Concursus Delicturum concerning Swedish Prosecution of Crimes under International Criminal Law

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1 Introduction

Firstly, it must be mentioned that the legal doctrine of concurrence of norms or offences, or *concursus delicturum*[1], is a complicated one, which cannot be given a complete description in this text. Instead the reader will find a summary of the principles and how these are applied when prosecuting crimes under international criminal law in Sweden, rather than a complete overview of the subject matter as such.[2]

The doctrine of concurrence of norms or offences centers around, among other things, whether a court can and should sentence for several crimes, based on one (1) single underlying act. Most jurisdictions, both national and international, have rules or principles setting out under what circumstances a court may decide to sentence an individual under several different criminal provisions, for a single committed criminal act.[3]

The juridico-political background to concurrence of norms or offences is differentiated. There is a political ambition to avoid a legislative void between criminal provisions. This ambition creates a constant balancing act between ensuring that all acts which the legislator believes should be criminalized are legislatively covered on the one hand, and unreasonably harsh punishments by counting the same act twice on the other. Within the Swedish juridco-political sphere, there has historically been a narrative that it is more important to avoid double penalization, than to avoid unwanted penal rebates, which might occur when some of the per se committed criminal acts are being consumed.[4]

The Swedish view is not, however, the only available one and it has been argued that it is better to avoid consuming certain crimes and instead practice concurrence of norms or offences, as this gives a more nuanced and fairer picture of the alleged perpetrator's criminality.[5]

2 Concurrence of Norms or Offences in Sweden

There are several different classes of concurrence of norms or offences within the Swedish doctrine. Normally, a distinction is made between "similar and/or real concurrence" (Sw. *likartad konkurrens*) and "unsimilar and/or apparent

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1 The Latin term used in Ambos, Kai, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing*, chapter 6, 2014, Oxford: Oxford University Press.

2 For a complete overview over cumulative charging in Sweden see Magnus Ulväng, *Brottslighetskonkurrens – Om relationer mellan regler och fall*, Uppsala: Iustus Förlag, 2013.

3 Friman, Håkan and others, *International Criminal Procedure: Principle and Rules*, Oxford: Oxford University Press, 2013, p. 488.

4 Jareborg, Nils, *Straffrättens gärningslära*, Stockholm: Nordstedts juridik, 1995, p. 162.

5 Friman, 2013, p. 451.

concurrence" (Sw. *olikartad konkurrens*) .[6] Real concurrence concerns whether the alleged perpetrator has infringed a criminal provision one or several times. The most relevant matter in these cases is whether the alleged perpetrator's underlying act(s) should be considered a single, or several separate, criminal act(s). The issues related to real concurrence will not be further discussed in this article.

The other type is apparent concurrence, meaning whether the alleged perpetrator's underlying acts can be classified as several different crimes. The issue presents itself as there is an overlap between the acts criminalized by Provision X, and the acts criminalized by Provision Y.[7] The doctrine further separates between two different classes of apparent concurrence, (i) subordination and (ii) interference.

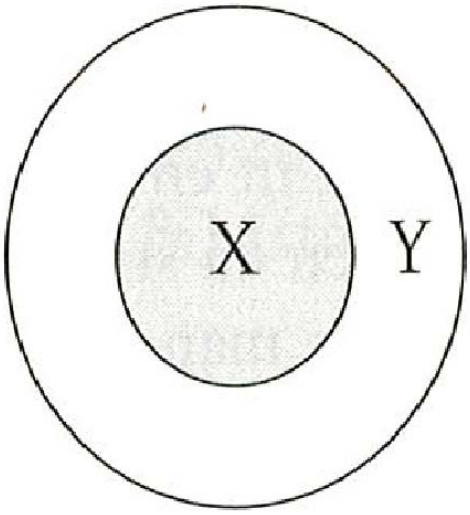

Diagram 1 – How Ulväng illustrates subordination. See Ulväng, 2013, page 121.

