

E. van Sliedregt

**THE CRIMINAL
RESPONSIBILITY
OF INDIVIDUALS
FOR VIOLATIONS OF
INTERNATIONAL
HUMANITARIAN LAW**

T·M·C·ASSER PRESS

The Criminal Responsibility of
Individuals for Violations of
International Humanitarian Law

by

E. van Sliedregt

T · M · C · A S S E R P R E S S

The Hague

The research for this study was financed by and carried out at Tilburg University and the T.M.C. Asser Institute in The Hague. It was defended as a PhD thesis on 19 September 2003 at Tilburg University. The Supervisors were: Prof. N. Keijzer, Prof. W.J.M. van Genugten, and Prof. G.L. Coolen. Members of the board of examiners: Prof. M.S. Groenhuijsen, Prof. A. Klip, Prof. F. Thomas, Prof. O. Triffterer.

Published by T.M.C.ASSER PRESS
P.O.Box 16163, 2500 BD The Hague, The Netherlands
<www.asserpress.nl>

ISBN 90-6704-166-1

All rights reserved.

© 2003, T.M.C.ASSER PRESS, The Hague, The Netherlands, and the author

No part of the material protected by this copyright notice may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without written permission from the copyright owner.

PRINTED IN THE NETHERLANDS

PREFACE

With the creation of international criminal tribunals, such as the one in Nuremberg after the Second World War, and more recently the International Tribunals for the former Yugoslavia and Rwanda, international criminal law has become a rapidly developing part of the law.

Since Nuremberg, especially in relation to crimes against humanity, genocide and war crimes, the focus has been on individuals, instead of states. Such crimes are very rarely committed by single individuals, however, but mostly by organizations, or groups of cooperating persons. For a just determination of their guilt and responsibility, a fair assessment of the mutual relationships and cooperation forms of those individuals, is indispensable. The present book provides the framework for that assessment. It gives guidance to practitioners, and to scholars as well, on how to understand and to apply international criminal law concepts such as 'common purpose', 'superior responsibility', duress and the defence of superior orders. It does so by bringing to light the roots of those new concepts, which are hidden not only in earlier phases of development of the international criminal law, but also in the domestic laws of various states.

The principles of individual criminal liability under international criminal law have ancestors both in common law systems and in civil law systems. By analyzing their pedigrees in an intelligent and accessible way, Dr. Van Sliedregt has made those principles clear for lawyers educated in either of those two very different legal cultures.

The time of publication of this study could not have better been chosen. In this very year 2003, the International Criminal Court is being established, its Statute having come in force in July 2002. The book is not only an important tool for the ICC, however, but also for prosecutors, defence lawyers and judges who will be engaged in war crimes trials and the like on the domestic level. The jurisdiction of the ICC is only subsidiary; under Article 17 of its Statute, the primary jurisdiction is with states, irrespective whether they have ratified the Statute or not. Therefore, it is mainly on the domestic level that such trials can be expected to take place, now that there is an ICC more than ever in the past. Also on the domestic level, the principles of international criminal liability will have to be taken into account, if only for preventing the ICC from considering the national authorities unwilling or unable to try the accused properly.

Worldwide, the legal community can be very grateful to Dr. Van Sliedregt for this extremely valuable contribution to the literature on international criminal law.

Nico Keijzer

Justice Extraordinary, Supreme Court of the Netherlands

July 2003

ACKNOWLEDGEMENTS

When I started the research for this book in the summer of 1998, international criminal law, more particularly, substantive international criminal or war crimes law was on the verge of a considerable move forward. In the following years, it underwent major developments, such as the establishment of the International Criminal Court and the commencement of the *Milosević* trial at the International Criminal Tribunal for the Former Yugoslavia. At the same time, the interest in this field of law amongst scholars and practitioners has been growing substantially. This can be measured by the number of books and law journals that have appeared over the last years concerning this area of law. I was fortunate to be able to witness these developments and write about them. It is exciting, but also difficult, to write about a field of law that is still in a stage of development and subject to so much attention. The continuing stream of case law coming from the *ad hoc* Tribunals and other courts, and the unremitting flow of scholarly writing on the topic made it hard to conclude this research, which I eventually did on 1 May 2003.

