Participation in International Crime Pursuant to Swedish and International Criminal Law – Perpetration and Accomplice Liability

Erik Svensson

1 Introduction

From a theoretical perspective, international criminal law represents a challenge to how the distinction between perpetration and accomplice liability should be drawn. When this distinction is discussed in the literature it is typically based on examples relating to relatively uncomplicated criminalized acts, such as assault. The difference between slapping someone in the face and urging another person to do so seldom seems especially hard to interpret. The act is clearly limited in time and space and the prerequisites are relatively concrete. But with more complex criminalized acts – for example those in international criminal law – things are different. The distinctions that seem clear in simple cases become considerably harder to handle. As an example, think about a criminalized act such as 'having a part of a civilian population move to an occupied area on behalf of an occupying power'[1] How are we to understand what it means to aid and abet such complex courses of events and distinguish this aiding from the actual commission? The theories constructed from simple examples such as assault by slapping are not particularly useful for answering such questions.

In what follows I discuss the dilemma sketched above. I describe the rules on perpetration and accomplice liability under Swedish law and international criminal law. I also relate these rules to Swedish case law on international crimes. An overall theme is, as indicated, the friction that takes place in the encounter between traditional criminal-law doctrine and the assessment of complex acts criminalized under international criminal law.

2 The Concept of Perpetration

2.1 Perpetration under Swedish International Criminal Law

In Swedish law, there is no legal definition of perpetration. But every act described in a penal provision is an example of what perpetration means. In this way the concept of perpetration becomes theoretically fluid. In one way it is the most important concept of all in criminal law, since every assessment of criminal responsibility starts with the question of whether the accused person has perpetrated a criminalized act. At the same time the concept is rather empty since "perpetration" is only a portmanteau word for all the disparate types of action that can represent a crime. There is no general rule of perpetration but the statutes where the criminalized acts are described contain an exhaustive collection of examples of what perpetration means.

In the present text, it is the international criminal law regulations that are in focus. Penal provisions on crime against international law (*folkrättsbrott*) were introduced in Swedish criminal law as early as 1948. These were subsequently incorporated in Chapter 22 of the Swedish Penal Code (BrB). The regulation incorporated international criminal law by reference (*renvoi*): it was stated that a person who committed certain legally specified acts or rendered himself guilty of a breach of an international treaty or international common law ("generally recognised principles of international law") should be convicted of an

[1] See section 5(1) act of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406).

international crime. In 1986 the provision was confined to criminalizing more serious transgressions of international law. Genocide, on the other hand, was punishable under the Act (1964:169) on penalty for genocide.

In connection with Sweden's accession to the Rome Statute of the International Criminal Court, the government held that Swedish legislation met treaty requirements.[2] Nevertheless, the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406) (henceforth the 2014 Act) was introduced as a consequence of the ratification. This Act replaced the provisions on crime against international law and genocide mentioned above. One argument for a reform was that rules on international criminal law should be gathered in a special law rather than being spread among several different provisions both in the penal code and in other penal legislation. According to the preparatory works, also the legislative technique using reference (*renvoi*) was not optimal with regard to the principle of legality.[3] With a specific act on international criminal law, the Swedish legal system was supposed to better live up to international-legal requirements on national legislation.[4]

2.2 Perpetration according to the Rome Statute

The 2014 Act is in all material respects based on the proposals in the International Criminal Law Commission's Report SOU 2002:98.[5] The Report discusses the relationship between the proposed Swedish rules and the general rules on penal liability in the Rome Statute that may be related to the general part of criminal law. The Report found satisfactory agreement between the Rome Statute rules in this respect and Swedish legislation and the Government bill expressed the same view.[6]

One difference between the Rome Statute and Swedish criminal law is that the former contains express rules on perpetration. The Rome Statute's Article 25 is entitled "Individual criminal responsibility", and regulates several issues relating to perpetration and accomplice liability. Among other things it states

---

2 Govt. bill 2000/01:122 Sweden's Accession to the Rome Statute for the International Criminal Court, p. 38.

3 Govt. bill 2013/14:146 Criminal Liability for Genocide, Crimes against Humanity and War Crimes, pp. 67 ff.

4 However the new act was also criticized. Some scholars regretted the abandonment of the earlier legislative technique using reference (*renvoi*). They called the change a system shift (see Bring, Ove and Träskman, Per Ole, *Folkrättens starka roll inom svensk straffrätt bör bestå – nu vill regeringen dumpa den*, [The strong role of international law in Swedish criminal law should remain – now the government wants to dump it] Dagens juridik 2014-02-10 and the same authors *Det är obegripligt att justitiedepartementet kan påstå att systemskiftet sker med vårt goda minne*, [It is incomprehensible that the Department of Justice can maintain that the system shift is taking place with our consent], Dagens juridik 2014-02-17). The new law would, according to the critics, unfortunately weaken the relationship between national Swedish criminal law and international law. They feared that developments in international law would not gain the same influence over Swedish criminal law when the express reference to international law was removed from the national penal provisions. I return to this criticism in section 6.3 below.

5 See however section 6.3 regarding the fact that a proposed section on the relationship of the new law to international law was not included in the Bill on which the law was based.

6 SOU 2002:98 Internationella brott och svensk jurisdiktion, [International crime and Swedish jurisdiction] p. 323 and Govt. bill 2013/14:146, pp. 212 f.

that natural persons may be held liable under the Statute. In addition there are rules that enumerate the various ways in which a crime may be committed.

