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# Cumulation of offences and purposes of sentencing in international criminal law: A troublesome inheritance of the Second World War☆

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ABSTRACT

In international criminal law, as well as in national penal systems, a defendant may be found guilty of more than one crime as a result of the same act. In that case, the question arises as to whether this act, while breaching several criminal provisions, in reality violates only one. The approach followed in case law is so formal as to provide no limiting effects to cumulative convictions. Plausibly, this is a consequence of a line of thought that emerged in the aftermath of the Second World War and advances a primarily 'retributive' idea of punishment for serious international crimes, i.e. a kind of idea where there is no room for the perpetrator's rehabilitation. In this author's view, bearing in mind the dramatic development of human rights' protection over the years, such an idea should be revised. And this in order to favor a more substantive approach to the matter of cumulation.

## 1. Introduction

Under the statutes of all international criminal courts and tribunals in operation, more than one penal provision may punish the same conduct. If one takes a look at the Statute of the International Criminal Court (ICC), for example, murder is punishable as genocide, as a crime against humanity and as a war crime. If so, according to the general principles of criminal law, we have either an *ideal concurrence* of offences or an *apparent concurrence* of provisions. An *ideal concurrence* of offences occurs when a single criminal act is split into two or more offences. An *apparent concurrence* of provisions, conversely, occurs when the perpetrator performs an act that may appear to simultaneously breach several criminal provisions, whilst, in reality, it violates only one. In this case, it will be necessary to identify the *prevailing provision* (Palombino, 2005; Stuckenberg, 2015).

To date, international criminal tribunals, following the United States (US) case law (Blockburger v. US, 1932, pp. 214-217), rely on two principles in order to establish whether multiple convictions are permissible: i) *unilateral specialty* and ii) *reciprocal* or *bilateral specialty*. An apparent concurrence of provisions, in particular, occurs when the offences in question are in a relationship of *unilateral specialty*: 'if an action is legally regulated both by a general provision and by a specific one, the latter prevails as the more

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appropriate of the two, since it is more specifically directed toward that action (*in toto jure genus per speciem derogatur*)' (Prosecutor v. Kupreškić, 2000). On the other hand, an ideal concurrence of crimes occurs when the offences are in a relationship of *bilateral specialty*, i.e. where each offence requires proof of an additional element (the so called contextual element) which the other(s) does not.

With the view to establishing how these principles work in practice, the recent judgment passed by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Karadžić (Prosecutor v. Karadžić, 2016) is of guidance. The tribunal, which was called upon to establish whether cumulative convictions for genocide, crimes against humanity and war crimes are permissible as a rule, answered the question in the affirmative and this by relying on the principle of bilateral specialty. In the terms of the decision, genocide requires the intent to destroy, in whole or in part, a national, ethnical, or religious group; crimes against humanity must have been committed as part of a widespread or systematic attack on a civilian population; and a war crime presupposes a close link between the acts of an accused and the armed conflict (para. 6011 and ff.). To put it another way, each of these crimes requires a contextual element that the other(s) does not, which means that first i) they are always in a relationship of bilateral specialty and second ii) a cumulative conviction is in the end always permissible.

The circumstance just described is susceptible to have a negative impact on the amount of sentence, but the use of bilateral specialty is usually balanced by the *totality principle* as it has been applied since Delalić (Prosecutor v. Delalić et al., 2001, para 429). This principle makes it possible to reduce the sentence in cases of multiple convictions and thus to avoid a strict application of the maxim *tot crimina tot poenae* (every crime charged demands just punishment). Still, its proper application always requires a correct assessment of the gravity of each individual offence, which, given the absence of a range of punishments in international criminal law, is anything but simple. Most importantly, the issue of cumulation of offences cannot be addressed only in terms of amount of sentence, because it is the very purpose of sentencing which may be affected.

Arguing from a human rights perspective, the scope of this article is exactly to assess whether i) the large use of bilateral speciality in international criminal law is compatible with one of the main purposes of sentencing, viz. the rehabilitative one, or quite the opposite ii) a more substantive approach to the problem of cumulation is desirable. To this end, the practice of human rights treaty bodies regarding penitentiary systems will be carefully considered.

