

Portugal

Informal note on Concurrence of offences

The matter of concurrence of offences or overlap of crimes, as it is also known, has a great importance and relevance in criminal law.

Due to the complexity of this issue there is a need to reflect upon it with the view to creating legal standards under which the question should be settled. These legal standards would be important for the correct application of the norms, which constitute the international criminal law international criminal norms.

The matter is relevant both at the level of the substantive international criminal law and at the level of the procedural international criminal law.

At the substantive level the problems that arise are:

First: i) whether the same act may infringe two or more rules of international criminal law and if so, on what conditions; ii) whether the same act may infringe more than one time the same rule of international criminal law; iii) whether several acts may infringe only one rule of international criminal law and if so, on what conditions.

For instance, whether the same conduct of homicide may infringe two or more provisions of the Statute - the provision that defines genocide by killing members of the group, the provision that defines crimes against humanity by murder and the provision that defines war crime by wilful killing.

Second, in case of cumulation of charges, which result on a cumulation of convictions, how may this be reflected in sentencing in accordance with article 78 (3) of the Statute?

At the level of the procedural international criminal law, the main problem that arises is how to proceed when the Prosecutor and the Trial Chamber have different evaluations relating to a particular conduct. For instance, the Trial Chamber does not agree with the cumulative charges for the same conduct of torture, as crime against humanity and as war crime.

Moreover, what should be the role of the Trial Chamber when it finds that the evidence presented shows that the accused has committed a different crime than that charged in the indictment? For example, the Trial Chamber finds, in relation to a

charged crime of sexual enslavement, that there is insufficient evidence, while there is enough evidence of the commission of a crime of rape. Or the Trial Chamber finds that there is enough evidence of the commission of a crime of genocide, in spite of the crime against humanity of persecution as it had been charged by the Prosecutor.

The substantive criminal issues

The establishment of the International Criminal Court is legitimated by its purpose: to repress the conducts which may represent the most serious offence to some values that have been considered to be inestimable for the international community. Such conducts have been referred to in the Preamble of the Statute as “atrocities that deeply shock the conscience of humanity”.

The crimes under the jurisdiction of the Court, the crime of genocide, the crimes against humanity and the war crimes, describe those serious offences which have become unbearable for the international community because such offences mean serious violations of the fundamental human rights and are in themselves a form of negation of the human existence.

The norms that describe these crimes have the intent to protect fundamental values such as life, personal integrity and freedom by repressing and condemning serious offences to these values.

Therefore, the issue of concurrence of offences should be solved by applying the *principle of protected value or protected interest*.

The norms of article 6° which defines genocide, article 7°, which defines crimes against humanity and article 8° which defines war crimes, are meant to protect specific interests. On the other hand, these norms reflect different degrees of violation of protected values and therefore they constitute different ways of protection of the same values.

There is a special relation between the norms that protect the same value in different ways, i. e., that describe different degrees of the offence or different stages of the conduct that relate to a protected interest (for instance, when the conduct creates only a danger of offence or when the conduct is an incomplete offence). This relation is hierarchical, which means that the application of a hierarchically superior norm - the norm that better defends the protected value - excludes the application of other norms. The protection of the value is ensured by the application of only one norm. The cumulative application of norms, which the conduct apparently fulfils would imply a

double or multiple jeopardy against the same concrete violation of protected value and, would lead to a violation of the “*ne bis in idem*” principle. When a conduct apparently falls within the scope of several norms, but in reality that conduct is entirely covered by one of those norms fully protecting the value offended, we are faced with the an apparent overlap or a concurrence of norms.

In the civil law system such hierarchical relationship between norms can assume the following forms:

The “relationship of speciality” is refereed to the situation where a conduct is described both by a general and by a specific provision. The specific provision prevails because it encompasses completely the specific elements of the conduct and describes a specific way of offence of the protected value (*lex specialis derogat generali*). The unlawfulness of the conduct is as well completely covered by this provision. The decision of applying both provisions could have the effect of cumulating charges and would therefore violate the principle of *ne bis in idem* (for example, the provision that defines war crime of unlawful deportation and transfer, is a *lex specialis* and the provision which defines crime against humanity of deportation or forcible transfer of population is a *lex generali*).

