

International Criminal Justice Series

Volume 33

Series Editors

Gerhard Werle, Berlin, Germany

Moritz Vormbaum, Münster, Germany

The *International Criminal Justice Series* aims to create a platform for publications covering the entire field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars.

Editorial Office

Prof. Dr. Moritz Vormbaum
University of Münster
Faculty of Law
Bispinghof 24-25
48143 Münster, Germany
vormbaum@uni-muenster.de

Johannes Block

Reconciling Responsibility with Reality

A Comparative Analysis of Modes of Active
Leadership Liability in International Criminal
Law



ASSER PRESS



Springer

Johannes Block
Bonn, Germany

ISSN 2352-6718 ISSN 2352-6726 (electronic)
International Criminal Justice Series
ISBN 978-94-6265-606-2 ISBN 978-94-6265-607-9 (eBook)
<https://doi.org/10.1007/978-94-6265-607-9>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2023

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE, part of Springer Nature.

The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Acknowledgements

This book is based on my thesis (Dr. iur.), which was accepted by the University of Cologne in June 2021 and which I defended in December of the same year. The thesis was awarded the *Promotionspreis der Rechtswissenschaftlichen Fakultät* of the University of Cologne and the *Ernst-Rabel-Preis* of the *Gesellschaft für Rechtsvergleichung e.V.*

I would like to express my deepest gratitude to Prof. Dr. Bettina Weisser, whose invaluable advice guided me through the research process, who encouraged me to look sceptically at established doctrine and allowed me considerable freedom to pursue my research while simultaneously working and teaching at the University of Cologne.

I am also indebted to Prof. Dr. Thomas Weigend, who was always available to discuss the many different aspects of the topic of this work and who provided the second report on my thesis.

I am furthermore grateful to Prof. Dr. Gerhard Werle, Prof. Dr. Moritz Vormbaum and Frank Bakker LL.M. for accepting my manuscript for publication in the *International Criminal Justice* Series and to Kiki van Gorp for her experienced and reliable guidance through the publication process.

The Faculty of Law at the University of Cologne generously supported the language editing of my thesis.

I also wish to thank the many colleagues and friends who have supported and encouraged me over the years of my research: Prof. Dr. Elies van Sliedregt for welcoming me as a visiting scholar at the University of Leeds and for sharing enriching insights into the topic of this work; Sir Howard Morrison QC for sharing his unparalleled expertise as a practitioner; Anna Seyfert for reviewing and discussing several chapters of the thesis; Julia Martens for her incredibly accurate and fast language editing; the team of the *Institut für ausländisches und internationales Strafrecht* at the University of Cologne, especially Kirsten Kindler, Dr. Sandra Petry, Christine Untch, Friederike Klimek, Yara Bröcker and Max Wrobel for great spirit and fruitful discussions; Dr. Jana Berberich and Kirsten Watson Weis for all the serious and not so serious conversations; Falko, Gabriel, Marvin and Lukas for real talk and fantastic encounters.

My mother, father and sister have encouraged and supported me in various ways throughout my years of study and research. Knowing that I will always have a home with them is one of the greatest gifts.

Finally, I am forever grateful to Jana, who has accepted and endured so much and without whose unrivalled positivity, good humour and loving support, I would not have been able to complete this work.

Cologne, Germany
April 2023

Johannes Block

Contents

1 Introduction	1
1.1 Topic and Method of this Book	1
1.2 Limits of and Definitions Used in this Book	5
References	7
Part I Indirect Perpetration Through an Organisation	
2 The German Origins of Indirect Perpetration Through an Organised Apparatus of Power	11
2.1 The Case of Adolf Eichmann—A Catalyst for the Development of a Doctrine	12
2.2 The Traditional Concept of Indirect Perpetration Through an Organisation	17
2.2.1 Eichmann as a Perpetrator	17
2.2.2 <i>Tatherrschaft</i> —Domination of the Crime: Methodology	19
2.2.3 <i>Mittelbare Täterschaft Kraft Organisationsherrschaft</i> —Indirect Perpetration Through an Organisation	22
2.2.4 Domination of the Crime in the Traditional Approach to Indirect Perpetration Through an Organisation	37
2.2.5 A Hierarchy of Blameworthiness	40
2.2.6 Summary and Conclusions	42
2.3 The German Federal Court of Justice and Indirect Perpetration Through an Organisation	44
2.3.1 The German Courts' Subjective Theory and Their Failure to Adjudicate Former Nazis	44
2.3.2 The BGH's Approach on Indirect Perpetration Through an Organisation	45
2.3.3 Summary and Conclusion	56