Subordination. Subordination means that the acts criminalized by Provision X is completely included by the acts criminalized by Provision Y, meaning that every single case of crimes under Provision X could also be described as a crime under Provision Y. This is the case with deliberate privileged and qualified provisions. An example is that all cases of minor theft according to Chapter 8, Section 2 of the Swedish Criminal Code are also theft of the normal degree in accordance with Chapter 8, Section 1 of the same, while the opposite is not true. This is also the case regarding the relationship of crimes against international law of the normal degree, and particularly severe crimes against international law in accordance with Chapter 22, Section 6 of the Swedish Criminal Code, concerning acts committed before July 1, 2014.

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6 Asp, Petter; Ulväng, Magnus and Jareborg, Nils, *Kriminalrättens grunder*, 2nd edition, Uppsala: Iustus Förlag, 2013, p. 465–466.

7 Asp, 2013, p. 479.

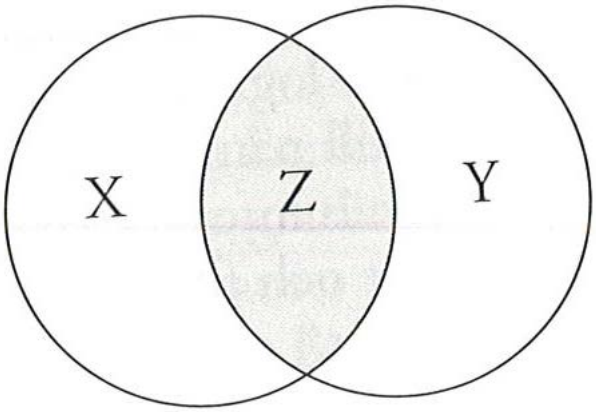

Diagram 2 - How Ulväng illustrates interference. See Ulväng, 2013, page 126.

Interference. Interference means that the acts criminalized by Provision X only partly overlaps with the acts criminalized by Provision Y. Thereby, there are acts that could be described as crimes under Provisions X *and* Y, but also acts that could be described as crimes under only Provision X *or* Provision Y. An example is a terrorist attack using a car bomb in Iraq or Syria, killing several civilians. The underlying act could, at a prima facie assessment, be classified both as a terrorist crime under Section 3, para. 1 of the Swedish Act on Criminal Responsibility for Terrorist Offences (2003:148) (*Sw lag (2003:148) om straff för terroristbrott*) (below the "Terrorism Penal Act"), and Section 4, para. 1 of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (*Sw. lagen (2014:406) om straff för folkmord, brott mot mänskligheten och krigsförbrytelser*) (below the "Act of 2014"). This conclusion is reached based on the fact that there are common elements for both crimes that are overlapping (the killing), but also elements not overlapping (mens rea for the terrorist crimes, the nexus requirement for the war crimes).[8]

2.1 Solving Subordination

In cases where the relationship between two criminal provisions can be described as subordination, the main rule is that the more specific of the provisions shall be applied alone. This follows from the principle of *lex specialis derogat legi generali*. The principle is well established within criminal law and simply put means that a more specific provision shall take precedence over a more general provision. This is a logical conclusion from the systematics of the legislative text. When applying the law to a specific act one should consider the existence of the more specific provision as a sign of the different degrees of culpability concerning the different elements described in the provision. The substance of the criminal provision gives at hand that if certain deliberate privileged and qualified elements exist, then these should be treated as distinct from the more general provision.[9]

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[8] Asp, 2013, p. 481.

[9] Ulväng, 2013, p. 441ff.

2.2 Solving Interference

When a case of interference is at hand, there are two alternatives on how to solve it, namely:

(i) Apply both provisions and charge and/or sentence the perpetrator under *both* Provision X and Provision Y, so called "accumulation"; or

(ii) Apply only Provision X *or* Provision Y, and let one of the crimes consume the other, so called "consumption".

There is, despite the Swedish juridico-political ambition to avoid double penalization, a presumption for alternative (i) above, accumulation. When applying the law one must expect and treat the legislative system as being rationally constructed and that any overlap between the criminal provisions are intentional, with the result that both provisions shall be applied.[10]

This presumption is, however, one of a theoretical starting point, rather than a practically useful main rule. The carve-outs and the exceptions to the presumption are so numerous that more often than not, one or more exceptions are applicable.