I could not have wished for a better mentor than Professor Nico Keijzer in developing the ideas put forward in this book. His long-standing expertise and interest in national and international war crimes law, going beyond an interest in the legal aspects, have enriched my mind and views, and this study. I wish to express my gratitude for his patience and unfailingly helpful and penetrating comments on the draft texts, and the erudite way in which they were put before me. I am also greatly indebted to the supervision of Professor Willem van Genugten and Professor Guido Coolen whose valuable insights and advice have been inspirational and of continuous support. I wish to extend my thanks to the board of examiners of this thesis: Professor Marc Groenhuijsen, Professor André Klip, Professor Françoise Thomas, and Professor Otto Triffterer. Their writings have been at the basis of this study. Many thanks are due to my colleagues at Tilburg University and the T.M.C. Asser Institute, in particular, Piet Hein van Kempen, François Kristen and Machteld Boot. I am grateful to my parents and sisters for their unrelenting moral support and faith in me. Finally, I wish to thank Howard Morrison Q.C., for being a true proof-reading partner-in-law, a source of inspiration and, most importantly, a dedicated friend.

The Hague, July 2003

Elies van Sliedregt

SUMMARY OF CONTENTS

Preface	V
Acknowledgements	VII
Table of Contents	XIII
Abbreviations	XXI

Introduction	1
1. Central Question	2
2. Applicable Law	6
3. Method and Structure	9
4. Limitations	10

ATTRIBUTING RESPONSIBILITY

Part I

Modes of Individual Responsibility

Introduction to Part I	14
-------------------------------	----

Chapter 1

Historical Survey: Collective Criminality and Individual Responsibility 15

1. Introduction	15
2. Theory of Collective Criminality	16
3. Conspiracy	17
4. Criminal Organisations	20
5. Subsequent Proceedings	25
6. Jurisprudence	26
7. Codification	31
8. Conflict Classification	36
9. Conclusion	38

Chapter 2

Perpetration and Participation 41

1. Introduction	41
2. Terminology	41
3. Different Models of Participation	61
4. Article 25 of the ICC Statute	65
5. Perpetration, including Perpetration by Means (of an 'Agent')	68
6. Joint or Co-perpetration	71
7. Instigation	76
8. Aiding, Abetting, or otherwise Assisting	87
9. Common Purpose	94

10. Incitement to Commit Genocide	110
11. Complicity after the Fact	111
12. Conclusion	113

Evaluation Part I	115
--------------------------	------------

Part II

Superior Responsibility

Introduction to Part II	118
--------------------------------	------------

Chapter 3

Historical Survey: A few leading cases	119
1. Introduction	119
2. The <i>Yamashita</i> Case	120
3. The Nuremberg Tribunal	124
4. Subsequent Nuremberg Proceedings	125
5. The Tokyo Tribunal	128
6. The United Nations War Crimes Commission	131
7. The <i>Medina</i> Case	132
8. The Kahan Commission	133
9. Conclusion	135

Chapter 4

Superior Responsibility at the Tribunals and the ICC	137
1. Introduction	137
2. Codification	137
3. <i>Ad Hoc</i> Tribunals	143
4. Conflict Classification	175
5. Article 28 ICC Statute	179
6. Different Standards for Military and Non-Military Superiors	191
7. Concurrence and Fusion of Individual Responsibility and Superior Responsibility	191
8. Superior Responsibility and Joint Criminal Enterprise	196
9. Conclusion	197

Chapter 5	
The Concept of Superior Responsibility	199
1. Introduction	199
2. Analogous Concepts	199
3. Evaluation	208
4. National Law and Military Manuals	209
5. Nature of the Concept	212
6. Conclusion	221
Evaluation Part II	223

AVERTING RESPONSIBILITY

Part III *Defences*

Introduction to Part III	226
Chapter 6	
Grounds for Excluding Criminal Responsibility	227
1. Introduction	227
2. Preliminary Observations	227
3. Article 31 of the ICC Statute	239
4. Mental Incapacity	243
5. Intoxication	248
6. Self-Defence	254
7. Duress	267
8. Non- Statutory Defences	291
9. Conclusion	299
Chapter 7	
The Defence of Mistake and of Superior Orders	301
1. Introduction	301
2. Article 32 ICC Statute: Mistake	301
3. Article 33 ICC Statute: Superior Orders	316
4. Conclusion	341
Evaluation Part III	342