## 2. Cumulation of offences and its impact on the purposes of sentencing

The purposes of sentencing in international criminal law is a question of great interest for scholars (D'Ascoli, 2011), also considering that the statutes of the concerned tribunals do not deal with the matter. Bearing in mind the traditional domestic theories of punishment, justifications for the latter mainly include: i) retribution (since the offender harmed society, society is entitled to inflict harm in return); ii) deterrence (the threat of punishment deters people from engaging in illegal acts); and iii) rehabilitation (the punishment changes the offender in order to make him a better citizen afterwards). Remarkably, as far as international criminal law is concerned, one gets the clear impression that while punishment fulfils the first two functions (even though it is not clear which of the two is to be prioritized)[2], the same is not true concerning the third one, i.e. the function to rehabilitate the offender. Suffice it to consider the judgment in Karadžić mentioned above. Its para. 6025 clearly states that 'retribution and deterrence are the primary objective of sentencing (...) Other factors, such as rehabilitation, are relevant to be considered in sentencing but should not play a predominant role.'

More in detail, the rehabilitative function of punishment is one of the most important, because its basic purpose is 'the moral improvement of the offender such that crime is no longer an active option in his deliberations [concerning] future actions' (Mertx Hsieh, 2005, p. 9). Yet the function under consideration was not taken into account by the Nuremberg Tribunal, viz. the tribunal which was the first to give impetus to the emergence of international criminal law and influenced the jurisprudence of the tribunals (including the ICTY) established over the years in its wake. Two reasons justify such a circumstance. First, the historical events leading to the institution of this tribunal instilled the idea that the main objective to be fulfilled was to incapacitate all those responsible for Nazi crimes. Second, and more importantly, human rights' international protection was very limited at that time.

Since then, however, much water has flowed under the bridge, and the dramatic development of human rights at international law level has ended up also impacting on the function of punishment in criminal law. One may refer, first, to Article 10, para. 3, of the International Covenant on Civil and Political Rights (ICCPR), whereby the 'penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation', as well as to the General Comment of the Human Rights Committee (1992) on that Article; its para. 10 states that 'no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.'

Second, the same commitment to rehabilitation is to be found in the 2006 European Prison Rules (EPR) and the case law of the European Court of Human Rights (ECtHR) more generally. The EPR are recommendations of the Committee of Ministers to member States of the Council of Europe regarding the minimum standards to be applied in prisons; accordingly, they are intended to guide the Legislator as well as judicial authorities and prison staff and inmates. Further, as rightly observed, there exists a sort of virtuous circle in the relationship between the EPR and the ECtHR, in the sense that '[v]arious provisions of the EPR have been influenced by judgments of the Strasbourg Court, and in turn the Court frequently refers to the Rules as evidence of support amongst

[2] In this regard, Drumbl (2007, p. 65), observes as follows: 'The ICTY has issued judgments that cite retribution and general deterrence as 'equally important', judgments that cite retribution as the 'primary objective' and deterrence as a 'further hope', warning deterrence 'should not be given undue prominence', and judgments that flatly state 'deterrence is probably the most important factor in the assessment of appropriate sentences.'

the Member States of the Council of Europe for a particular policy stance' (Ovey, 2014). One example is Rule 6 of the EPR, according to which 'all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty'. Additionally, Rule 102.1 (headed 'Objective of the regime for sentenced prisoners') provides that 'the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life'. On the other hand, giving due weight, *inter alia*, to these provisions, the ECtHR increasingly argues that 'while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence' (Vinter et al. v. the United Kingdom, 2013, para. 115).[3]

The foregoing observations pose the question of whether the wide use of bilateral specialty in international criminal law, and thus the fact that a cumulative conviction is indeed always permissible, may imperil the rehabilitative purpose of sentencing. The answer cannot but be positive. Nevertheless, only a very low number of international criminal judges took this aspect into account. Reference is made, in particular, to the separate and dissenting opinion appended by judges David Hunt and Mohamed Bennouna in the ICTY decision in Delalić (Prosecutor v. Delalić et al., 2001). According to this opinion, '[p]rejudice to the rights of the accused – or the very real risk of such prejudice – lies in allowing cumulative convictions. [T]he number of crimes for which a person is convicted may have some impact on the sentence ultimately to be served when national laws as to, for example, early release of various kinds are applied. The risk may therefore be that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend not only on the sentence passed but also on the number and/or nature of convictions. This may prejudice the convicted person notwithstanding that, under the Statute, the Rules and the various enforcement treaties, the President has the final say in determining whether a convicted person should be released early. By the time national laws trigger early release proceedings, and a State request for early release reaches the President, the prejudice may already have been incurred. Finally, cumulative convictions may also expose the convicted person to the (...) application of 'habitual offender' laws in case of subsequent convictions in another jurisdiction' (para. 23).