The “relationship of consumption”, which may correspond to the common law doctrine of the “*lesser included offence*” arises from the relation between the norm that describes a greater offence to the protected value and the norm that describes a lesser offence. The first norm prevails over the latter norm. The *ratio* of such relationship is as follows: the protected values relate hierarchically. The guaranty accorded by the norm that describes a higher lesion value is considered to be sufficient in order to consume in it the safeguard envisaged by the norm that describes the smaller lesion. Some provisions pursue the protection of the same value when describing different forms or degrees of the offence relating to the same value. The norm that describes the higher degree of the offence consumes the others. No doubt that such norm is more efficient in protecting the value to be ensured. To avoid a clear violation of the principle *ne bis in idem*, one must conclude that the *lex consumens derogat legi consumptae* (for example, the provision that describes the war crime of wilful killing in art. 8° n.2 a) (i) consumes the provision that describes the war crime of wilfully causing great suffering or serious injury to body or health in art. 8°, n.2 a) (iii))

Part of the school of legal thought uses to establish two other relationships between the criminal provisions: the *relation of subsidiarity* and the *relationship of alternativity*.

The relation of subsidiarity is hierarchical as well between two provisions. The first one describes a conduct, which is the way to prepare the commission of the crime defined by the second one. The efficacy of the application of the first norm is voided by the application of the second one. The rationale is that criminal law defines and punishes conducts which are, besides being themselves a crime, preparatory forms of committing other crimes - i. e., previous state of another criminal action (for example, there is a relation of subsidiarity between the provision that describes the crime against humanity of imprisonment in art. 7º n.1, para. e) and the provision that describes the crime against humanity of enslavement in n.1 para. c). The latter prevails).

The subsidiarity is, according to part of the school of legal thought, considered to be included in the notion of consumption.

The relation of alternativity arises when two provisions protect the same value in a different manner. These are norms that relate among themselves to guaranty the same protected interest, through different ways, while describing different constituent elements of the crime (for example, torture as war crime and torture as crime against humanity). The norm that better guarantees the protected interest prevails because it better describes the offence in the particular case (in the latter example the perpetrator should be convicted with torture as war crime).

Specific considerations on crimes under the jurisdiction of the Court

Crime of genocide.

The prevailing opinion is that the crime of genocide is the most serious crime against humanity. Genocide is a conduct directed to the destruction, either in part or of a whole, of a national, ethnical, racial or religious group. The existence of a group of human beings with common characteristics is an inestimable value of humanity as a plural community of men. The destruction of this value represents an irreparable loss for humanity. Any conduct that leads to the destruction of one of the protected groups denies the concept of man, shared by all human beings independently of their ethnic group, race, nationality or religion and questions the richness of human diversity. Genocide is therefore a severe crime against humanity.

However, genocide is an autonomous crime that offends a specific protected interest, the very existence of the protected groups.

The typical actions described in art. 6 para. a) to e) of the Statute, rather than different crimes, are forms of commission of the same crime as long as the conduct is directed to destruction of the same protected group. This crime is typically perpetrated by the repetition of conducts. Therefore, the repetition of homogeneous conducts, for instance the repetition of the conduct of killing members of the group, para.a), or the practice of several heterogeneous conducts, for example, killing members of the group and imposing measures intended to prevent births within the group, para. d), should be considered as the perpetration of one crime only. The second and third conducts are not independent; they are integrated in the same process. They are linked to the first act and are included in a progression of the same attack to the protected interest. Each conduct represents a different level of unlawfulness of action, seen as a whole, and has to be considered when the sentence is determined. The agent should be punished for only one crime of genocide but the severity of the sentence should correspond to the gravity of the attack to the protected interest.

Crimes against humanity

The crimes that art. 7° of the Statue designates as crimes against humanity are conducts that constitute an offence of rights or fundamental human values carried out arbitrarily and unlawfully by an power institutionalised by law or fact, in a context of widespread or systematic attack directed against a civilian population.

Paras. a) to k) describe offences to distinctive protected interests. Some of these interests are individual (for example, life - murder in para. a), freedom - enslavement in para.c) and imprisonment in para e), physical and moral integrity – torture in para. f), sexual freedom – rape in para. g)). Others are collective values, i.e, the right of non discrimination of a group - persecution in para. h).

Each conduct described in the article 7° constitutes an autonomous crime because each offends an autonomous value. Therefore, when there is no hierarchical relation between these norms, as it is the case with imprisonment and enslavement, enslavement and sexual slavery, one might accept that the agent, with his conduct, can commit more than one crime against humanity (for example, when the same individual value is violated several times; when the object of conduct is more than one person, in the case of several homicides or rapes; when several protected interests are violated through a

conduct which in this specific case the perpetrator first enslaves the victim and kills a the victim.

Crimes of War

Article 8° refers to crimes of war and describes offences to, on one part, individual protected interests such as life - wilful killing in para. i) of para. a) of n.2, physical and moral integrity - torture, para. ii), the right to a fair trial - para. vi) and, on the other part, the collective protected interests such as religious and cultural patrimony in para. ix) of para. b), committed in the context and associated with a conflict. Therefore, the crimes of war constitute a violation of the so-called humanitarian law, keeping in mind the Geneva Conventions, and they constitute essentially serious violations of the laws and customs applicable in international and non-international armed conflicts. In other words, the crimes of war are intolerable offences because they are unlawful and arbitrary conducts against the protected values in the context of an armed conflict.