First of all, Article 25.3 a) prescribes that liability arises if a breach of the Statute is committed by an *individual*, and also if a crime within the jurisdiction of the court is committed by an individual *jointly with another person* or if someone commits such a crime *through another person*, regardless of whether the other person is criminally liable or not. Compared with Swedish doctrinal terminology the article lays down that a crime can be committed through i) perpetration in the strict sense (*gärningsmannaskap i strikt mening),* ii) co-perpetration (*medgärningsmannaskap*) and iii) what is termed indirect perpetration and/or perpetration by proxy (*medelbart gärningsmannaskap).*

Secondly Article 25.3 b) prescribes that liability can also be imposed on a person who (compared with Swedish terminology) either b) orders, solicits or induces (*anstiftar)* the commission of such a crime or c) aids, abets or in other way assists (*gör sig skyldig till medhjälp*) the commission of the crime.[7] Corresponding rules in Swedish criminal law exist in Chapter 23 section 4 of the Swedish Criminal Code (*Brottsbalken)* (henceforth BrB). Article 25.3 d) of the Rome Statute further prescribes that that liability under some conditions can be imposed on a person who contributes to the commission of a crime within the jurisdiction of the court by a group of persons acting with a common purpose. This mode of liability does not have a conceptual equivalence in Swedish law or Swedish doctrine. Depending on the circumstances of the case, acts corresponding to this mode of liability would, from a Swedish national law perspective, be regarded either as co-perpetration (*medgärningsmannaskap*) or aiding and abetting (*medhjälp till brott*).[8]

In addition to what has just been said, Article 25.3 e) of the Rome Statute further provides that incitement to genocide is punishable, and the Statute's 25.3 f) lays down what applies in the case of an attempt to commit this crime and, lastly, the conditions that apply for what in Swedish criminal law is termed voluntary withdrawal (*frivilligt tillbakaträdande*). In Swedish law these issues are regulated in Chapter 23 sections 1 and 3 BrB, respectively. In this section I will only address issues of perpetration, concentrating on the issues that are regulated in Article 25.3 a) of the Rome Statute. In addition, however, Article 28 of the Rome Statute contains a special provision on the criminal liability of a military commander or other person in authority. I return to this provision in section 3.4 below.

2.3 The Concept of Perpetration in Swedish Law and in International Criminal Law

Article 25.3 a) of the Rome Statute thus supplies a legal definition of the concept of perpetration. Swedish law, as mentioned, lacks any corresponding definition. In the preparatory works on the Swedish rules on accomplice liability it is stated

---

[7] See further section 6.

[8] For an introduction to the concept of group acting with a common purpose, from the perspective of international criminal law, see Cupido, Marjolein, *Group Acting with a Common Purpose,* in de Hemptinne, Jérôme, Roth, Robert & van Sliedregt, Elies (eds.) *Modes of Liability in International Criminal Law,* Cambridge: Cambridge University Press, 2019 Ch. 10.

that such a definition was not considered necessary.[9] Personally, I find it easy to sympathize with the legislator's view here. All Swedish statutes defining criminal acts are in the abstract sense designed in the same way: a given act is described and an appropriate scale of penalties is stated for this act. A legal definition of the type "a crime is committed under perpetration by someone who has carried out the criminalized action" would not contribute very much to a better understanding of perpetration as a concept.

Many national judicial systems, however, include a legally defined concept of perpetration. Two examples close at hand are German and Finnish criminal law, respectively.[10] Like Article 25.3 a) of the Rome Statute, both these systems state that perpetration is at hand not only when a single person has committed a certain punishable act but also when two or more persons have done this together, or one person has acted "through" another. Provisions of this type have come about to clarify that offences can be committed in other ways than purely physically by one person alone. The Swedish legislator has, as mentioned, not considered such a clarification necessary; but the Swedish concept of perpetration is, for all that, no less limited than the German, the Finnish or the one in the Rome Statute. In Swedish law also, crime can be committed through and together with other persons. In other words, Swedish law possesses a concept of perpetration that corresponds, for example, to German or Finnish law. Swedish law may possibly be criticized for affording weak legal basis for variants such as co-perpetration and indirect perpetration, but that is another matter.[11]

In my view, one cannot claim that there is a conflict between the Rome Statute's way of defining perpetration and the way the concept is used in Swedish criminal law. While the Rome Statute does define certain forms of perpetration that do not appear in Swedish legal text, one cannot conclude that an adjudicator would arrive at different results when examining who had committed a certain offence depending on whether the examination was based on the Swedish or the international-legal concept of perpetration. In other words I draw the same conclusion on this issue as the International Criminal Code Commission did when it summarized that "there is probably no significant difference between the rules on perpetration […] in the Rome Statute and in Swedish law".[12] Nor did the new legislation that the Commission's work resulted in contain any special rules on perpetration in cases of genocide, crimes against humanity and war crimes.

Specific rules on different forms of perpetration are in conclusion best viewed merely as a reminder that crime may be committed in several different ways. The principle of legality does not require specific rules on different modes of perpetration. I will return to this point, that might seem controversial to some

---

9 SOU 1944:69 Straffrättskommitténs betänkande med förslag till lagstiftning om brott mot staten och allmänheten [Criminal Code Committee Report with proposals for legislation on crimes against the state and the public] p. 92.

10 German law contains rules on different forms of perpetration in 25 § StGB: In Finnish law corresponding rules are given in 5:4 and 5:5 of the Finnish Penal Code.

11 See on this point my book *Gärningsmannaskap vid fleras deltagande i brott*, (Perpetration of Crime by Involvement of Several Actors), Uppsala, 2016, section 5.6.5, where I in fact argue that the criticism of inadequate support in the law is exaggerated and to some extent misdirected.

12 SOU 2002:98, p. 323. See also Govt. bill 2013/14:146, pp. 212 f.

readers, in sections 3 and 4 below. In section 3 below I discuss the different forms of perpetration in more detail by describing, starting with the Rome Statute definitions in Article 25.3 a) and Article 28 how the cases defined there have been handled in Swedish criminal law.

The foregoing applies, as indicated above, with an exception. The International Criminal Law Committee maintained in its Report that the special form of principals' liability regulated in Article 28 of the Rome Statute ought to lead to a separate provision on the matter in Swedish law. This turned out to be the case in the special form of principals' liability regulated in paragraph 13 of the 2014 Act. (However, similar rules also applied earlier, in Chapter 22 section 6 BrB, see also section 3.4 below.)