## 3. In search of a more substantive approach to the problem of cumulation of offences

Moving from these assumptions, a more substantive approach to the problem of cumulation of offences in international criminal law is desirable. The application of the principle of bilateral speciality leads to the practical result that cumulative convictions for war crimes, crimes against humanity and genocide are always possible, and this can have serious consequences for the accused. The existence of a well-established jurisprudence in this matter does not necessarily tie the hands of international criminal tribunals with regard to future cases. In Aleksovski, where the ICTY confronted the issue regarding the value of precedent in its case law, the Appeals Chamber found that 'a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow the previous decisions, but should be free to depart from them for cogent reasons in the interests of justice' (Prosecutor v. Aleksovski, 2000, para. 107). Arguably, such reasons exist in the matter of cumulation of offences, a matter that should be revisited accordingly.

A potential solution to the problem of unfairness resulting from multiple convictions for the same conduct may be the following one. As already said, genocide, crimes against humanity and war crimes are offences which always require proof of an additional element that the other(s) does not (namely the intent to destroy a specified group in respect of genocide, the widespread or systematic nature of the attack with respect to a crime against humanity and a close link between the acts of an accused and the armed conflict with respect to a war crime). In this connection, with a view to identifying the prevailing provision, one may resort to a criterion which, while somewhat neglected in case law, proves of much assistance: the criterion of consumption.

This criterion has been defined by the ICTY in Kupreškić: 'Its *ratio* is that when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct' (Prosecutor v. Kupreškić, 2000, para. 688). Such a definition, however, appears ambiguous. When one crime encompasses all legal elements of another, there is a relationship of *unilateral specialty*, and the ascertainment of the *relative gravity of each crime* is not necessary. This ascertainment, instead, which is required by the principle of consumption (at least as applied in civil law systems), becomes necessary where two offences are in a relationship of *reciprocal specialty*, and each of the two crimes simultaneously appears both general and special in respect of the other. On the practical level, the question is always the same and consists of establishing which parameters can be used to identify the relative gravity of each crime and, thus, the *lex consumens*.

The first parameter is represented by the penalty: the offence, which carries the graver penalty, consumes the other. Its application, however, which is easy in national law systems, appears difficult in international criminal law, where there is not a range of punishments (Prosecutor v. Kunarac, 2002).

The second parameter is based on the comparative gravity of the different contextual elements of crimes. For example, there is no doubt that, all else being equal, the contextual element of genocide is graver than the contextual element of a crime against humanity, and makes the first offence *lex consumens* with regard to the latter. Support for this conclusion may be found in a number of national and international decisions, which tacitly or expressly recognize the existence of a difference in terms of gravity between genocide and the other international crimes. In *Blaskic*, the ICTY's Appeals Chamber stressed that hierarchy of crimes had not yet been transposed in its case law, and that the relative gravity of each crime had to be fixed by reference to the circumstances of the case (as is currently required by Article 78 of the ICC Statute) (Prosecutor v. Blaškic, 2000, para. 802). Surprisingly, in the same judgment, the Chamber specified that the objective method for assessing the seriousness of an offence 'is linked to the intrinsic

[3] See also Murray v. The Netherlands, 2016, para. 101 ff.

seriousness of the legal crime's characterization' (para. 803). In doing so, it implicitly used the main argument of those who are favourable to ranking the crimes according to their gravity (Frulli, 2001). More expressly, in *Kambanda*, a Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) highlighted that genocide 'is unique because of its element of *dolus specialis* (...); hence (...) genocide constitutes the crime of crimes' (Prosecutor v. Kmbanda, 1998, para. 14). In the same vein, in *Eichmann*, the Israel District Court described the crime of genocide as the 'crime of the crimes' (Eichmann 1061). The same remarks apply as far as the relationship between a crime against humanity and a war crime is concerned. And indeed, also in this case, the contextual element of the former - *ceteris paribus* - is graver than that of the latter (Frulli, 2001).

## 4. Conclusion

In spite of the existence of a well-established jurisprudence on the matter, the issue of cumulation of offences in international criminal law still appears quite controversial. The approach followed by international criminal tribunals in dealing with it, namely resort to the principle of reciprocal speciality, allows the conviction of an individual of two or more crimes with regard to the same conduct. Such an approach, however, is questionable, since it can bring about serious and unfair consequences for the accused, especially by jeopardising the rehabilitative purpose of sentencing. On these grounds, it is our view that also where two or more crimes are in a relationship of reciprocal speciality, the criterion of consumption should be adopted in order to identify the prevailing criminal provision.

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