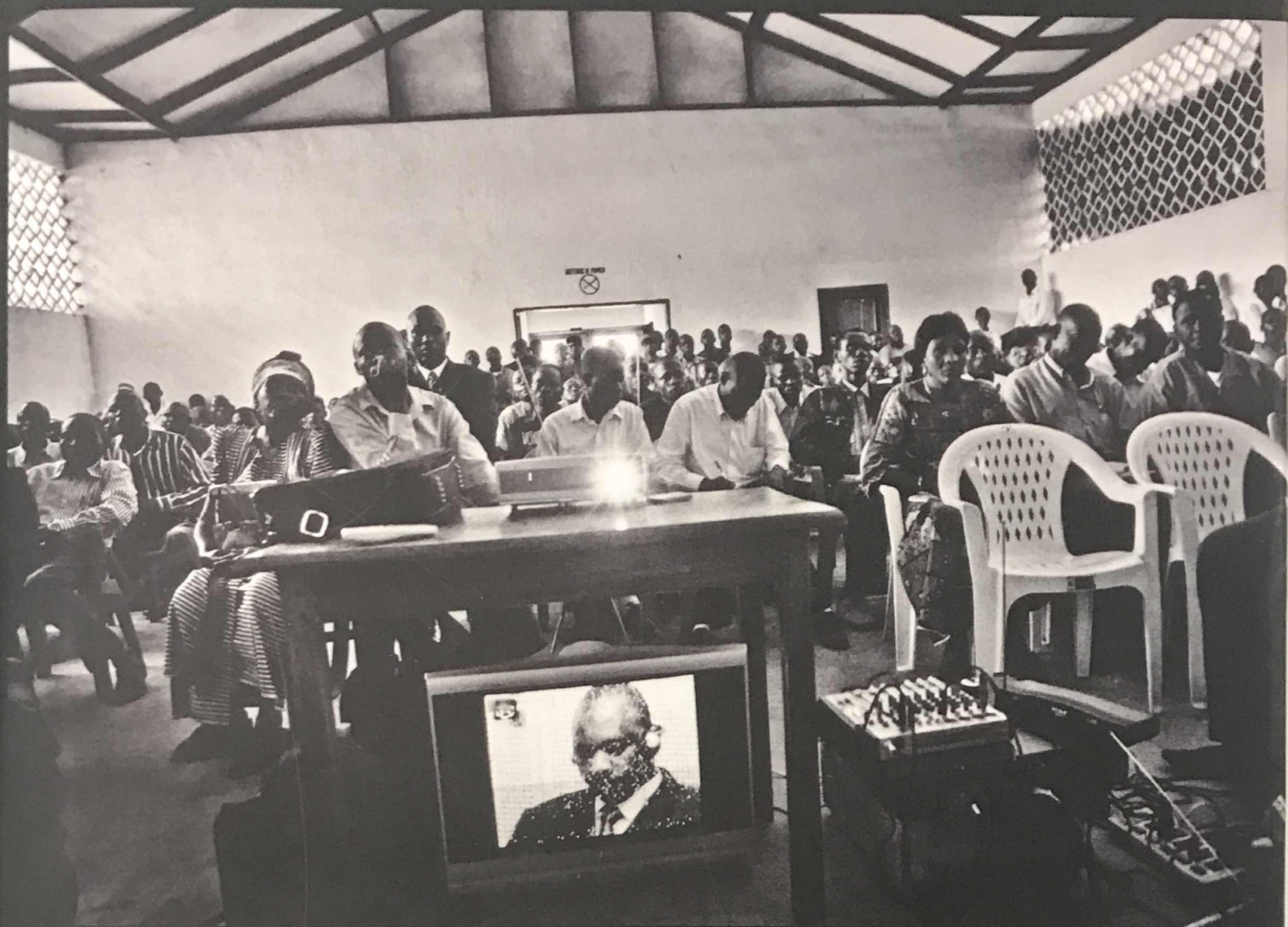


Annex D.7

NEHA JAIN



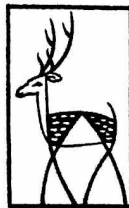
Perpetrators and Accessories in International Criminal Law

Individual Modes of
Responsibility for
Collective Crimes

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Neha Jain



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The Principal in German Criminal Law Theory

I. FORMS OF PARTICIPATION IN GERMAN CRIMINAL LAW

GERMAN CRIMINAL LAW presents a complicated and minutely theorised account of the principal party to a crime, especially as compared to English criminal law. This is partly on account of the fact that a party to a crime can be classified as an accessory only once it has been established that he cannot be considered a principal.¹ The German Criminal Code (StGB)² regulates the following categories of participation in a crime:

Section 25 Principals

- (1) Any person who commits the offence himself or through another shall be liable as a principal.
- (2) If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).

Section 26 Instigation

Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

Section 27 Aiding

- (1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.
- (2) The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to section 49(1).

¹ KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford, Clarendon Press, 1991) 80–81.

² Criminal Code (*Strafgesetzbuch*, StGB) promulgated on 13 November 1998 (*Federal Law Gazette* I, 345, 3322). I have relied on the English translation by Michael Bohlander authorised by the Federal Ministry of Justice, available at <www.gesetze-im-internet.de/englisch_stgb/index.html>. The only variation I have introduced is in the translation of the term *Anstiftung* as 'Instigation' rather than the original 'Abetting' as I believe it more appropriately reflects the understanding of the term in English law. I am grateful to Claus Kress and Rebecca Williams for helping me arrive at an accurate translation.