2.4	The Systemic-Functional Approach to Indirect Perpetration Through an Organisation	58
2.4.1	Elements of Indirect Perpetration Through an Organisation Pursuant to the Systemic Approach	61
2.4.2	Consequences in Comparison to the Traditional Concept	64
2.5	Views on a Hierarchy of Blameworthiness	70
2.6	Summary	72
2.6.1	Summary and Comparison	72
2.6.2	Concluding Remarks: The <i>Eichmann</i> Case and Its Implications for International Criminal Law	74
	References	75
3	Indirect Perpetration Through an Organisation Under the Rome Statute	81
3.1	Indirect Perpetration Through an Organisation in the Rome Statute's System of Perpetration and Participation	82
3.1.1	Forms of Responsibility—The Structure of Art. 25 (3) Rome Statute	83
3.1.2	Analysis of Indirect Perpetration Through an Organisation in the ICC's Jurisprudence	85
3.1.3	The Notion of Control Over the Crime Under the ICC's Jurisprudence	114
3.1.4	A Hierarchy of Forms of Responsibility Under the Control Theory	119
3.1.5	Summary	123
3.2	Comparison	124
3.2.1	The Theoretical Foundation of Indirect Perpetration Through an Organisation	125
3.2.2	The Legal Requirements	128
3.2.3	The Notion of Domination/Control Over the Crime	139
3.2.4	A Hierarchy of Blameworthiness as the Consequence of Control Over the Crime	143
3.2.5	Conclusion	144
3.3	Critical Analysis	145
3.3.1	The Conception of the Doctrine	145
3.3.2	On Indirect Perpetration Through an Organisation	154
3.3.3	The Theory of Control Over the Crime/Domination of the Crime as an Unconvincing Concept	172
3.3.4	Uncertainties in Dealing with the Doctrine in Theory and in Practice	195
3.3.5	Summary and Conclusion	199
3.4	Concluding Remarks	199
	References	201

Part II Responsibility for Ordering a Crime

4 Historic Precedents: Ordering in Post-World War II Trials 211

4.1 The Structure of Art. 2 Para. 2 CCL 10 212

4.2 Legal Requirements 214

4.2.1 *Actus Reus*—The Conduct Element of Ordering 214

4.2.2 Unlawfulness of the Order 219

4.2.3 Position of Authority 220

4.2.4 The *Mens Rea* of Ordering a Crime 228

4.2.5 Commission of the Crime, Ordering as a Substantive
Crime and Attempt 229

4.2.6 Summary and Conclusion 231

4.3 Observations on Ordering and Authority in Post-World War
II Trials 232

4.3.1 Authority or Authorship as a Determining Factor 232

4.3.2 Exercising Authority or Power Without Being
Charged Under Ordering 235

4.3.3 Control Over Parts of the Nazi Apparatus and “Direct
Participation” 238

4.4 Sentencing Practice and Possible Implications on Ordering
and the Over-All System of Forms of Liability 242

4.5 The Relation Between Ordering and Other Modes
of Responsibility 248

4.6 Conclusion 250

References 250

**5 Responsibility for Ordering a Crime Under the Jurisprudence
of the *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda** 253

5.1 Legal Requirements and Categorization of Ordering
in the Law of the *Ad Hoc* Tribunals 254

5.1.1 Legal Requirements 256

5.1.2 Ordering as Principal or Accessorial Liability
in the Jurisprudence of the *Ad Hoc* Tribunals 281

5.1.3 The Attempt of Ordering a Crime 285

5.1.4 Summary 286

5.2 The Difference Between Ordering and Contributing to a Joint
Criminal Enterprise 286

5.2.1 Joint Criminal Enterprise—The ICTY’s and ICTR’s
Approach to Dealing with Various Contributions
to Large-Scale Crimes 288