A SYSTEM OF RESPONSIBILITY

Epilogue	343
1. The National Pedigree	344
2. Moral and Legal Responsibility	347
3. Collective Responsibility	349
4. System-Responsibility	351
5. A Mature and Effective System?	360
6. Final Comment	361
 Summary	 363
Nederlandse Samenvatting	373
 Annex	 383
 Bibliography	 387
 Table of Cases	 405
 Table of Documents	 415
 Index	 419

TABLE OF CONTENTS

Preface	V
Acknowledgements	VII
Abbreviations	XXI

Introduction	I
---------------------	----------

<i>War and law</i>	1
<i>Criminal responsibility</i>	2
1. Central Question	3
<i>Nature of norms</i>	4
<i>Nature of crimes</i>	4
<i>Individual criminal responsibility</i>	5
2. Applicable Law	6
3. Method and Structure	9
<i>Part I</i>	10
<i>Part II</i>	10
<i>Part III</i>	10
4. Limitations	10

ATTRIBUTING RESPONSIBILITY

Part I

Modes of Individual Responsibility

Introduction to Part I	14
-------------------------------	-----------

Chapter 1

Historical Survey: Collective Criminality and Individual Responsibility	15
--	-----------

1. Introduction	15
2. Theory of Collective Criminality	16
3. Conspiracy	17
4. Criminal Organisations	20
5. Subsequent Proceedings	25
6. Jurisprudence	26
(a) Membership of a criminal organisation	27
(b) Common design	28
(c) Complicity	30
7. Codification	31
8. Conflict Classification	36
9. Conclusion	38

Chapter 2	
Perpetration and Participation	41
1. Introduction	41
2. Terminology	41
(a) Subjective element	43
<i>Anglo-American law</i>	43
<i>Civil law</i>	45
<i>Ad hoc tribunals</i>	48
<i>ICC Statute</i>	50
(b) Objective element	53
<i>Commission and omission</i>	53
<i>Material element</i>	56
(c) Principal/direct and derivative/indirect responsibility	57
3. Different Models of Participation	61
4. Article 25 of the ICC Statute	65
5. Perpetration, including Perpetration by Means (of an 'Agent')	68
(a) Text and legal history	68
(b) Jurisprudence	68
(c) National underpinnings	69
(d) Observations	71
6. Joint or Co-perpetration	71
(a) Text and legal history	71
(b) Jurisprudence	72
(c) National underpinnings	74
(d) Observations	76
7. Instigation	77
(a) Text and legal history	77
<i>Soliciting or inducing</i>	77
<i>Ordering</i>	77
<i>Double intent</i>	78
(b) Jurisprudence	78
<i>Planning</i>	78
<i>Instigating</i>	80
<i>Ordering</i>	83
(c) National underpinnings	84
(d) Observations	86
8. Aiding, Abetting, or otherwise Assisting	87
(a) Text and legal history	87
(b) Jurisprudence	88
(c) National underpinnings	91
(d) Observations	93
9. Common Purpose	94
(a) Text and legal history	94
(b) Jurisprudence	95
<i>Tadić: Three categories of common purpose</i>	95

<i>Joint criminal enterprise</i>	100
<i>Common purpose/joint criminal enterprise distinguished from aiding and abetting</i>	101
(c) National underpinnings	103
(d) Observations	106
<i>Collective criminality theory revisited?</i>	106
<i>ICC Statute</i>	107
10. Incitement to Commit Genocide	110
11. Complicity after the Fact	111
12. Conclusion	113
Evaluation Part I	115
 Part II <i>Superior Responsibility</i> 	
Introduction to Part II	118
Chapter 3	
Historical Survey: A few leading cases	119
1. Introduction	119
2. The <i>Yamashita</i> Case	120
3. The Nuremberg Tribunal	124
4. Subsequent Nuremberg Proceedings	125
5. The Tokyo Tribunal	128
6. The United Nations War Crimes Commission	131
7. The <i>Medina</i> Case	132
8. The Kahan Commission	133
9. Conclusion	135
Chapter 4	
Superior Responsibility at the Tribunals and the ICC	137
1. Introduction	137
2. Codification	137
(a) Prior to the ICC Statute	137
(b) Article 28 of the ICC Statute	142
3. <i>Ad Hoc</i> Tribunals	143
(i) <i>Functional element: superior-subordinate relationship</i>	144
(a) Superior	144
(b) Command	146
(c) Types of command	147
(d) Control	149
(e) Command and control	152
(f) Evidence of <i>de facto</i> command and control	154
(g) Parallel chains of command and delegation	155