These exceptions can be divided into different categories.

2.2.1 Written subsidiarity clauses

In some cases, the preferred solution to the interference is written out in the statutory text, in the form of a subsidiarity clause. Subsidiarity clauses mean that it from the legislative text is apparent what provision should take precedence. The doctrine describes two different sorts of clauses, absolute clauses and relative clauses.

Absolute clauses mean that a certain provision should always be used as a last alternative, i.e. only if the underlying act is not criminalized in any other provision. Relative clauses mean that a certain provision should be used only if the underlying act is not criminalized in another specified provision or legal act. According to Ulväng these clauses are the strongest of all solutions to interference, since the legislator has given an explicit instruction in how the provisions relate to each other.[11]

2.2.2 Preparatory works

Even if the legislator has chosen not to explicitly state the preferred solution to the interference in the statutory text, as is the case with subsidiarity clauses, the legislator may have expressed opinions regarding what provisions should take precedence. This could be in the form of guiding statements in the preparatory works to the statute at hand, which should of course be respected when applying the law. However, to be of practical use, the statements should be clear and unambiguous. Often any statements in the preparatory works will be of a general character, which makes them harder to rely on. There are several statements

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[10] Löfmarck, Madeleine, *Straffrättens konkurrensproblem,* Stockholm: P A Nordstedts och Söners förlag, 1974, p. 81ff.

[11] Ulväng, 2013, p. 431f.

referring to "the general principles" regarding concurrence of norms or offences, which is, to say the least, not very helpful, as the Swedish rules regarding concurrence of norms or offences are too complex to be described as "general principles".[12]

2.2.3 General principles

If the legislator has not expressed an opinion on how to solve the problem of concurrence of norms or offences, one has to make use of the general principles described in the doctrine.

Common applicability. In cases where the provisions largely overlap and are often both applicable, one should use the more severe of the two provisions. This is especially true if there is a big difference in the penal scales of the two provisions. The reasoning behind the principle is that the more the applicability of the provisions overlap, the more similar the case is to subordination, where only one of the provisions will be applicable.[13]

Same primary legal background. Another principle to distinguish between two provisions is to see if they have the same primary legislative interest or similar criminal-politico backgrounds, which, if such is the case, hints that only one of the provisions should be used. The reasoning is that it should be enough to use only one of the provisions, as the legislative interest has been sufficiently protected. As is the case above, large differences in the penal scales of the two provisions also indicate that one of the crimes should be consumed.[14]

Crimes with different degrees of severities. It has been discussed within the doctrine whether the fact that the crime under Provision X is an element that might make the crime under Provision Y be assessed as more severe should lead to the consuming of the crime under Provision X. The reasoning here is simple, if the court would consider the crime under Provision X when categorizing the crime under Provision Y, and still accumulate the provisions, it could lead to a sort of double penalization.[15]

Other possible elements. It is possible to imagine other elements effecting whether the provisions should be consumed or accumulated. In the *Berinkindi*-judgement[16], the district court relies on case law from the International Criminal Tribunal for Rwanda (the "ICTR") when solving the issue of concurrence of norms or offences in relation to crimes committed under the Act on Criminal Responsibility for Genocide (1964:169) (*Sw. lag 1964:169 om straff för folkmord*) and crimes against international law under Chapter 22, Section 6 of the Swedish Criminal Code, with the conclusion that the crimes should be accumulated. None of the above discussed principles explicitly allows for the use of rulings from international tribunals in this manner. Such usage could

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12 Ulväng, 2013, p. 438f.

13 Ulväng, 2013, p. 448; Jareborg, 1995, p. 170.

14 Ulväng, 2013, p. 453; Jareborg, 1995, p. 170.

15 Ulväng 2013, p. 458f; Jareborg, 1995, p. 170; NJA 2008 p. 1010.

16 Svea hovrätts decision 2017-02-15, Case B 4951-16.

therefore be seen as an independent principle, to be relied on in the assessment if a certain underlying act should lead to consumption or accumulation.