5.2.2 Comparison of JCE and Ordering 294

5.2.3 Ordering as an Alternative Mode of Responsibility
to JCE in Leadership Cases Before the *Ad Hoc*
Tribunals 310

5.2.4 Critical Analysis of the JCE Doctrine and Advantages
of Ordering 323

5.3	Ordering and Its Relation to Other Modes of Liability in the <i>Ad Hoc</i> Tribunals' Jurisprudence	334
5.3.1	The <i>Ad Hoc</i> Tribunals' Terminology for Different Modes of Perpetration and Participation	335
5.3.2	The Legal Requirements of Ordering	341
5.3.3	The Influence of Modes of Liability on Sentencing at the <i>Ad Hoc</i> Tribunals	344
5.3.4	Legal Concurrences and Choice of Modes of Liability	349
5.3.5	Excursion: The ICTR Appeals Chamber's Approach Opposed to the Preceding Findings	355
5.3.6	Conclusion on the Role and Position of Ordering in a System of Perpetration and Participation at the <i>Ad Hoc</i> Tribunals	357
5.4	Summary and Conclusion	363
	References	364
6	Responsibility for Ordering Under Article 25 (3) (b) of the Rome Statute	367
6.1	Conceptualization of Ordering Under Article 25 (3) (a) Rome Statute	368
6.2	Legal Requirements	370
6.2.1	Conduct Element: Giving an Order	371
6.2.2	Position of Authority	373
6.3	Summary: Authority as a Broad but Accurate Requirement	381
6.3.1	Causal Nexus: A Direct Effect on the Commission of the Crime	382
6.3.2	Mental Element	384
6.3.3	Commission or Attempted Commission of the Crime	387
6.4	Application of Ordering to High-Level Decision Makers Before the ICC	387
6.4.1	Replacement of Ordering and Indirect Perpetration With Each Other	388
6.4.2	Qualification of Decision Makers Under Ordering in ICC Cases	391
6.4.3	Influence on Specific Crimes, Temporal and Spatial Extent and Position	396
6.4.4	Conclusion: The Applicability of Ordering to Decision Maker Cases Before the ICC	396
6.5	The Relation of Ordering and Other Forms of Responsibility Under the Rome Statute	397
6.5.1	Ordering in a Differentiated System of Perpetration and Participation	397
6.5.2	The Attempt to Order a Crime	402
6.5.3	A Hierarchy of Blameworthiness and the Expected Influence of Ordering on Sentencing	403

6.6 Conclusion: Ordering Is Suitable but Downgraded in Practice 409
References 409

Part III Comparison, Evaluation and Conclusion

7 Comparison and Evaluation 415
7.1 Comparison of Indirect Perpetration Through an Organisation
and Ordering 416
7.1.1 Historic Development 417
7.1.2 Legal Requirements 420
7.1.3 “Control” versus No Control 430
7.1.4 Encompassed Cases 433
7.1.5 Evidence 434
7.1.6 Conclusion 435
7.2 Evaluation: The Nature of Responsibility
and the Blameworthiness of Indirect Perpetration
and Ordering 437
7.2.1 Principal versus Accessorial Liability Under the Rome
Statute 437
7.2.2 The Majority Approach: Ordering as a Less
Blameworthy Form of Responsibility in Comparison
to Forms of Commission 440
7.2.3 Critical Analysis of Arguments in Favour
of a Hierarchy of Blameworthiness 441
7.2.4 No Reasons for a Hierarchy of Blameworthiness
as Applied by the Majority Opinion 462
7.3 Preliminary Conclusion 462
References 463