(ii) <i>Cognitive element: standards of knowledge</i>	157
(a) Knew	158
(b) Had reason to know	159
(c) Different interpretations	160
(d) One uniform knowledge standard at both Tribunals	164
(iii) <i>Operational element: failure to prevent or punish</i>	166
(a) Duty to anticipate	166
(b) Prevent or punish: two scenario's, one superior	167
(c) Failure to punish entailing individual criminal responsibility?	172
(d) Dereliction of duty to supervise	173
(e) Causality	174
4. Conflict Classification	175
5. Article 28 ICC Statute	179
(i) <i>Functional element: superior-subordinate relationship</i>	180
(a) Superior	180
(b) A military commander or person effectively acting as a military commander	181
(c) Effective command and control, or effective authority and control	183
(ii) <i>Cognitive element: standards of knowledge</i>	185
(a) Knew	186
(b) Should have known	186
<i>Negligence</i>	186
(c) Wilful blindness	188
(iii) <i>Operational element: failure to prevent, repress or submit to authorities</i>	189
(a) Causality	189
(b) Dereliction of duty to supervise	190
6. Different Standards for Military and Non-Military Superiors	191
7. Concurrence and Fusion of Individual Responsibility and Superior Responsibility	192
8. Superior Responsibility and Joint Criminal Enterprise	196
9. Conclusion	197

Chapter 5

The Concept of Superior Responsibility 199

1. Introduction	199
2. Analogous Concepts	199
(a) Responsibility of corporate officers and employers	199
(b) Parental responsibility	202
(c) Responsibility of members of government	203
<i>Cabinet responsibility</i>	204
<i>Individual responsibility</i>	204
3. Evaluation	208
4. National Law and Military Manuals	209
5. Nature of the Concept	217

(a) Strict or vicarious liability	217
(b) Participation/Complicity	217
<i>Active and passive superior responsibility</i>	218
<i>Complicity by omission</i>	218
<i>Superior responsibility: sui generis participation</i>	219
(c) Separate crime of 'failure to supervise'	221
6. Conclusion	221

Evaluation Part II	223
---------------------------	-----

AVERTING RESPONSIBILITY

Part III *Defences*

Introduction to Part III	226
---------------------------------	-----

Chapter 6	
Grounds for Excluding Criminal Responsibility	227

1. Introduction	227
2. Preliminary Observations	227
(a) International law defences and criminal law defences	228
(b) Justification and excuse	229
(c) <i>Mens rea</i> /mental element	231
(d) The 'reasonable man standard' and <i>Garantenstellung</i>	234
(e) The <i>culpa in causa</i> or 'conduct-in-causing' analysis	238
3. Article 31 of the ICC Statute	239
4. Mental Incapacity	243
(a) Text and legal history	243
(b) National underpinnings	243
(c) Jurisprudence	245
(d) Observations	247
5. Intoxication	248
(a) Text and legal history	248
(b) National underpinnings	250
<i>Different tests</i>	251
(c) Observations	252
6. Self-Defence	254
(a) Preliminary observations	254
(b) Text and legal history	258
<i>Reasonableness</i>	260
<i>Proportionality</i>	261
<i>Imminent and unlawful use of force</i>	262
<i>Culpa in causa</i>	263
(c) National underpinnings	264

(d) Jurisprudence	266
(e) Observations	267
7. Duress	267
(a) Text and legal history	268
(b) National underpinnings	269
<i>Anglo-American law</i>	269
<i>Duress and murder charges</i>	271
<i>Civil law</i>	276
(c) Jurisprudence	279
<i>Nuremberg jurisprudence</i>	279
<i>Post-Nuremberg jurisprudence</i>	283
<i>ICTY</i>	286
<i>Evaluation</i>	289
(d) Observations	290
8. Non-Statutory Defences	291
(a) Belligerent reprisals	291
(b) <i>Tu quoque</i>	294
(c) Military necessity	295
9. Conclusion	299