Each conduct defined in art.8° constitutes an autonomous crime while it represents an offence to a different protected value.

While there is no hierarchical relation between these norms, it could be admitted that the agent with its conduct violates more than one norm and commits more than one crime. For example, when the agent commits a crime of hostage taking and the crime of homicide in relation to a person protected by the Geneva Conventions or, in a context of a non-international armed conflict, the agent commits the crime of rape in para. vi) of para. e), and the crime of pillaging a town or place in para. v) of para. e).

Relationship between the norms that describe the crime of genocide, the crime against humanity and the crime of war.

In principle, the crime of genocide protects the value of “the very existence of a group”. Hence, the practice of several acts described in paras. of art.6° against the same protected group does not constitute in itself the perpetration of various genocide crimes. They rather constitute the continuation of the same criminal activity.

Each time the perpetrator fulfils with his or her conduct the typical description that appears in art 6° and, at the same time fulfils the typical description of one or more of the norms that define crimes against humanity of art. 7°, or one or more of the norms that define crimes of war in art. 8°, in case they aim at protecting personnel values such

as life, physical integrity, freedom, or different collective protected interests such as cultural and religious patrimony, it should be considered that the perpetrator has committed other crimes than genocide only. The perpetrator may commit, therefore, the crime of genocide and one or more crimes of war or one or more crimes against humanity. For example, a genocide by killing in para a) of article 6, and by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part in para c) article 6, and several crimes against humanity murder and enslavement in para a) and c), n.1 of article 7. And also, a genocide by killing and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part and several war crimes of wilful killing in n.2 i) of para a) and sexual enslavement in xxii) of para. b) of article 8.

The norms that define crimes against humanity and war crimes that protect the same values have a hierarchical relationship. If the conduct fulfils therefore, the elements of a crime against humanity and the elements of a war crime the norm that is special and better protects the value must be applicable. The conviction with regard to two crimes represents a violation of the principle *ne bis in idem*. (for example, when the rape or the enforced prostitution fall within the scope of art.7°, n.1, para. g) and fall within the provision of the art. 8 n.2 , xxii) of para. b), only the provision that describes the war crime, as *lex specialis*, shall apply.

For a better understanding of the relation to be established between the crime under the jurisdiction of the Court, the following criteria is suggested:

1. In deciding on the existence of a question of concurrence of offences (overlapping of crimes) the value protected by the provision must be taken into consideration.
2. There is a plurality of crimes whenever the conduct fulfils more than once the same type of crime, that is, more than once violating the same protected value, or whenever the conduct fulfils several types of crime, that is, violating several protected values.
3. The violation of protected individual values concerning several persons shall always be considered a case of concurrence of crimes (overlapping of crimes).

The procedural international criminal issues.

On procedural matters, the main issue lies on the different evaluations that the Prosecutor and the Trial Chamber might have over the same conduct. It is necessary to create a provision in the **Rules of Procedure and Evidence** to regulate the situation in which the Trial Chamber considers that the evidence presented during the trial conclusively shows that the accused has committed a different crime than the one charged in the indictment.

The respect of the guarantees and rights of the accused demands that such issue should be decided in the light of the principle that binds the Trial Chamber to the elements (factual and legal) included in the indictment. Hence, the need to establish, in accordance with article 64 of the Rome statute, the limits in which the Trial Chamber can qualify the conduct of the accused differently from the one in the indictment.

The following rule is therefore proposed:

1. The Trial Chamber shall only ~~convict~~ the accused ~~identified in the indictment~~ and by the crimes included in the same indictment only.
2. Provided the parties are duly notified by the Trial Chamber and given appropriate opportunity to make submissions before the conclusion of the trial, the Trial Chamber, bearing in mind the facts included in the indictment, may
 - a) apply a lesser included offence ~~than~~ that contained in the indictment, or
 - b) classify the particular form of participation in an offence in a different manner under article 25 (3) than that contained in the indictment.
- 3 If, during the trial, the Trial Chamber finds that the evidence conclusively shows that the accused has committed a different offense, or a more serious offense, than the one contained in the indictment:
 - a) The Trial Chamber shall ask the Prosecutor to conduct further investigation with respect to that offence.
 - b) With the agreement of the parties, the Trial Chamber may ask the Prosecutor, or the Prosecutor may request authorization of the Trial Chamber, to amend the indictment.