

Annex D.4

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY

Volume IB

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VOLUME I B

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INDIVIDUAL CRIMINAL RESPONSIBILITY

Albin Eser

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The author is greatly indebted to Alexander Schöpsdau for assistance in preparing this contribution and to Brigid Wefelnberg for her linguistic support.

Individual Criminal Responsibility

(Article 31(1) and (3)),¹⁰⁷ and perhaps not even ending with the special case of Article 28(b)(i) that the instrumentalized person in fact lacked the quality of a superior. This openness due to the 'independence clause' (in terms of the indirect perpetrator's responsibility independent from that of his tool) is also true in the other direction by making indirect perpetration possible even in a case in which the tool himself is in full terms criminally responsible such as, for instance, in the case where the intermediary was fully conscious of his own responsibility but bowed to overwhelming influence or force, or where the indirect perpetrator thought to exploit the error of his tool who was fully aware of the situation but did not dare to resist. This legal figure of an '(indirect) perpetrator behind the (direct) perpetrator', which as 'Täter hinter dem Täter' has found special attention and elaboration in German doctrine and practice,¹⁰⁸ is especially characteristic for hierarchically organized power structures. As this is not only typical for mafia-like organizations but for military systems as well, this type of perpetratorship may easily occur with war crimes or other state-supported criminal acts.¹⁰⁹ In order to be still distinguishable from normal instigation (Article 25(3)(b) of the ICC Statute), this sort of 'Organisationsherrschaft'¹¹⁰ by which the crime of the direct perpetrator is attributed to the perpetrator behind him as though it were his own, can be justified only if there is a sufficiently tight control by the indirect over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility (Article 28 of the ICC Statute).¹¹¹

D. Instigation (Article 25(3)(b) of the ICC Statute)

Although the Rome Statute itself does not speak of 'instigation' but rather of ordering, soliciting, or inducing the commission of a crime, it appears fair to use this term as perhaps the best and most common expression for summarizing what also used to be called 'accessory before the fact'.

1. Accessorial to the Principal Crime

As a mode of participation distinct from perpetration, instigation must remain in a certain relationship to the principal crime.¹¹² Whereas this accessorial problem

¹⁰⁷ See also *supra*, V.A.2.

¹⁰⁸ For further details see F. C. Schroeder, *Der Täter hinter dem Täter* (1965); Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 25 margin No. 6-60, in particular 20 ff.

¹⁰⁹ Therefore, it is no wonder that the breakthrough for the judicial recognition of this type of indirect perpetratorship in Germany was a case of criminal responsibility of members of the National Defence Council of the former German Democratic Republic for intentional killings of refugees by boarder control soldiers: *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt) 40 (1995), 218 ff. Cf. Ambos, in McDonald and Swaak-Goldman, *supra* note 6, Vol. I, p. 20 f.

¹¹⁰ On its development, cf. in particular C. Roxin, *Täterschaft und Tatherrschaft* (6th edn., 1994) 242-252, 653-654.

¹¹¹ See Ambos, in Triffterer (ed.), *supra* note 7, margin No. 9.

¹¹² Both on the differentiation of perpetration and participation and their relation, cf. *supra* V.A.2.

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