3 Various Forms of Perpetration in Swedish and International Criminal Law

3.1 Individual Perpetration

The form of perpetration that typically leads to the least difficulties is when one person commits a crime individually. Most people probably see this as the archetypical form of perpetration. Swedish doctrine sometimes uses the term *gärningsmannaskap i strikt mening* "perpetration in the strict sense". But the fact that the Rome Statute speaks of committing a crime "individually" does not imply that this form of perpetration only becomes applicable where only one person has been involved in the event in question. An individual perpetrator may have had his action furthered by one or more persons, or have been in company with other perpetrators who in the context of the same course of events may have committed other crimes in parallel (this is termed *Nebentäterschaft* in German doctrine).

It is not seldom hard to decide who in a given process has played what part in the commission of a given punishable offence, i.e. perpetrated the act or only acted as an accomplice to this act. This applies not least when the criminal act in itself is complex and cannot easily be related to a given, concrete event clearly delimited in time and space. This is often the case in international criminal law.

3.2 Indirect Perpetration/Perpetration by Proxy

In the literature the basic form of perpetration is often described as a willed, physical, causal relation between a bodily movement and a (criminalized) consequence. With such a starting point, problems arise in certain cases. One example is that a person who has committed a punishable offence has been considered as a tool in another person's hands. The person who in a purely tangible sense has committed the offence – "the person in the front" – has been controlled by another person who has acted "behind" the person in the front and has not committed the crime in a physical sense. A textbook example of this type of case is that a parent urges an under-aged child to steal. The parent has not grabbed anything with his or her own hands but has had a decisive influence over the child's behavior. Another textbook example is that someone is compelled to commit a criminal act. The term *"medelbart gärningsmannaskap"*,

meaning indirect perpetration and/or perpetration by proxy, is normally employed in Swedish doctrine to describe these cases.[13] In the Rome Statute, this kind of perpetration is, as we have seen, particularly defined. In connection with the 1948 revision of the Swedish Penal Code, when the current rules on accomplice liability were introduced into Swedish law, it was stated in the preparatory works that the flexibility in the new set of regulations meant that there was no need to define the concept of indirect perpetration (*"medelbart gärningsmannaskap"*) in the legislation.[14]

My own position on this issue regarding Swedish law is as follows. The notion of perpetration as a willed, physical and causal relationship between a bodily movement and certain consequences is erroneous. A theory of action of this kind does not hold up philosophically but, irrespective of this – and more importantly – the rules defining criminal acts are not designed on such a pattern. They only seldom assume a given, palpable, purely physical action by the perpetrator. If A tricks the unknowing B into serving C with food that A has poisoned it is fully possible to claim that A intentionally has "taken another person's life" (which is the prerequisite for murder in Swedish law, Chapter 3 section 1 BrB) if C subsequently dies. Many similar examples can be constructed to make the same point.

The provision in the Rome Statute is, however, maybe a bit narrower than what I have suggested for Swedish law. The Statute text states that the criminal act must be committed *through* another person, which may be said to clarify that it is only cases of pure exploitation (where the front person has been merely a tool in the hands of the person behind) that are covered by this provision. Action that may to a certain extent be described as indirect without actually involving the use of another person as a tool, should be adjudicable as either individual perpetration or co-perpetration according to sections 1 or 2 BrB, respectively, Rome Statute, Article 25.3 a).

3.3 Co-perpetration

It is very common that two or more persons commit a crime together. This case type is also distinguished as a specific form of perpetration according to the Rome Statute. In Swedish law the term *medgärningsmannaskap*, co-perpetration, is used to describe such cases.[15] When two or more persons have cooperated to commit a criminal offence they are thus convicted as co-perpetrators. This could be the case also when each person individually has not met the prerequisites of the criminal act, as defined by law. In cases like this, the assessment of the act is not directed at what each person has done individually, but at what the persons involved have done jointly in a cooperative manner. Cooperation, in this sense, is characterized by mutual adaptation of the individual behavior to the behavior of the other, either through immediate communication or through action following a predetermined plan.

---

[13] See Svensson, Erik, *Gärningsmannaskap vid fleras deltagare i brott*, Uppsala: Iustus 2016, section 5.3 with further references.

[14] See SOU 1944:69, p. 92

[15] See Svensson, Erik, *Gärningsmannaskap vid fleras deltagare i brott*, Uppsala: Iustus, 2016, section 5.6 with further references; also ibid. chapters 6 and 7.

Liability in co-perpetration cases can be more controversial or less, depending on the nature of the particular case. From a Swedish perspective, I have elsewhere maintained that the cases of co-perpetration normally considered controversial are those that exhibit a considerable qualitative difference among the individual actions that constitute the co-perpetration.[16] If A on his own meets the prerequisites in a penal provision while B does not, much is required for B and A to be judged as co-perpetrators. Typically B will instead be convicted for furthering A's offence. Some scholars have claimed that Swedish courts have tended to convict in co-perpetration cases in a routine fashion.[17] My view, however, is that the criticism is exaggerated. The type of offences handled in international criminal law are typically such that it becomes appropriate to convict offenders under co-perpetration: quite simply, the criminal acts are typically defined in such a way that they are typically committed jointly with others.

3.4 Principal Liability

Article 28 of the Rome Statute contains a special provision on the liability of a military commander for crimes under international criminal law (i.e. in this context crimes regulated in the Statute) committed by armed forces under his or her effective command and control, in consequence of his or her inability to exercise appropriate control of these forces. This mode of liability has some similarity to indirect perpetration. But it is not a question of the commander being held liable under the provision for having acted through subordinates and being responsible for committing the offences the subordinates have carried out physically (which is the case in indirect perpetration). Instead, it is the superior's failure to exercise control in a correct manner that is criminalized as such, provided that the subordinates commit certain specific offences. The superior is indeed held responsible for this lack of control: he is punished not for having committed an offence using others as tools, but for his failure to prevent or repress others from committing them, or for not submitting them to competent authorities for investigation and prosecution.

