A CURE FOR CONCURSUS DELICTORUM IN INTERNATIONAL CRIMINAL LAW?

Reviewing:


The problem of concursus delictorum seems to be an incurable birth defect of crimes under international law. Since the beginnings at Nuremberg, almost every international criminal trial involves multiple charges and multiple convictions based on the same set of facts. The reason is obvious: war crimes, crimes against humanity, and genocide have more definitional elements in common than not, and this family resemblance is barely a surprise in light of their genesis.

Concursus delictorum has two legal dimensions. The substantive dimension concerns sentencing: Should a conviction be entered for all nominally applicable offenses, and if so, should the total amount of punishment be increased, and how? The procedural dimension relates to pleading and double jeopardy: Are multiple charges admissible? How does concursus delictorum affect the scope of res iudicata: Are repeated trials possible for the same facts by way of different legal qualifications? Finally, in both dimensions, an apparently trivial question has to be solved which turns out to be a philosophical puzzle of the first order\(^1\) in

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legal guise: when are facts the ‘same’ and when are offenses ‘different’? How to deal with multiplicity of offenses is a question that has plagued national criminal laws for 2,000 years, and a plethora of answers, ranging from confused neglect via straightforward pragmatism to arcane complexity, is available. In international criminal law, tribunals have repeatedly addressed the problem and the scholarly literature is growing, yet without a generally accepted and satisfactory solution being in sight. So far, the aforementioned questions also seem less pressing in international than in national criminal law. There is no clear evidence that multiple convictions for the same facts have led to stiffer sentences, and repeated trials before international tribunals for the same facts have not been a concern. However, there is still a third dimension. The incidence of concursus delictorum and the techniques for its resolution are indicators for the internal consistency, sophistication and over-all rationality of a given criminal law. This is not a mere aesthetic or theoretical matter, since lack of internal rationality may cause annoyance, judicial error, and injustice.

The book under review boldly sets out to resolve all these actual or potential concerns and offers two radical proposals aimed at completely eliminating the occurrence of concursus delictorum in international criminal law.

The work is divided into five chapters. Chapter 1 is an introduction to the problem field that the author will henceforth call ‘re-characterisation’ (defined as ‘multiple characterisation of the same facts under different headings’, p. 5), with an overview of the relevant literature and the structure of the book.

Chapter 2 traces the history of the emergence of ‘re-characterisation’ in international criminal law. After brief remarks on the history of double jeopardy in general, the author analyzes the factors that shaped the concepts of war crimes and crimes against humanity in the Nuremberg trials (pp. 33–66). Both concepts are employed to penalize violations of humanitarian law originating in the Hague Regulations of 1907 and should, in the author’s view, therefore be regarded as identical (p. 50). The purported difference between them, i.e., protection of differing groups of persons, is rejected in light of the

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2 For a historical survey see Wilhelm Höpener, Einheit und Mehrheit der Verbrechen 7–100 (1901).

3 In hindsight, this terminological choice is somewhat unfortunate because it could be confused with the procedural device now provided for in Regulation 55 (‘Authority of the Court to modify the legal characterisation of facts’), Regulations of the Court (ICC), Adopted on 26 May 2004, ICC-BD/01-01-04.