**8 Conclusion: The Responsibility of Decision Makers
for Ordering the Commission of International Crimes** 467
8.1 Reasons in Favour of Ordering Being the Suitable Mode
of Liability for High- and Mid-level Decision Makers 468
8.1.1 History and Uniformity: An Inherently International
Concept for One of the Most Relevant Forms
of Leadership Conduct in Mass Atrocities 468
8.1.2 Practice Cases and Their Description: Ordering
as a Comprehensive, Intuitive and Suitable Label 470
8.1.3 The Legal Requirements: Ordering as the More
Precise Form of Responsibility 471
8.1.4 The Overall System: Ordering Within the Correct
Hierarchy of Blameworthiness 472
8.1.5 The Comparative Perspective: Leadership Liability
as a Highly Blameworthy but Differently Regulated
and Approached Issue in National Legal Systems 474
8.1.6 Conclusion 476

- 8.2 Consequences of the Proposed Approach 477
 - 8.2.1 The Overall Hierarchy of Blameworthiness
in the System of Article 25 (3)(a) to (d) Rome Statute 477
 - 8.2.2 The Role of Indirect (Co-)Perpetration Through
an Organisation 480
 - 8.2.3 The Distinction Between Forms of Perpetration
and Participation 480
 - 8.2.4 Accessorial Object and Executioners Without Special
Intent 482
 - 8.2.5 Type of Model: Individual, Direct Linkage Rather
Than Systemic, Indirect Linkage 483
 - 8.2.6 Conclusion 485
- 8.3 Thoughts on Future Provisions on Forms of Responsibility
in International Criminal Law 485
- References 492

- Table of Cases** 495
- Index** 503

Abbreviations

Art.	Article
<i>BGH</i>	<i>Bundesgerichtshof</i> (German Federal Court of Justice)
CCL 10	Control Council Law 10
e.g.	<i>Exempli gratia</i>
ECCC	Extraordinary Chambers in the Courts of Cambodia
et seq.	Et sequence
<i>FDS</i>	<i>Forces de Défence et de Sécurité</i> (Ivorian Defense Forces)
fn.	Footnote
<i>FPLC</i>	<i>Front Patriotique pour la Libération du Congo</i>
GCC	German Criminal Code
GCCov	German Criminal Code old version
GDR	German Democratic Republic
<i>Gestapo</i>	<i>Geheime Staatspolizei</i> (Secret State Police)
HVO	Croatian Defence Council
i.e.	<i>id est</i>
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East
JCE	Joint Criminal Enterprise
<i>Lit.</i>	<i>littera/e</i>
LRA	Lord's Resistance Army
MICT	International Residual Mechanism for Criminal Tribunals
<i>MLC/ALC</i>	<i>Mouvement de libération du Congo/Armée de libération du Congo</i>
mn.	Margin number
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
<i>NVA</i>	<i>Nationale Volksarmee</i> (National People's Army)
<i>OKW</i>	<i>Oberkommando Wehrmacht</i> (High Command of the Wehrmacht)

OTP	Office of the Prosecutor (of the International Criminal Court)
PNU	Party of National Unity (Kenya)
PTC	Pre-Trial Chamber (of the ICC)
<i>RKFDV</i>	<i>Reichskommissar für die Festigung des deutschen Volkstums</i> (Reich Commissioner for the Strengthening of Germanism)
<i>RSHA</i>	<i>Reichssicherheitshauptamt</i> (Reich Security Main Office)
<i>RuSHA</i>	<i>Rasse- und Siedlungshauptamt</i> (Race and Settlement Main Office)
SCSL	Special Court for Sierra Leone
<i>SD</i>	<i>Sicherheitsdienst</i> (Security Service of the SS)
<i>SED</i>	<i>Sozialistische Einheitspartei Deutschlands</i> (Socialist Unity Party of Germany)
SS	<i>Schutzstaffel</i> (Paramilitary party organisation of the National Socialist Party)
<i>UPC</i>	<i>Union Patriotique du Congo</i>
VCLT	Vienna Convention on the Law of the Treaties
<i>WVHA</i>	<i>Wirtschafts- und Verwaltungshauptamt</i> (Main Economic and Administrative Office of the SS)