



Judge Zaid Falah

Ph.D. Student

Scholarship at the University of Cologne and the Max-Planck-Institute for Comparative and International Criminal Law. June-August 2009

E-mail: ZaidF_at_court.gov.il

<http://weblaw.haifa.ac.il/en/Research/ResStudents/Pages/ZaidF.aspx>

The Criminal Liability of the Arch-Criminal

The Head or Leader of a Criminal Organization for Offences Committed by a Member of the Organization due to his Order

Before amendment 39 in 1994 the Israeli criminal law adopted the doctrine of solidarity liability whereby a conspirator was liable for the offence committed by a conspirator even if his contribution did not exceed the stage of conspiracy – the doctrine of *actio illicita in causa* – Everyone is responsible of the ramification of his actions. The origin of this rule is the Anglo-American law, and this rule was the foundation of courting and charging and Nazi leaders for committing the offences against humanity during the 2 World War in Nuremberg International Court.

This rule has been rejected in amendment 39, and adopted the continental law system, especially the German law system, and ruled that the laws of complicities would be determined in accordance with the general provisions of section 29 of the Penal Law.

The direct perpetrator(*unmittelbarer Taeter*) is the person who fulfils all the elements of the offence in person and who controls his own actions. This is the member of the organization who committed the offence in his hands; the head of the organization who just gave the order is not a direct perpetrator.

According to section 31, an abettor(*Gehilfe*) is a person who – before or during the offence committed – support committing the offence by enabling, facilitating or ensuring its conduct or by preventing the apprehension of the offender, the discovery of the offence or its loot, or who support in any other way to the creation of supportive conditions. An instigator(*Anstifter*) is defined in section 30 as ‘a person who prompts another person to commit an offence by demanding its commission or by urging or encouraging him using means that mount to imposing pressure’. Instigation is possible by initiating the decision to commit the offence or when this

decision has been generally made but was not yet final, i.e. the act of instigation swayed the balance in finalizing the decision to commit the offence.

The head of the organization can commit these forms of complicity; but the "problem" is that the wrongfulness and culpability in these forms are less than that in the form of perpetrator; since the head of the organization gave the order, he is the main responsible, and must receive harsher punishment than others.

The question is if he can be dealt as a joint-perpetrator or an indirect perpetrator?

Joint perpetrators(Mittäter) are defined in section 20(b) as 'persons participating in the commission of an offence by doing acts for its commission. It is immaterial whether all the acts are done together or whether some are done by one person and some by other.' Joint commission refers to the situation where the partners are considered to be a single entity and therefore all the acts committed are also attributed to the other partner(s). In joint commission of an offence, each partner controls the event. The essential requirements for a joint commission are a joint decision and a joint action. The allocation of contributions in the commission of the offence is an essential element in the joint commission of an offence. If the offence cannot be carried out without the contribution of a partner or where the offence would be carried out in a different manner, this contribution constitutes a joint commission of an offence.

An indirect perpetrator(Mittelbarer Täter) is a person acting by means of another person. Section 29(c) describes him as 'a person who contributes to the doing of the act by another person, who serves as an instrument in the first person's hands, while the other person was in a condition such as one of the following, as defined in this code: (a) in a state of minority or mental incapacity; (b) without voluntariness; (c) without mens rea; (d) without being aware of the true state of things; or (e) under duress or with justification.' A person committing a crime by means of another does not participate physically in the commission of the crime. At least historically, the figure of indirect perpetrator is relevant when the direct perpetrator cannot be held responsible at all or for a mens rea offence, i.e. the direct perpetrator is 'an instrument in his hands' as put by section 29(c).

The majority view in the case law considers an arch-criminal – i.e. the leader of a gang who prepares plans for the commission of an offence or who gives orders and instructions for its commission and supplies the means for carrying it out – as being very similar to an indirect perpetrator. It is argued that he has a superior and outstanding control (Täterschaft kraft Organisationsherrschaft) over the gang members who then conduct the crimes according to his orders. But, since the direct perpetrator – the member of the organization who commits the offence in his hands – is full responsible for a mens rea offence, the direct perpetrator is not a means (Werkzeug) and therefore the head of the organization cannot be indirect perpetrator. Since most justices of the Israeli Supreme Court want to hold the arch-criminal accountable as a perpetrator, they classify him as a joint perpetrator. This has been the view of the German case

law until 1991, with the same arguments. After the fall of Berlin Wall, the German case law treated the east German leaders who gave the orders to shoot the persons who tried to escape to west Berlin as indirect perpetrator (or perpetrator behind perpetrator – Taeter hinter dem Taeter). This is also the view of the Israeli academia, according to it the arch-criminal, such as the leader of the group, is an indirect perpetrator since he controls the event (controlling the organization).