However, such usage could also be seen as a prolongment of the interpretation of the preparatory works, as such works point to the international criminal law as the legislative background to the criminal provisions. This view is supported by the *Mbanenande*-judgement[17], where the Svea Court of Appeal refers to the Act of 2014 and its preparatory works, but passes judgement using the older provisions.[18]

What is clear is that even if it is done by their own initiative, or as an interpretation of the preparatory works, the Swedish courts have decided to adapt after international criminal law and case law from the international tribunals.

3 Concurrence of Norms or Offences under International Criminal Law

Cumulative charging, convictions and sentencing is generally not regulated in treaties, but has evolved through case law from international tribunals. In February 2001, the International Criminal Tribunal for the former Yugoslavia (the "ICTY") passed judgement in the *Čelebići*-case[19], which has become the major guiding case in the subject.[20]

In *Čelebići* the ICTY states that it is only possible to convict alleged perpetrators for the same underlying acts under different criminal provisions (i.e. unsimilar cumulative charging using the Swedish terminology) if Provision X has material elements that are not found in Provision Y. This shall, according to the ICTY, be assessed by analyzing what elements must be proven according to the different provisions.[21]

Translated into the Swedish context, this means that in cases of interference a court should accumulate the charging and pass sentence under both provisions, while in cases of subsidiarity the court should only use the more specific provisions. International criminal law however lacks the general principles discussed in section 2.2.3 whereby a Swedish court could let a provision consume another, even in cases of interference. The result is that it should be easier for an international tribunal to practice cumulative charging and sentencing, compared to a Swedish court.[22]

It should here be added, however, that the International Criminal Court (the "ICC") has not yet used or approved the *Čelebići*-test and it remains to be seen how cumulative charging will be used in international criminal law under the jurisdiction of the ICC. The ICC has, in line with the principle of *iura novit curia*,

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17 *Åklagaren ./. Mbanenande*, Svea hovrätts decision 2014-06-19, case 6659-13.

18 *Mbanenande*, 2014-06-19, p. 20.

19 *Prosecutor v. Delalić, Mucić, Delić and Landžo*, (Case No. IT-96-21-A), ICTY A. Ch., Judgement, 20 February 2001, ("*Čelebići*").

20 Boas, Gideon and others, *Elements of Crimes under International Law*, 2009, Cambridge: Cambridge University Press, p. 326.

21 *Čelebići*, ICTY A. Ch., 20 February 2001, para. 412.

22 Boas, 2009, p. 333.

more flexibility regarding recharacterizing acts than the ad-hoc tribunals had.[23] This could lead to a reduction of cumulative charging within international criminal law. In the *Bemba*-judgement[24], the Pre-Trial Chamber of the ICC distanced themselves from the usage of cumulative charging, even if they gave some approval to the *Čelebići*-test. The rationale was the above-mentioned possibility for the ICC to reclassify underlying acts, which in the Pre-Trial Chamber's opinion, has reduced the need for cumulative charging.[25]

4 Concurrence of Norms or Offences when Prosecuting International Crimes in Sweden

Starting with the above discussed Swedish principles regarding concurrence of norms or offences, this section will clarify how different situations should be solved. Three different situations will be discussed, concurrence of norms or offences regarding (i) international crimes and crimes under the Swedish Criminal Code, (ii) international crimes and terrorist crimes, and (iii) international crimes in relation to each other.

4.1 International Crimes and Crimes under the Swedish Criminal Code

When prosecuting international crimes in Sweden, it will often be necessary to handle the question of how international crimes relate to the crimes under the Swedish Criminal Code, concerning concurrence of norms or offences, as the underlying acts of international crimes are likely to be criminalized in the Swedish Criminal Code.

Concerning the older provisions of crimes against international law in Chapter 22, Section 6 of the Swedish Criminal Code, the preparatory works to the provision gives some explicit guidance. It is stated that the penal scale of the provision has been constructed to be used cumulatively with the relevant crime under the Swedish Criminal Code.[26] This was explicitly used by the Svea Court of Appeal in *Droubi*, where the court cumulatively sentenced for both aggravated assault and crimes against international law.[27]

In other cases, the application has not been so clearly in line with the discussed principles governing concurrence of norms or offences. In *Makitan* the Stockholm district court assesses that the nature of the underlying acts in this case has a clear tone of crimes against international law, and not kidnapping, and

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[23] Friman, 2013, p. 435 och p. 447-451.

