

INDIRECT PERPETRATION WITHIN THE MEANING AND THE APPLICATION OF ART. 25(3)(a), THIRD ALTERNATIVE, OF THE ROME STATUTE

Tutors (cotutelle program): Prof. Lorenzo Picotti and Prof. Dr. Kai Ambos

Student: Giulia Lanza (giulia.lanza@univr.it)

Among the various topics in international criminal law that have absorbed the focus and energy of numerous academics and practitioners is that of the attribution of liability and fair labelling of those who, despite their absence from the scene of the crime, plan, mastermind, organize, order or acquiesce to the crime's commission. In most cases, these individuals – named “intellectual perpetrators” or “perpetrators behind the desk” – occupy senior leadership positions, such as Heads of States or military chiefs, using other persons to commit the crimes and dealing with the dirty work while remaining in the background. In such contexts, it is not uncommon that the responsibility of the perpetrators of international crimes increases proportionately with their distance from the physical commission of the crimes. The attribution of criminal responsibility for the offences committed on the ground to the men in the backstage is particularly complex in macro-criminal contexts. Different concepts and theories have been put forth and developed with the purpose of adequately capturing the responsibility of individuals in the background (or the *Hintermann*, as they are referred to in German doctrine) for offences perpetrated on the battlefield by their subordinates. Before indirect perpetration was included in the Rome Statute as form of responsibility, the most common modes of liability used to prosecute and punish those far removed from the crime scene (in most cases civilian and political leaders) were ordering, instigation, planning, participation in a JCE, conspiracy and superior responsibility.

The codification of indirect perpetration in art. 25(3)(a), third alternative, ICCSt, constitutes a novelty – above all, because it is the first time that an international instrument refers explicitly to this mode of liability, and secondly, because of its broad formulation. The provision (art. 25(3)(a)) enables an individual to commit a crime “through another person, regardless of whether that other person is criminally responsible”. The appearance of indirect perpetration in international criminal law marked a turning point. It unexpectedly became one of the preferred modes of liability applied by the ICC to prosecute individuals in leadership-like positions.

In absence of a definition of indirect perpetration in the Rome Statute, the majority of the judges has interpreted art. 25(3)(a), third alternative, ICCSt along the lines of the *Organisationsherrschaftslehre*, developed for the first time by Claus Roxin in 1963. The adoption of this theory by the ICC is based on: the hierarchical reading of art. 25(3) ICCSt (with the only exception of the *Katanga* judgment), the implicit implementation of a

differentiated model of responsibility and the rejection of the subjective and the objective approaches typically used to distinguish primary and secondary responsibility.

In a presumed differentiated model, the *Organisationsherrschaftslehre* allows for those who are far removed from the crime scene to be considered as principal offenders and thus fair labelling their responsibility. Furthermore, the *Organisationsherrschaftslehre* has been widely accepted by entities engaged in the prosecution and punishment of grave and large violations of human rights occurring during military dictatorships and armed conflicts. Following the *Juntas* trials in Argentina, it has been applied in several national trials in Germany, Chile, Colombia and Peru to hold senior leaders responsible for the crimes committed by members of the organizations they controlled. Despite the dominant acceptance at the ICC of the German theory, this approach and its premises are far from being settled and have been strongly criticized in case law and in doctrine.

The objective of the present investigation is therefore to establish whether: (i) it is appropriate to resort to the control over the organization to interpret and apply art. 25(3)(a), third alternative, ICCSt; (ii) it is preferable to interpret the “independency clause” in a different way; or, (iii) in the extreme case, it is advisable to modify the Rome Statute. In order to answer this query it is fundamental to face and solve the problems related to the implementation of the doctrine at the ICC. Such issues can be grouped and analysed on various levels, including the theoretical foundations level, the empirical level and the imputation level. The first concerns the doctrine’s theoretical foundations in the Rome Statute itself. For example, is there legal basis for the approach chosen by the majority? Can one be sure that the ICC needed to rely on theoretical concepts to fill alleged gaps in the Rome Statute and in order to overcome its ambiguities? The second relates to the substantive analysis of the doctrine and its empirical application in macro-criminal contexts. Is the *Organisationsherrschaftslehre* a persuasive theory, capable on one side of capturing the collective nature of international crimes, and on the other, of ascribing the responsibility for the commission of such crimes to the “intellectual perpetrators” or “perpetrators behind the desk”? Lastly, the third deals with the premises upon which the application of the theory is based and the structure of art. 25 ICCSt in general. Is it truly necessary to resort to the control over the organization theory to attribute the responsibility to the leaders of the organizations for crimes committed by their subordinates? Departing from the controversial premises over which the implementation of the doctrine is based, can we still apply it at the ICC?

In the first part of this study, I analyse the premises upon which the *Organisationsherrschaftslehre* has been implemented at the ICC. In other words, the first part focuses on: (i) the codification of a broad formulation of indirect-perpetration in art. 25(3)(a), third alternative, ICCSt; (ii) the presumed implementation of a differentiated model of responsibility in the Rome Statute; and, (iii) the adoption of the control over the

crime theory as a criterion used to distinguish principals from accessories. Successively, I analyse the case law relating to the interpretation and application of art. 25(3)(a), third alternative, ICCSt, and delineate the limits of the control over the organization theory according to the constitutive elements identified and developed by judges in relevant case law. A detailed and critical analysis of the case law is not only required in order to define the theory, but also to highlight the problems that its implementation at the ICC presents both on a substantive and theoretical foundations level.

In the second part of the study, I focus on Claus Roxin's *Organisationsherrschaftslehre* in its original version, also in order to highlight the main differences between the original version of the doctrine and the version that has resulted from its implementation by the ICC. I also place significant emphasis on its empirical application in macro-criminal contexts. In fact, when evaluating the doctrine's success, one's analysis cannot be limited to the constitutive elements identified in literature – it is also equally as important to examine how the doctrine has been practically applied over time. My analysis, however, focuses not only on the application of the *Organisationsherrschaftslehre* in Germany, but also in other national jurisdictions, such as Argentina, Peru, Colombia and Chile. The empirical application of the doctrine in different macro-criminal contexts allows one to assess the validity and persuasiveness of the doctrine's transposition at the ICC.

In the third part, I analyse a case that would be subject to the ICC's jurisdiction and which has already been decided on the basis of the control over the organization theory, according to Italian criminal law, based on an unitarian system of attribution of accountability. The Italian legal system is not used as a "true source of law", but as a source "of ideas and concepts" that are capable to address the criticism raised against of the dominant approach. This is particularly true if we consider that the implementation of a differentiated model of attribution of responsibility in art. 25(3) ICCSt is still controversial, and that the control theory is only one of the possibilities by means it is possible to interpret the disposition. Furthermore, this study is based on the presumption that because the formulation of art. 25(3) ICCSt is the result of a compromise between different legal systems, its interpretation can change significant depending on the experience and legal background of the interpreter. However, the analysis of the same problem from a different legal perspective – in this case the Italian one – can offer great insight generally and assist in the search of the best mechanism of attribution of criminal responsibility to those who are far removed from the crime scene for the offences committed by their subordinates.

In the last part of this study, I compare the findings made in previous sections and analyse whether it is desirable to continue – where necessary with some modifications and specifications – along the path followed by the majority, or it is preferable to depart from it. This includes considering models other than the alleged differentiated model of

attribution of responsibility and resorting to other mechanisms to interpret and apply indirect perpetration under art. 25(3)(a), third alternative, ICCSt.