Co-perpetration is based on the functional act domination of each co-perpetrator, which arises from the principle of division of labour and functional role allocation.⁴⁰ This allocation ensures that the success of the criminal act is possible only through the co-operation of all co-perpetrators, so that the plan succeeds or fails depending on the functional contribution of each perpetrator. The act domination of the co-perpetrator is based on the fact that through his part of the act, he simultaneously controls the total act; his failure to perform his part of the act also results in a failure of the entire plan for all the other participants.⁴¹ If two bank robbers, A and B, rob a bank together, where A threatens the employees with a gun while B removes the cash from the tills, each participant acts an equal partner – he participates in a common agreement or plan and a joint commission of the criminal act. The act contributions complement each other in such a manner that they collectively make the criminal act a joint venture, and the joint result is fully attributable to each co-worker.⁴² There are mainly two requirements for co-perpetration: an objective requirement of collective act execution for the realisation of the elements of the offence, and a subjective requirement of a common act plan.⁴³

The co-perpetrators must work together jointly, based on a division of labour, towards the result of the elements of the offence. The act contribution of each co-perpetrator must therefore be of sufficient weight and importance such that it grounds the necessary co-domination over the act.⁴⁴ As a general rule, the contribution must consist of an act by the perpetrator, though the jurisprudence of the courts and part of the literature endorses co-perpetration through omissions.⁴⁵ Thus, if A and B, two prison officers, agree to enable the escape of a prisoner such that A hands him the prison key (act) while B leaves the outer prison gates unlocked in violation of his duty (omission), they will be co-perpetrators of the offence of facilitating the escape of prisoners.⁴⁶ If the conditions for co-perpetration are present, the objective act contributions of the participants are mutually attributed as if they had realised all the elements themselves. However, an attribution is not possible when the elements of the offence have special requirements for the perpetrator and call for personal commission by the perpetrator. Also, it is not possible to attribute subjective characteristics such as special intent requirements.⁴⁷

There is a good deal of controversy over whether act contributions in the preparation stage suffice for co-perpetration. According to the BGH,

⁴⁰ *Leipziger Kommentar*, above n 7, 1931.

⁴¹ *Ibid.*, 1931–32.

⁴² MPICC Report, above n 6, 29; *Leipziger Kommentar*, above n 7, 1931–32.

⁴³ MPICC Report, above n 6, 30.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ § 120, StGB; *Leipziger Kommentar*, above n 7, 1935.

⁴⁷ MPICC Report, above n 6, 32; Wessels and Beulke, above n 3, 200.

even a small degree of co-operation in the preparation stage may lead to liability as a co-perpetrator if it is carried out with the will of a perpetrator,⁴⁸ but commentators are divided on this requirement. The typical example given is that of a gang leader who conceives of the criminal scheme and decides on its mode of commission, but who leaves its execution entirely to the other gang members.⁴⁹ One strand of opinion insists that the co-perpetrator must take part in some manner in the execution of the crime.⁵⁰ Others argue that unlike an accessory, an individual, such as a gang leader, who does not take part in the execution does not participate in the act of another; instead, the result follows from his willing collective participation in a joint act.⁵¹

There is, however, merit in the argument that since perpetration is tied to the realisation of the elements of the offence, co-perpetration must consist of joint domination of these elements.⁵² Thus, only co-operation in the execution stage would justify responsibility as a co-perpetrator. This execution stage is not limited to the core elements of the offence but encompasses the entire phase between the beginning of the attempt and the formal completion of the act, and covers actions that would form an inseparable part of the complex action chain.⁵³

As the functional act domination based on co-operation presupposes an overall plan, co-perpetration requires that the contributors to the criminal act reach an agreement to commit the act as equal partners.⁵⁴ There must be mutual consent over the joint realisation of the act at the time of, or even before the beginning of, the act; this agreement need not take place explicitly but may also take place by implication.⁵⁵ This would exclude situations where a joint accord is missing, such as a coincidental simultaneous exploitation of a situation by persons working side by side but without a mutual understanding.⁵⁶ Co-perpetration is also possible if the individual participants do not know each other, as long as each person is conscious that there are other participants who are likewise working towards a common goal, and these other participants have the same knowledge.⁵⁷

From the necessity for a common act plan, it follows that the act of one of the contributors that goes beyond the plan, the so-called 'excess', cannot be attributed to the others.⁵⁸ This is because the other contributors do

⁴⁸ *Leipziger Kommentar*, above n 7, 1942, and cases cited therein.

⁴⁹ Wessels and Beulke, above n 3, 199; Roxin, above n 26, 298–300.

⁵⁰ Roxin, above n 26, 298–300.

⁵¹ Wessels and Beulke, above n 3, 199.

⁵² *Leipziger Kommentar*, above n 7, 1943.

⁵³ *Ibid*, 1943–44.

⁵⁴ MPICC Report, above n 6, 31; *Leipziger Kommentar*, above n 7, 1938.

⁵⁵ *Ibid*, 31; *ibid*, 1938.

⁵⁶ *Ibid*, 31; *ibid*, 1938.

⁵⁷ *Ibid*, 31; *ibid*, 1939.

⁵⁸ *Ibid*, 32; *ibid*, 1940.

The Emergence of EU Criminal Law

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