[24] *Prosecutor v. Jean-Pierre Bemba Gombo*, (Case No. ICC-01/05-01/08), ICC PT. Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para 202-209.

[25] Cryer, Robert and others, *An Introduction to International Criminal Law and Procedure*, 3rd edition, Cambridge: Cambridge University Press, 2014, p. 426; *Jean-Pierre Bemba Gombo*, (Case No. ICC-01/05-01/08), ICC PT. Ch. II, 15 June 2009, para 203.

[26] NJA II 1949, p. 188.

[27] *Åklagaren ./. Droubi*, Svea hovrätts decision 2016-08-05, Case B 4770-16, p. 8.

that in practice, the provisions were indistinguishable.[28] It seems like the district court here uses the principle of *common applicability*, but it does not state so explicitly.

Neither does the district court elaborate on why this general principle should take precedent over the more specific statements in the preparatory works. In the end, the district court does arrive at the conclusion that the crime against international law is to be considered particularly severe, but that assessment does not seem to affect the district court in the ruling of whether the crimes should be consumed or accumulated, as the court had already decided that the crimes should be consumed, when approaching the question of severity.[29]

The Stockholm district court makes a similar assessment concerning concurrence of norms or offences in the M.M.-case, where the court lets the crime against international law consume aggravated robbery and kidnapping, referring to the two charges having a clear distinction as a crime against international law.[30] It is not clear what the district court means by this, or why robbery and kidnapping had a clearer distinction than the other underlying acts that the crime against international law consisted of. The M.M.-case illustrates how the Swedish courts generally lack a coherent line and procedure regarding concurrence of norms or offences, and how the courts fail to present their arguments transparently.

In other cases, the question of concurrence of norms or offences has been avoided by only charging for the crime against international law. In the *Haisam*-case a rebel soldier is convicted for particularly severe crimes against international law, for participating in the execution of Syrian government forces. Both the district court and the appeals court arrive at the conclusion that as there was an armed conflict in Syria at the time, and there was a connection between the executions and said armed conflict, Haisam should be sentenced for particularly severe crimes against international law.[31] Neither court assessed, or even acknowledged the question, of whether the perpetrator also should be sentenced for murder, as was done in the M.M.-case and, as will be discussed below, is established practice regarding the relationship between crimes against international law, and crimes against the Act on Criminal Responsibility for Genocide (1964:169). The question of concurrence of norms or offences is also completely avoided in the *Arklöv*-case, where the district court only sentences the perpetrator for particularly severe crimes against international law, without touching upon the question of concurrence of norms or offences in respect of the underlying acts.[32]

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[28] *Åklagaren ./. Ahmet Makitan*, Stockholms tingsrätt, Case B 382-10, Judgement 8 April 2011, p. 78.

[29] *Åklagaren ./. Ahmet Makitan*, Stockholms tingsrätt, Case B 382-10, Judgement 8 April 2011, p. 78.

[30] *Åklagaren ./. M.M.*, Stockholms tingsrätt, Case B 5373-10, Judgement 20 January 2012, p. 55.

[31] *Åklagaren ./. Haisam Sakhanh*, Stockholms tingsrätt, Case B 3738-16, Judgement 16 February 2017, p. 40-41; *Åklagaren ./. Haisam Sakhanh*, Svea hovrätts decision 2017-05-31, Case B 2259-17, p. 7.

[32] *Åklagaren ./. Jackie Arklöv*, Stockholms tingsrätt, Case B 4084-04, Judgement 18 December 2006, p. 63-64.

It is problematic that the courts do not elaborate on why the perpetrators in *Haisam* and *Arklöv* should only be sentenced for the crimes that they are, as it is very serious crimes that are being consumed.