Before the introduction of the legislation now in force through the Act of 2014 there was in Swedish law a regulation in Chapter 22 section 6(3) BrB on a principal's liability for infringement of international law by combatants under the principal's command. This provision was inserted into the Criminal Code with consideration of the Geneva Conventions (which in this respect were based

---

16 See Svensson, Erik, *Gärningsmannaskap vid fleras deltagare i brott*, Uppsala: Iustus, 2016, section 6.4.4.

17 See in particular Herlitz, Carl Erik, *Delaktighet i brott i ljuset av NJA 1992 s. 474 – en förvirrad del av straffrätten? (*Participation in crime in the light of NJA 1992 p. 474 – a confused part of criminal law?) JT 1996–97, pp. 277–305; Wennberg, Suzanne, *Tillsammans och i samförstånd – ett nytt begrepp för gärningsmannaskap* (Together and in mutual understanding – a new concept of perpetration), NJM 2002, pp. 615–638 and Lernestedt, Claes *Upplösta kroppar, upplösta sinnen: medverkansläran och bortom*, (Decomposed bodies, decomposed minds: the doctrine of accomplice liability and beyond), in Asp Petter et al., *Katedralen*, Uppsala: Iustus, 2009 pp. 49–147.

on what is termed the "Yamashita principle" regarding a superior's liability.)[18] The International Criminal Law Committee noted in its Report that a principal's failure to exercise control may also be punishable in Swedish law without this being specially regulated. Through what in Swedish is termed *"garantläran"* (the doctrine of omission responsibility), military principals, at least under certain conditions, are responsible for their failure to prevent subordinates from committing crimes.[19] According to the Committee, however, it is unclear how far responsibility according to the *"garantläran"* extends. For this reason it was proposed that a special regulation should be inserted in the law regulating a principal's liability. This was subsequently done, in section 13 of the Act of 2014. The preparatory works provide that only if the superior is deemed neither to be a perpetrator nor an accomplice that one may consider whether the superior is criminally responsible by omission under the rule on superior responsibility.[20]

4 Drawing the Distinctions between Different Forms of Perpetration, and Accomplice Liability, under Swedish Law and International Criminal Law

When the relation between perpetration and accomplice liability is discussed in the Swedish doctrine at a general level the analysis is, as mentioned, typically based on simple cases of crimes such as intentional killing or assault. Person A punches person B in the stomach with his fist, causing B pain. A is the perpetrator. If C shouts to A that he should punch really hard, C has possibly been an accomplice to A's action, but not a perpetrator. Examples of this kind can be used to construct theories of the type "perpetration involves acting causally, accomplice liability involves giving someone else a reason to start a causal process" or "perpetration is direct action, complicity is indirect action."[21] The matter then appears to be simple.

But the acts criminalized in international criminal law are of a different kind than the acts used in the archetypical examples of perpetration that occur in the literature (on "normal" crimes in Sweden). Acts such as "inflicting pain" (Chapter 3 section 5 BrB) and "taking another person's life" (Chapter 3 section 1 BrB) are concrete, specific and measurable. But international crimes are harder to handle. What is meant by, for example that someone 'with the help of an act that is part of or is otherwise connected with an armed conflict or occupation, recruits children under fifteen years of age to national armed forces or armed

---

18 See regarding the background to the Rome Statute's rules in this respect Govt. bill 2013/14:146, pp. 200 f. and for example Ambos, Kai, "Superior Responsibility" in Cassese, A et al., (eds.), *The International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, pp. 825 ff.

19 SOU 2002:98, p. 330.

20 Govt. bill 2013/14:146, p. 207.

21 One example of a theory of the former type, which has gained much influence not least in the Anglo-Saxon world is given in Kadish, Stanford, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, California Law Review, 1985, pp. 323–410. Kadish takes much of his inspiration from Hart, H.L.A & Honoré, Tony, *Causation in the Law*, Oxford: Oxford University Press, 1959. Theories of the latter type have had great influence over Swedish doctrine, not least until the first half of the twentieth century. Such theories also appears in more recent doctrine, see for example Husabø, Erling Johannes, *Straffansvarets periferi*, (The Periphery of Criminal Liability) Bergen: Universitetsforlaget, 1999, especially p. 66.

groups, or use for such children for direct participation in hostilities' (see section 4(11) of the 2014 Act)? This question is not easy to analyse in terms of the dichotomies causality/influence or direct/indirect action. How does one, for example, commit an act of the type just mentioned "individually"? This is not easy to say.

Cases of international criminal law typically involve large sequences of events involving many persons. The criminalized acts are, as mentioned, often compound and complex. They can seldom be related to a single bodily movement by a given person. But it is necessary to determine who has acted as perpetrator, who has been an accomplice to what the perpetrator has done, and who has done nothing punishable at all.

The issue of drawing the distinctions between different forms of liability under Article 25 of the Rome Statute has received increasing attention in recent years. There are several theories of how attribution should take place. In the literature on international criminal law it is often asserted that the International Criminal Court (ICC) deals with the issue of attribution of roles among several involved people by using the German *Tatherrschaftslehre*, sometimes termed *"control theory"* in English.[22] It is also usually noted that the International Criminal Tribunal for the former Yugoslavia (ICTY) has employed what is termed *Joint Criminal Enterprise* (JCE) in the delimitation of the perpetration concept vis-à-vis accomplice liability. The former term originates in German law, the latter in Anglo-Saxon – chiefly English – law. Both theories have been developed in the framework of national criminal law.

Tatherrschaftslehre has been very influential in the German doctrine. It was developed by Claus Roxin from the 1960s.[23] Very briefly, the doctrine implies that the perpetrator is the person who has controlled the circumstances leading to commission of a crime.[24] Another way of expressing the same thing is that the offender is the "*Zentralgestalt*", the central figure, in the event. "Control" of the criminal act can be of several different kinds. A person who, himself or herself, physically commits a certain criminal act clearly controls the commission of the act. "*Handlungsherrschaft*" therefore corresponds to what in the sense of the Rome Statute may be called individual perpetration. Control can also be exerted

---

[22] See Guilfoyle, Douglas, *Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law*, Current Legal Problems 2011, vol. 64, pp. 255–286; Werle, Gerhard & Burghardt, Boris, *Establishing Degrees of Responsibility. Modes of Participation in Article 25 of the ICC Statute*, in van Sliedregt, Elies & Vasilyev, Sergey (eds.), *Pluralism in International Law*, Oxford: Oxford University Press, 2014, pp. 301–319; van Sliedregt, Elies, *Perpetration and Participation in Article 25(3)*, in Stahn, Carsten (ed.), *The Law and Practice of the International Criminal Court*, Oxford: Oxford University Press, 2015, pp. 506; Kamuli, Raphael, *Modern International Criminal Justice*, Cambridge: Intersentia, 2015, pp. 97; Aksenova, Marina, *Complicity in International Criminal Law*, Oxford: Oxford University Press, 2016, Ch. 5; Schabas, W, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford: Oxford University Press, 2016, pp. 569; van Sliedregt, Elies & Yanev, Lachezar *Co-perpetration Based on Joint Control over the Crime*, in de Hemptinne, Jérôme, Roth, Robert & van Sliedregt, Elies (eds.) *Modes of Liability in International Criminal Law*, Cambridge: Cambridge University Press, 2019 Ch. 5.