Chapter 7

The Defence of Mistake and of Superior Orders 301

1. Introduction	301
2. Article 32 ICC Statute: Mistake	301
(a) Preliminary observations	301
<i>Mistake of fact</i>	303
<i>Mistake of law</i>	303
(b) Text and legal history	306
(c) National underpinnings	309
(d) Jurisprudence	313
(e) Observations	315
3. Article 33 ICC Statute: Superior Orders	316
(a) Text and legal history	316
<i>Legal history</i>	316
<i>Text</i>	323
<i>Three conditions</i>	324
(b) Jurisprudence	326
(c) National underpinnings	329
<i>The conditional liability approach, different types</i>	329
<i>The absolute liability approach</i>	332
<i>A combined approach</i>	333
<i>Justification or excuse?</i>	335
(d) Observations	337
<i>Legal reasons for adopting conditional liability approach</i>	337
<i>The 'battlefield reality' and social reasons for adopting conditional liability approach</i>	339

<i>Position of Article 33 in the ICC Statute</i>	340
4. Conclusion	341
Evaluation Part III	342
A SYSTEM OF RESPONSIBILITY	
Epilogue	343
1. The National Pedigree	344
2. Moral and Legal Responsibility	347
3. Collective Responsibility	349
4. System-Responsibility	351
<i>Institutionalised membership responsibility</i>	352
<i>ICC</i>	354
<i>Collateral membership responsibility</i>	354
<i>ICC</i>	356
<i>Assessment</i>	357
<i>Superior responsibility, perpetration by means, instigation</i>	359
5. A Mature and Effective System?	360
6. Final Comment	361
Summary	363
Nederlandse Samenvatting	373
Annex	383
Bibliography	387
Table of Cases	405
Table of Documents	415
Index	419

INTRODUCTION

In early July, Mladić attacked the safe Muslim haven of Srebrenica. Bosnian Serb troops entered the city on the late afternoon of Tuesday, 11 July 1995, and began to commit the single biggest crime of the Bosnian war, the murder of some 8,000 unarmed Muslim men.¹

He had been a witness to Calley's gunning down of at least three separate groups of villagers. 'It was terrible. They were slaughtering the villagers like so many sheep' (...) Exactly what did, in fact, occur in the village of 'Pinkville' in March 1968 I do not know for certain, but I am convinced that it was something very black indeed.²

Srebrenica and My Lai set the scene for this study. This research deals with mass crime constituting conduct that is criminal under international law and which generates individual responsibility. While the Srebrenica and My Lai massacres differ in scale and background, the former prompted by ethnic hatred and extreme nationalism, the latter by a degeneration and moral devaluation brought out by war, they both qualify as violations of international law entailing individual criminal responsibility. Differences may be expressed in their respective legal qualification, as genocide/crimes against humanity in the Srebrenica case and as war crimes in the case of My Lai, but not in relation to the concept of individual criminal responsibility attached to it.

The focal point of this research is the concept of individual criminal responsibility. Before taking a closer look at this concept, we should take a step backwards and concentrate on the framework within which this concept is placed and has evolved.

War and law

The waging of war seems to be inherent in mankind. As Best observes in his magnificent study on war and law,

No one can tell how war began among men but there is evidence of it from earliest times; evidence not just in the form of weapons meant for fighting and of human remains broken by weapons, which cannot of themselves signify anything as serious war, but of fighting by organized groups for collective purposes.³

The laws of war have an impressive history. Already before the emergence of the modern State the need was felt to regulate conflict behaviour. 'War' being a social phenomenon that can be found in any community of men has generated 'law' in

¹ M. Glenny, *The Balkans, 1804-1999. Nationalism, War and the Great Powers*, London (1999), p. 650.

² Extract from 'the Ridenhour Letter' in P.A. French (ed.), *Individual and Collective responsibility, the Massacre at My Lai*, Cambridge (Mass.), (1972), pp. 172-173.

³ G. Best, *War and Law Since 1945*, Oxford (1994), p. 14.