Review

Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes by Neha Jain, Hart Publishing, 2014, 250 pp (ISBN 978-184-94645-50)

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Domestic criminal law scholars from common law countries tend to look to international criminal law as a realm in which issues of criminal responsibility — broadly, the conditions under which it is possible to hold someone to account for his or her actions — have been given the most serious attention. The challenges posed by crimes such as genocide and crimes against humanity — which, as Neha Jain observes, are 'inherently collective in nature' (p 2) — give rise to distinctive challenges for criminal law and the centrality of individual responsibility for crime as its organising principle. But, as Jain also notes, to date there has been no coherent account of modes of responsibility for such crimes in international criminal law (p 9), and thus the faith of domestic criminal law scholars in international criminal law may be misplaced.

In *Perpetrators and Accessories in International Criminal Law*, Jain attempts to construct a theoretical framework for distinguishing between parties to an international crime and to generate modes of accessory and perpetration responsibility that appropriately capture the collective nature of such crimes. As Jain notes, international criminal law has relied on two different doctrines: joint criminal enterprise ('JCE'), which is a common law doctrine relating to assisting or encouraging a crime to be committed; and perpetration (as indirect perpetration and co-perpetration), which is a form of participation in crime under German criminal law. Each of these doctrines has been subject to criticism by both scholars and courts, at both domestic and international levels, but Jain argues that, with some modifications to the domestic doctrine, it is possible to formulate a doctrine of *Organisationsherrschaft* that provides a 'more accurate' characterisation of the role of high-level participants in mass atrocity (p 10). Jain also advocates for a 'more tightly circumscribed' version of one type of JCE ('JCE II') as a useful doctrine for capturing accessory or secondary responsibility for international crime (p 11).

The first part of the book provides a detailed review of the development of doctrines of responsibility for crime under international criminal law. Here, Jain charts the way in which, starting at the Nuremberg trials in the aftermath of World War II, and proceeding through *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia ('ICTY') to the International Criminal Court ('ICC'), doctrines such as JCE (in three versions: JCE I, JCE II and JCE III) were developed to capture collective participation in crime. Jain notes the slippages between different doctrines as they developed in the hands of different courts, and observes that courts sometimes relied on sentencing rather than legal principle to accommodate different degrees of participation by different actors (p 36). Jain concludes that the incorporation of doctrines of 'commission', accessorial responsibility, and 'common

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purpose' into the ICC's *Rome Statute* 'dethroned' JCE — 'the darling of prosecutors' — from its pre-eminent position in international criminal law (p 98), giving rise to the current situation in which both perpetration and accessory liability together attempt to capture collective participation in crime.

Part Two of the book is devoted to a close treatment of the doctrines of perpetration responsibility (participation in crime by more than one principal) in English and German criminal law respectively, from which Jain draws lessons to mount a 'theory of perpetration for international crimes' (p 138). According to Jain, because the English criminal law does not appear to countenance situations in which there may be several thousand immediate perpetrators, or a policy-level perpetrator who may not know the identity of his or her agent, or 'a climate of moral permissiveness' that encourages or endorses the crime (p 139), the doctrine of JCE is not as promising a starting point for such a theory as the German criminal law theory on perpetration. With its emphasis on a high-level participant's control over the will of a direct perpetrator, rather than his or her role in causing the crime, and its contemplation of leaders being held responsible *as perpetrators* of crimes committed by 'very large number of anonymous and exchangeable physical perpetrators' (in the category of *Organisationsherrschaft*), German criminal law is better able to accommodate 'our intuitions' about mass atrocity (such as to hold senior and mid-level individuals to account), and thus provides a 'promising template' from which to construct a theory of participation in international crime (p 140). Nonetheless, Jain proposes some modifications to the theory of *Organisationsherrschaft* so that it allows for the different motivations of different physical perpetrators and the variable operational frameworks in which mass atrocity occurs (organised or loosely structured, rigidly hierarchical or flexible) (p 149). Utilised together with a modified version of JCE I (covering crimes committed by a group of people working with a common plan based on mutual understanding) (p 150), Jain concludes that this doctrine provides a 'suitable account' of participation in international crime (p 150).

Part Three of the book focuses on accessorial or secondary responsibility, rather than perpetration and, here, Jain makes the case for a limited role for JCE II (where the common plan is based on more than mere acquiescence by the accused, and both the accused and the physical perpetrator are parties to the agreement) (p 203), and concludes that the 'insecure foundations' of JCE III in criminal law theory counsel in favour of its abandonment (p 210).

With its detailed assessment of the relevant international criminal law cases and doctrines and its careful mining of domestic law and theory (both English and German), the strengths of this book are those of traditional doctrinal legal scholarship: it is exhaustive, principled and directed towards a clear end, in this case, a more theorised approach to assigning individual responsibility for international crimes that are committed collectively. But the limitations of the book are also, arguably, those of traditional doctrinal legal scholarship: the motivations for the author's development of the theory (to provide a stronger basis in international law for liability for senior and mid-level individuals) and the all-important (complex and diverse) political and social contexts in which international crimes occur (where lines of authority and legal and moral norms are blurred or erased altogether) appear only at the margins of the analysis. Painting a more detailed picture — taking into account the changed needs over time of international criminal law as a system of sanction and condemnation, and approaching responsibility as more than just forms of liability, for instance — would have strengthened both the analysis of the problem (the seriousness of the lack of coherent account of responsibility for international crime) and the author's prescriptions for its solution (better use of domestic criminal law principles).

More generally, while Jain's discussion reminds us of the value of the more gradual development of legal principles over time, as has occurred in domestic criminal law systems, it does not seem to hold out much hope for the more radical potential of international criminal law, given its hybrid civil-common law status, the newness of relevant statutes, and the scale and nature of the offences it covers. Such a radical potential might be better served by developing new concepts and fostering truly creative thinking around ideas of collectivity and collective action than by even the most principled account a scholar could offer.

Reference

Rome Statute of the International Criminal Court, opened for signature 17 July 1988, 2187 UNTS 90 (entered into force 1 July 2002)