[23] Roxin, Claus, *Täterschaft und Tatherrschaft*, (Perpetration and Control over the Act) where control theory is discussed in detail over 800 pages, has appeared in nine revised editions since 1963. The latest was published in Berlin in 2015.

[24] A somewhat less brief – but still very concentrated – description of *Tatherrschaftslehre* is to be found in Svensson, Erik *Gärningsmannaskap vid fleras deltagare i brott*, Uppsala: Iustus 2016, section 4.4. See also Herlitz, Carl Erik, *Parties to a Crime and the Notion of a Complicity Object*, Uppsala: Iustus, 1992, Ch. 8.

by governing another person's action. This is then "*Willenherrschaft*", which may be said to correspond to perpetration by proxy. Further, co-perpetration exists regarding persons who may be said to have had "*funktionelle Tatherrschaft*" of a certain event. In this case, each of the persons involved controls a certain part of the commission of the joint offence without being able to control the whole course of events on their own (for in such cases "*Handlungsherrschaft*" or alternatively "*Willenherrschaft*" obtains). Thus here commission of the criminal offence posits cooperation between several different persons. A person who has contributed to committing a joint offence without his or her action being decisive for how the act was carried out will not be convicted for co-perpetration but for instigation. This is because this person has not had control of the event or, in other words, has not had "*die Tat in der Hand*" (lit. the deed in the hand). The decision of the ICC in *Lubanga* is usually adduced as an example of a case where the court has applied the doctrine of *Tatherrschaft*.[25]

JCE has several similarities to *Tatherrschaftslehre*. The concept is, however, harder to pin down and JCE exists in several variants, being described in different ways by different authors. Both JCE and *Tatherrschaftslehre* however, represent attempts to explain why several persons who have been involved in a certain event will all be convicted as perpetrators even though they have not met the relevant prerequisites at an individual level. A decisive difference, though, is that *Tatherrschaftslehre* seeks to determine who has *done* something concrete, i.e. who has *committed the offence* while the JCE is a way of extending the criminal liability to persons who have *not* actually committed the offence him or herself. At the same time, it is important to remember that the comparison is difficult to make because different authors working within different legal traditions may have differing perceptions of what the expression "commit the offence" actually signifies. Yet the following may be noted briefly about the JCE.[26] If A and B have a common purpose in committing a certain crime and one of them commits the criminal act on his or her own, both are guilty if both have contributed to the crime. Moreover, the JCE can be relevant if A or B commits *another* crime apart from the planned offence A and B have intended to commit. If A and B have planned a bank robbery and B in connection with the robbery murders a member of the bank's staff, A can be held responsible for murder even though the murder was not planned and even though A has not murdered anybody him or herself. The JCE doctrine is considerably less sophisticated than *Tatherrschaftslehre* (which reflects the difference between Anglo-Saxon and German legal doctrine in general).

In my opinion the JCE is entirely unacceptable from a national Swedish perspective *de lege lata*. To extend perpetration liability to include others than the person or persons who have committed the criminal offence is in manifest conflict with the prohibition of analogy which is part of the principle of legality. Application of the JCE would in other words require changes in the law. There is, however, nothing to indicate that arguments inspired by the JCE have occurred in trials at Swedish courts, neither in international criminal law contexts nor in other contexts.

---

25 See e.g. van Sliedregt, E, 2015, p. 506 ff.

26 See regarding the JCE from an international-legal perspective e.g. Guilfoyle, 2011, pp. 255–286; Cassese, A, *International Criminal Law*, 3rd edn, Oxford: Oxford University Press, Ch. 9.

However, *Tatherrschaftslehre* is arguably easier to accept in principle. The theory concerns how statutes should be interpreted in accordance with their wording in certain special situations, but does not concern – as has been mentioned – extending criminal liability. It is in other words a kind of doctrine of interpretation. However, there is no basis to conclude that *Tatherrschaftslehre* is actually used in Swedish case-law to make distinctions between different forms of perpetration and accomplice liability. The theory is sometimes mentioned in Swedish doctrine but cannot be said to have achieved any real breakthrough. I myself have in a different context questioned whether the theory really simplifies the questions at hand.[27] Is it really easier to decide who has committed a certain crime as a perpetrator simply because one rephrases the question to concern who had "control" of a certain event, or who had been the "central figure" in the course of events under assessment? I find it hard to see that this would be the case. Instead, I have argued that the question of perpetration should in each individual case be addressed by the adjudicator as a matter of interpretation in relation to the prerequisites of a given regulation, rather than as a theoretical question of what perpetration really "is". The interpretation issue remains, regardless of what "theory" one might be attracted to.

But if *Tatherrschaftslehre* is used as an aid to thought instead of as a definite theory I believe it has a large part to play in Swedish doctrine. The theory originates in Roxin's attempt to formulate an explanation of why persons who have not acted directly and physically in relation to a given criminal act may still be a perpetrator of this act. It illustrates elegantly that crimes can be committed in many different ways, and not only purely "physically". But as I have indicated I believe that the theory represents a reverse argument: it is to put the cart the before the horse if one first constructs a theory – for example *Tatherrschaftslehre* – and then interprets the law on the theory's own premises. On the contrary, careful scrutiny of the law often leads to the realization that the criminal offence can also be committed in other ways than only directly and physically.