According to the Act of 2014, the crimes under the Swedish Criminal Code are *lex generalis* in relation to the newer statute and the Act of 2014 should therefore take precedence[33]

A pragmatic view supports this line, at least as regards less serious crimes against international humanitarian law. In the *Abdulkareem*-case, an Iraqi soldier was sentenced for war crimes according to the Act of 2014 for posing with, among other things, a severed head.[34] The same argument is relevant in *Abdullah* and *Saeed* where similar, but less extensive, underlying criminality had a combined penal value of eight months, and one year and three months respectively.[35]

4.2 Concurrence of Norms or Offences Related to the Terrorism Penal Act

The relationship between the crimes under international humanitarian law and crimes according to the Terrorism Penal Act is particularly interesting, as there is currently no guidance from the Supreme Court as concerns the relationship between the relevant penal statutes, guidance which is likely to become sorely needed when prosecuting individuals for crimes committed during the last ten years in Syria and Iraq. A relevant starting point for the discussion could be a likely scenario where a prospective perpetrator, belonging to the armed forces of Islamic State, has committed atrocities against civilians in Syria or Iraq, and thereafter made his way to Sweden, where he is to be prosecuted.

Firstly, an interesting issue is whether the Terrorism Penal Act is at all applicable in armed conflicts, as this has been the source of quite some debate and, recently, a ruling from the Supreme Court. The controversy stems from the fact that the Terrorism Penal Act has its roots in the EU framework decision 2002/475 on combating of terrorism. In preamble 11 it is stated:

> actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.

Based on this, the question arises of whether the activities of Islamic State, being an armed force active in an armed conflict, is excluded from the scope of the

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[33] Prop. 2013/14:146, Straffansvar för folkmord, brott mot mänskligheter och krigsförbrytelser, p. 223-224.

[34] *Åklagaren ./. Abdulkareem*, Blekinge tingsrätt, Case B 569-16, Judgement 6 December 2016; *Åklagaren ./. Abdulkareem*, Hovrätten över Blekinge och Skånes decision 2017-04-11, Case B 3187-16.

[35] *Åklagaren ./. Abdullah*, Södertörns tingsrätt, Case B 11191-17, Judgement 25 September 2017, p. 20-21; *Åklagaren ./.H Saeed*, Örebro tingsrätt, Case B 1662-18, Judgement 19 February 2019; *Åklagaren ./.H Saeed*, Göta Hovrätts decision 2019-09-24, Case B 939-19.

Terrorism Penal Act, as their actions are to be seen through the light of international humanitarian law, and no other legislation.[36]

The question is not an entirely new one. Already in 2011, in a case from the Gothenburg district court, two men were charged with conspiracy to terrorism crimes, after allegedly taking part in an education programme in Somalia arranged by al-Shaabab.[37] After an initial conviction in the district court, the defence made the case in the court of appeal that the Terrorism Penal Act was not at all applicable, stating that al-Shaabab was an armed force in an armed conflict, referring to similar case law from Norway.[38] The court of appeal overturned the district court's ruling based on a lack of evidence, leaving the legal question unanswered.[39]

The question would remain unanswered until November 2019, when the Supreme Court made their ruling in the *Qadan*-case. Until that point, there had been at least one case indicating that the Terrorism Penal Act would not be applicable in armed conflicts, where two men were being prosecuted for participating in the killing of civilians. The district court concluded that the Terrorism Penal Act was not applicable in armed conflicts, but that since the men could not be seen to be participating in any armed force, the exception in preamble 11 of the framework decision was not applicable, and the Terrorism Penal Act could be used. The reasoning was not questioned by the court of appeal.[40]

Against the view expressed above stood the *Qadan*-case, together with another case where a district court, later supported by a court of appeal, had expressed the view that a terrorist organization was not mutually exclusive from being an armed force, and that both pieces of legislation can be applicable at the same time.[41]

In the *Qadan*-case the alleged perpetrator had raised money for, among others, the Islamic State in Syria and Iraq, thereby possibly violating certain anti-terror financing legislation, which also had the framework decision 2002/475 as its legislative background, and thereby the same carve-out in preamble 11, which the defence argued meant that his actions were not illegal, since he had financed an armed force. The Supreme Court, however, concluded that preamble 11 notwithstanding, there was no reason to interpret the current legislation as having implemented any such exception and there was further nothing under either

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[36] Council Framework Decision, 2002/475/JHA of 13 June 2002 on combating terrorism, preamble 11.

