundo Marey) was an isolated act, and, therefore, had not taken place in the context of a systematic unlawful activity by illegal groups operating from within the state.

Spanish courts could have resorted to the notion of indirect perpetration through organized structures of power in those cases against individuals who were allegedly at the top of the terrorist organization ETA for crimes committed by their subordinates within such organization. Nevertheless, although one can observe the influence of such a notion in the legal arguments used to justify convictions for instigation and necessary contribution in several cases, Spanish courts have never expressly applied it.

Finally, the 10 December 1998 decision to proceed against General Augusto Pinochet issued by Spanish investigative judge Baltasar Garzón is another example of this pattern. The decision charged General Augusto Pinochet with crimes against humanity, torture and genocide committed by the Chilean state apparatus during his authoritarian regime. Although the arguments contained therein are clearly related to the notion of indirect perpetration through organized structures of power, such a notion is not expressly mentioned in the decision.

F. Uruguay

The 9 February 2010 judgment of the Uruguayan Penal Tribunal No. 7 (hereinafter 'the Tribunal') convicted Juan Maria Bordaberry Arocena, former Uruguayan president from 1972 to 1976, as (i) a direct perpetrator of the crime of an attack against the Constitution (Bordaberry's signature was necessary to enact the 27 June 1973 Decree No. 464/973 by which the Parliament was dissolved); and as (ii) a co-perpetrator of nine crimes of forced disappearance and two murders for political reasons.

According to the Tribunal, Bordaberry did not have effective control over the repressive operations carried out by the Uruguayan Armed Forces between 1973 and 1976 (a period during which around one-fiftieth of all Uruguayan citizens were detained or interrogated, turning Uruguay into the country with the highest percentage of political detentions in Latin America at that time) because, from 9 February 1973 onwards, the Uruguayan Armed Forces had taken up, unilaterally, the fight against subversion, and Bordaberry had no influence in its design or implementation. The means by which the anti-subversive campaign was carried out, widespread detention and torture, followed at times by enforced disappearance and murder, were not decided by Bordaberry, but by the Uruguayan Armed Forces. As a result, the Uruguayan Penal Tribunal did not discuss in its judgment whether the notion of indirect perpetration through organized structures of power could apply.

The Tribunal focused on the notion of co-perpetration because Bordaberry supported the repressive policies of the Uruguayan Armed Forces in the pursuit of a common goal, shared by himself, the senior commanders of the Uruguayan Armed Forces, and the Uruguayan Armed Forces. In its Decision to Proceed to Trial (Auto de procesamiento) against General Augusto Pinochet of 10 December 1998, the Investigating Chamber no. 5 of the Spanish Audiencia Nacional (Judge Baltasar Garzón) held:

As head of the Government Council and President of the Republic, [General Augusto Pinochet] has the power to stop the existing situation. Nevertheless, he, on the contrary, incite and encourage giving the necessary orders to his subordinates, and controlling at times with full control over the crimes, their material execution through his leadership position in the DNA.

Nevertheless, this Decision does not consider Pinochet as an indirect perpetrator. Quite the contrary, it considers him sometimes as an instigator and at other times as a co-perpetrator.
Uruguayan Armed Forces and the perpetrators of the crimes: the persecution and elimination of those political groups considered to be dangerous for national security. Not only did Bordaberry fail to comply with his duties to take the necessary actions to prevent and stop the commission of the crimes, to request their investigation and to file criminal complaints with the competent judicial institutions (as president of the Republic of Uruguay he had sufficient authority to take these measures through his Ministers), but he took measures to support the overall anti-subversive campaign. Indeed, according to the Tribunal, the repressive policies designed and implemented by the Uruguayan Armed Forces could not have been carried out for several years without the agreement and support of the then president of the Republic of Uruguay.43

3. Conclusion

When Roxin defined the notion of indirect perpetration through organized structures of power for the first time in 1963, he had in mind an unfortunate and unique chapter in the history of the twentieth century: the holocaust and the network of Nazi concentration and extermination camps. At the top of the Nazi organization were Adolf Hitler and Heinrich Himmler. However, the effective functioning of the Nazi organization required coordinated action of thousands of additional members of this organization who, according to a strict chain of command, operated at different levels of the Nazi organization. The notion of indirect perpetration through organized structures of power strongly put into question those attempts to portray the criminal liability of senior Nazi political and military leaders, as well as mid-level superiors of the Nazi organization, as mere accessories to the crimes committed in execution of the infamous 'Final Solution'.

Despite the initial reluctance of national and international courts to resort to the notion of indirect perpetration through organized structures of power, the situation has, to a very important extent, changed over time. This is the result of a growing perception that the application, in this type of cases, of notions of accessorial liability, such as instigation or necessary contribution, even if it may have no impact on the penalty, relegates superiors to a secondary role, which does not correspond to their actual relevance.

Moreover, although Latin American and Spanish courts remain, to a certain extent, divided on the determination of the specific notion of principal liability to be resorted to in these cases (indirect perpetration through organized structures of power vis-à-vis co-perpetration based on joint control), the cases analysed in the present article show how, today, the notion of indirect perpetration has come to play a key role in portraying the criminal liability of senior political leaders and high military commanders who make use of the organizations that they control to effect the commission of crimes.

43 Citing Welzel and Bacigalupo, the Tribunal highlighted that the application of the notion of co-perpetration requires that the contribution of the accused (i) takes place during the stage of execution of the crime; and (ii) is essential because, without it, the crime could not have been committed. Only if these requirements are met, it can be stated that the accused had joint control (shared with the other co-perpetrators) over the commission of the crime and, therefore, decided to move forward with its completion.