The questions that *Tatherrschaftslehre* seeks to answer arise in all jurisdictions, irrespective of the framing of the material regulations. Both *Tatherrschaftslehre* and the JCE were developed on the basis of national legislation. The Rome Statute came about through compromises from numerous legal systems. Even though different models cover the contours of the perpetration concept, and even though different jurisdictions differ in how the general part of penal law is structured, there are good reasons to believe that the issues now under discussion are handled in a largely similar manner in most countries. A difference in theory need not correspond to a difference in practice. Despite this, the rules in the Rome Statute are couched so generally that there is large scope for variation in the national legal systems, both at rule level and in the application of the national rules. In other words, I see no reason to apply a different concept of perpetration in Swedish international criminal law from that applied in the rest of Swedish criminal law.

---

[27] Svensson, Erik, *Gärningsmannaskap vid fleras deltagare i brott*, Uppsala: Iustus 2016, section 4.4.4.

5 The Concept of Perpetration in Swedish Case Law on International Criminal Law

As we have seen, the concept of perpetration in international criminal law is elusive. The distinctions between differing ways of committing a criminal offence are themselves intricate. In addition there is a large volume of theoretical literature dealing with how these distinctions are to be handled in practice. In view of all this, however, it is striking how seldom the issue of perpetration *itself* emerges as an issue in the case-law. The complexity of the theories cannot be said to meet up to corresponding problems of legal application. Moreover, the fact that it is possible to act together with other people, or through another person, is not unique to criminal law. On the contrary, everyday language shows that such conceptions are a self-evident part of how we think about action. One can for example ponder on what it means to present a string quartet (it can only be done together with other people), or what it means to send a letter (it can only be done through the postman). Descriptions of chamber music and the postal system need no special, unique theory on actions to be understood. Nor does criminal law.

All criminal proceedings are about determining whether a certain person has committed a criminal act. The question of perpetration is in this sense the most basic question of interpretation in criminal law. In practice, it is not handled by the court first deciding on a certain theory of perpetration – for example *Tatherrschaftslehre* – and then applying this to a given course of events. The question is, theoretically, much simpler than this, namely "did person A commit the criminal act X?" Whether it is hard or easy to produce an answer to this question depends on evidence, not theory of action or conceptual issues regarding perpetration.

Swedish case law on international criminal law does not differ in this respect from national criminal law. Sometimes cases have concerned perpetration where the defendant has, according to the prosecutor, acted together and in agreement with one or more others and the court has adopted the prosecutor's line. This was the case in the case law stemming from the genocide in Rwanda. For example in the *Tabaro* case the defendant was convicted by the Stockholm District Court for having committed genocide in co-perpetration with others (is it ever possible to commit genocide "individually"?).[28] The difficulties in the trial were connected with evidentiary issues. The *Berinkindi* case, which also dealt with similar offences committed in Rwanda, can be said to have resembled the Tabaro case in the present respect.[29]

It can however be established that assessment of what the defendants had done concentrates, in the cases mentioned not so much on what each individual had done at an individual level. The jointly committed offence is considered to meet the requirements for the provision being adjudicated even though each defendant's individual contribution does not meet the prerequisites of the provision. On the basis of the courts' findings it is not entirely easy to form an opinion on how the courts have reasoned on the distinction between perpetration and accomplice liability: it is hard to know what factors the courts have given

[28] Prosecutor ./. Tabaro, Stockholm District Court, Trial B 13688-16, sentence 27 June 2018.

[29] Prosecutor ./. Berinkindi, Svea Court of Appeal, Trial B 4951-16, sentence 15 February 2017.

weight when concluding that the defendant participated in committing the criminal offence. The assessment does not seem to have concentrated on concrete, individual acts clearly delimited in time and space. In my view the explanation of this lies in the fact that the character of international crimes as such does not admit this type of concrete assessment. But it would not have been unreasonable to expect a more thorough reasoning from the courts regarding what evidentiary facts that were important for the judgment.

Other cases have concerned individual perpetration, as for example in some decisions on offences committed in the framework of the conflict in Syria. An example is Abdulkareem, the first case in which the Act of 2014 was applied.[30] The defendant had published photos of himself posing in front of dead and wounded bodies. He was convicted for a war crime for subjecting a person who was protected under international criminal law to humiliating or insulting treatment intended to violate personal dignity (4 para. 7 p. Act of 2014). In a case of this type the issue of perpetration does not itself appear complicated.

6 Accomplice Liability in Swedish and International Criminal Law

6.1 Introduction

As yet there has been no case before Swedish courts in which a person has been convicted of accomplice liability to an offence under international criminal law. But it is not improbable that such a case may be examined in the future. In the following sections I discuss some of the issues that may arise in such a case.

6.2 Briefly on Accomplice Liability in Swedish Criminal Law

The rules on accomplice liability to an offence under Swedish criminal law are given in Chapter 23 section 4 BrB. These state that punishment should be imposed not only on the person who has committed the offence but also on anyone who has aided or abetted this by advice or deed. It is also clear from the wording that the person who is not considered as the perpetrator shall be sentenced for instigation (*anstiftan)* if he or she has induced another to commit the act or, otherwise, for aiding the crime (*medhjälp*.

The act that is furthered through instigation or aiding and abetting has in doctrine come to be called the "complicity object" (*medverkansobjekt*). In simple terms the complicity object is the unlawful act committed by the perpetrator. Prerequisites ascribable to the perpetrator's personal liability – such as *mens rea* – do not affect the complicity object. If B gets A to commit an offence of which A does not realize the significance, B can be sentenced for instigating an offence even if A has acted without *mens rea*. However, the matter becomes slightly more complicated by the fact that the complicity object can in some circumstances be supplemented with prerequisites that may refer only to one or more accomplices. This is the case for example with excess *mens rea* requirements.

---

[30] Prosecutor ./. Abdulkareem, Skåne and Blekinge Court of Appeal, Cases B 3187-16, sentence 11 April 2017.

As for *mens rea*, complicity could be committed with intent, recklessness or negligence. A person who negligently contributes to, for example, another person causing bodily injury to someone else (Chapter 3 section 8 BrB) is sentenced for complicity in that offence. It is also conceivable that several persons are convicted for different offences, depending on their individual *mens rea*. A person who has had intent both to cause injury (in the example just given) and to abet in connection with this injury is thus convicted for aiding and abetting the intentional crime of assault even though the perpetrator renders himself guilty only of negligently causing the bodily harm. This follows from the wording of Chapter 23 section 4, which provides that each abettor shall be sentenced for the intent or the negligence attributable to him.

It is often asserted that the requirements are set low in Swedish law in relation to the outer limit for what can constitute aiding or abetting. For example, it is sufficient for accomplice liability (provided that other relevant conditions are present) that he or she has supported the perpetrator B in his intention to commit a given crime. No assessment of whether it became "easier" for the perpetrator to commit the act in a physical sense is needed.

The rules on accomplice liability are generally applicable to all types of crimes in the Penal Code and to all other provisions that might lead to a prison sentence. However, a subsidiary rule in Chapter 23 section 4 BrB provides that the normal rules do not apply if something else is specially provided for in certain cases. Any special rules on accomplice liability with regard to a certain penal provision take precedence over the general rules on accomplice liability.

Thus, there is a need to examine whether such special rules for accomplice liability exist in the context of international criminal law.

6.3 Accomplice Liability in the Rome Statute and Its Relation to Swedish Law

The rules on accomplice liability that have developed in international criminal law may be said to differ partly from the Swedish rules, as outlined in Section 6.2 immediately above. The Rome Statute contains fairly detailed rules on different forms accomplice liability. Article 25.3 b) – e) describes a number of forms of liability which would all, under certain circumstances, have been assessed as either instigation or aiding and abetting in national Swedish criminal law. Thus, sub-paragraph b) of the mentioned Article provides that liability for an offence under the Statute also includes a person or persons who orders, solicits or induces such a crime; sub-paragraph c) provides for liability for persons who – for the purpose of facilitating the commission of a crime – aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; sub-paragraph d) provides liability for a person or persons who otherwise contribute to the commitment of or attempt to commit a crime under the Statute by a group of persons acting in concert (with certain further qualifications); and in sub-paragraph e) liability is provided for persons who directly and publicly incite others to commit genocide.

These rules – which are specially designed for situations arising in armed conflicts and other situations of unrest – appear somewhat narrower than the decidedly flexible Swedish rules on accomplice liability. The rule in b) may be said to correspond to instigation under Swedish law. But liability under c) –

corresponding to aiding under Swedish law – requires that, for example, the accomplice acts for the purpose to facilitate commitment of the offence. No such purpose is required under Swedish national law, which even criminalizes negligent complicity. The rule in d) appears more open than that in c), but on the other hand there is here a requirement that the complicity take place in connection with offences committed by a certain group of persons which, moreover, must act with a common purpose. As mentioned above, this mode of liability has no conceptual equivalence in Swedish law or Swedish doctrine. Action in complicity with a group, sharing a common purpose, could in some cases be regarded as co-perpetration under Swedish law. The rule in sub-paragraph e) on public incitement to genocide is, however, construed as an independent crime rather than a rule on accomplice liability: what is criminalized is not the urging of someone else to commit genocide, or even to act as an accomplice in genocide, but the actual incitement as such, regardless of the possible consequences of the incitement. A near parallel in Swedish national law is section 3 of the Act (2010:299) on Penalty for Public Incitement, Recruitment and Training for Terrorist Crimes and other Particularly Serious Criminality, where criminal liability is provided for a person or persons who in communication with the public urge or otherwise attempt to lead them into particularly serious criminality.

With the introduction of the 2014 Act it was stated in the preparatory work that there was no "practically significant difference" between the Swedish rules and the provisions of the Rome Statute.[31] Thus incorporation of the Rome Statute did not involve any conflict of norms in relation to Swedish criminal law. In the preparatory works of the 2014 Act it is noted that regulation of the general part of criminal law in the Rome Stature is intended chiefly to govern the work in the International Criminal Court and cannot be claimed to correspond to customary international law. Accession to the Statute does not, according to preparatory works, involve any undertaking for states to apply within their domestic systems principles related to the general part of criminal law expressed in the Statute .[32] In the preparatory works, it is considered that from the point of view of harmonization there was no reason to introduce special rules for accomplice liability (or for that matter other sections of the general part of criminal law) concerning the provisions in the 2014 Act. The point of departure according to the preparatory works is that the national Swedish rules on accomplice liability should also be applied to provisions regulated in the 2014 Act.[33] The special provision on a principal's liability in the 2014 Act represents an explicit exception from this point. As stated in section 3.4 above, this is also expressed in section 13 of the Act.

To summarize, the normal rules on complicity under Chapter 23 section 4 BrB apply to the 2014 Act. There are no special rules on accomplice liability related to the 2014 act, and for this reason the subsidiary provision in Chapter 23 section 4 sec. 4 BrB does not apply

Turning to offences committed before the 2014 Act came into force, one could view the matter differently. The old penal regulation on crime against

---

31 Govt. bill 2013/14:146, p. 212

32 Govt. bill 2013/14:146, p. 212 f. See also SOU 2002:98, p. 323.

33 Govt. bill 2013/14:146, p. 71.

international law (*folkrättsbrott*) in Chapter 22 section 6 BrB was more open-ended than the 2014 Act since it refers in general terms to infringements of agreements with foreign powers (treaties) or generally recognized principles of humanitarian law governing armed conflicts (customary international law). One way of understanding this is that the legislative technique led to an order where custom or rules at international law level relating to accomplice liability should take precedence over Chapter 23 section 4 BrB. With this view, then, the international law rules and regulations are incorporated into Swedish law via the open-ended penalty regulation on crime against international law.[34] Since the rules on complicity in the Rome Statute are, as mentioned, somewhat narrower than the Swedish ones, fewer cases would be considered criminal. In the earlier preparatory work, however, it is noted that the relevant jurisdiction's general criminal law principles should be decisive regarding e.g. the liability of a person who has acted upon a superior's orders.[35] This suggests that the rules on accomplice liability of the Rome Statute were not incorporated into Swedish law despite the earlier legislative technique.

Even when applying the 2014 Act, however, there may be reason to allow considerations of international law to play a part in the interpretation of the rules: i.e. to interpret the Swedish rules in conformity with these considerations. It should be noted that the original proposal of the International Criminal Liability Committee (the basis of the 2014 Act) contained an introductory provision to the effect that the courts should particularly observe "the principles and the practice that guide and have been developed within the […] International Criminal Court" in the application of the law.[36] However the Government elected to exclude this part of the proposal in the Bill that formed the basis of the legal text.[37] How far Article 25.3 of the Rome Statute, for example, should affect interpretation of Chapter 23 section 4 BrB in the light of the provisions of the 2014 Act may therefore be said to be a relatively open question.

---

[34] The previous provision in Chapter 22 section 6 BrB has been called "a form of 'sector monism' in the otherwise dualistic Swedish system", see Cameron, Iain, *Swedish International Criminal Law Rules on Gross Human Rights Offences*, in *Festskrift till Nils Jareborg*, Uppsala: Iustus, 2002, p. 148. Cf. Asp, Petter *Folkrätten och straffrätten* (International law and criminal law) in Stern, Rebecca & Österdahl, Inger, *Folkrätten i svensk rätt* (International law in Swedish law) Malmö, 2012, p. 65, in which Asp considers that one can also view the earlier Chapter 22 section 6 BrB as confirmation of Swedish dualism, since it is precisely through reference in Swedish law that international law enters the picture.

[35] Govt. bill 1953:142, pp. 19 and 53–54.

[36] See para. 2 of the Committee's proposal, SOU 2002:98, p. 357.

[37] Bring and Träskman have pointed out that this leads to the relation between Swedish criminal law and international law becoming weakened in an unfortunate manner. See Bring, Ove & Träskman Per Ole *Folkrättens starka roll inom svensk straffrätt bör bestå – nu vill regeringen dumpa den*, [The strong role of international law in Swedish criminal law should remain – now the government wants to dump it] Dagens juridik 2014-02-10 and the same authors *Det är obegripligt att justitiedepartementet kan påstå att systemskiftet sker med vårt goda minne*, [It is incomprehensible that the Department of Justice can maintain that the system shift is taking place with our consent], Dagens juridik 2014-02-17). Cf. Kelt, Maria, *Systemskiftet om folkrättens roll i svensk straffrätt sker med professorernas goda minne* (The system shift on the role of international law in Swedish criminal law is happening with the consent of the professors), Dagens Juridik, 2014-02-14, which tones down the importance of the absence of an introductory clause on the relationship between the 2014 Act and international law.

Literature

Ambos, Kai, "Superior Responsibility" in Cassese, Antonio and others (eds.), *The International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, 823–872

Aksenova, Marina, *Complicity in International Criminal Law*, Oxford: Oxford University Press, 2016

Asp, Petter, "Folkrätten och straffrätten" in Stern, Rebecca & Österdahl, Inger (eds.), *Folkrätten i svensk rätt*, Malmö: Liber, 2012 58–73

Bring, Ove and Träskman, Per Ole, *Folkrättens starka roll inom svensk straffrätt bör bestå – nu vill regeringen dumpa den*, Dagens juridik 2014-02-10

- *Det är obegripligt att justitiedepartementet kan påstå att systemskiftet sker med vårt goda minne*, Dagens juridik 2014-02-17

Cameron, Iain, "Swedish International Criminal Law Rules on Gross Human Rights Offences" in *Festskrift till Nils Jareborg*, Uppsala: Iustus, 2002 123–149

Cassese, Antonio, *International Criminal Law*, 3rd edn, Oxford: Oxford University Press

Cupido, Marjolein, "Group Acting with a Common Purpose", in de Hemptinne, Jérôme, Roth, Robert & van Sliedregt, Elies (eds.), *Modes of Liability in International Criminal Law*, Cambridge: Cambridge University Press, 2019 Ch. 10

Guilfoyle, Douglas, *Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law*, *Current Legal Problems* 2011, vol. 64, 255–286

Hart, H.L.A. & Honoré, Tony, *Causation in the Law*, Oxford: Oxford University Press, 1959

Herlitz, Carl-Erik, *Parties to a Crime and the Notion of a Complicity Object*, Uppsala: Iustus, 1992

- *Delaktighet i brott i ljuset av NJA 1992 s. 474 – en förvirrad del av straffrätten?*, JT 1996– 97, 277–305

Kadish, Stanford, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, California Law Review, 1985, 323–410

Kamuli, Raphael, *Modern International Criminal Justice*, Cambridge: Intersentia, 2015

Kelt, Maria, *Systemskiftet om folkrättens roll i svensk straffrätt sker med professorernas goda minne*, Dagens Juridik, 2014-02-14

Lernestedt, Claes, "Upplösta kroppar, upplösta sinnen: medverkansläran och bortom" in Asp, Petter and others, *Katedralen*, 49–147, Uppsala: Iustus, 2009

Roxin, Claus, *Täterschaft und Tatherrschaft*, 10th edn, Berlin: De Gruyter, 2019

Schabas, William, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford: Oxford University Press, 2016

van Sliedregt, Elies, "Perpetration and Participation in Article 25(3)" in Stahn, Carsten (ed,), *The Law and Practice of the International Criminal Court*, Oxford: Oxford University Press, 2015

van Sliedregt, Elies & Yanev, Lachezar, "Co-perpetration Based on Joint Control over the Crime", in de Hemptinne, Jérôme, Roth, Robert & van Sliedregt, Elies (eds.), *Modes of Liability in International Criminal Law*, Cambridge: Cambridge University Press, 2019 Ch. 5

Svensson, Erik, *Gärningsmannaskap vid fleras deltagande i brott*, Uppsala, 2016

Wennberg, Suzanne, *Tillsammans och i samförstånd – ett nytt begrepp för gärningsmannaskap*, NJM 2002, 615–638

Werle, Gerhard & Burghardt, Boris, "Establishing Degrees of Responsibility. Modes of Participation in Article 25 of the ICC Statute" in van Sliedregt, Elies & Vasiliev, Sergey (eds,), *Pluralism in International Law*, Oxford: Oxford University Press, 2014, 301–319