[37] *Åklagaren ./. Mohamoud och Billé*, Hovrätten för Västra Sveriges decision 2011-03-02, Case B 4645-10.

[38] TT, *Unik dom prövas i hovrätten*, Sveriges Radio, 2011-01-28, https://sverigesradio.se/sida/artikel.aspx?programid=104&artikel=4317264 (checked 2018-04-24).

[39] *Åklagaren ./. Mohamoud och Billé*, Hovrätten för Västra Sveriges decision 2011-03-02, Case B 4645-10, p. 10-11.

[40] *Åklagaren ./. Al-Mandlawi och Sultan*, Göteborgs tingsrätt, Case B 9086-15, Judgement 14 December 2015, p. 29-31; *Åklagaren ./. Al-Mandlawi och Sultan*, Hovrätten för Västra Sveriges decision 2013-03-30, Case B 5306-15, p. 5.

[41] *Åklagaren ./. Abdullaev m.fl.*, Solna tingsrätt, Case B 3678-18, Judgement 8 March 2019, p. 63; *Åklagaren ./. Abdullaev m.fl.*, Svea Hovrätts decision 2019-06-12, Case B 3392-19.

international law or European Union legislation stopping the legislator from going further than the *de minimis* required by the framework decision.[42]

The conclusion from the *Qadan*-case is that the Terrorism Penal Act is applicable during armed conflicts.

4.3 Concurrence of Norms or Offences concerning the Terrorism Penal Act and Crimes against International Law under the Swedish Criminal Code

As previously stated the Terrorism Penal Act is applicable during armed conflicts. This means that there may be situations concerning concurrence of norms or offences in respect of the Terrorism Penal Act and crimes against international law under Chapter 22, Section 6 of the Swedish Criminal Code, as regards underlying acts committed before July 1, 2014.

According to the preparatory works of the predecessor to Chapter 22, Section 6, the provision is meant to be used cumulatively with the other criminal provisions related to the underlying acts, at least in cases concerning crimes against international law of the normal degree. The penal scale was meant to be used in conjunction with the non-international crimes deemed to be included in the criminal act.[43]

In addition, particularly severe crimes against international law have been used cumulatively with the Act on Criminal Responsibility for Genocide, notably in the *Berinkindi*-case.[44] In its judgement, the district court referred to the ICTY who in turned had referred to the *Čelebići*-case, stating that war crimes should not consume charges of genocide.

However, there is case law where the courts have made the opposite assessment, as in the M.M-case and in *Makitan,* as discussed in section 4.1.

The preparatory works must, despite *Makitan* and the M.M.-case, be seen to give its support to the view that the crime against international law should be used cumulatively with the Terrorism Penal Act, even if the particular statements refer to crimes under what today would be crimes under the Swedish Criminal Code, rather than other specialized criminal provisions such as the Terrorism Penal Act.

As the crimes against international law under Chapter 22, Section 6 of the Swedish Criminal Code are separated into different degrees of severity, it follows that the issue may also regard concurrence of norms or offences regarding crimes under the Terrorism Penal Act, and particularly severe crimes against international law. However, as further described below, the underlying acts will almost certainly be of the severity that no other classification that the harshest degree can be relevant and consequently, the charges will accumulate.

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42 *Åklagaren ./. Qadan*, Högsta domstolens decision 2013-11-13, Case B 5948-17, p. 14.

43 NJA II 1949 p. 188 as quoted in *Droubi*, Svea hovrätts decision 2016-08-08, Case B 4770-16; Ulväng, 2013, p. 514.

44 RH 2014:34.

4.4 Concurrence of Norms or Offences concerning the Terrorism Penal Act and the Act of 2014

Since both the Terrorism Penal Act and the Act of 2014 can be applicable to the same underlying acts, it is easy to imagine cases of interference, both in relation to war crimes, but also genocide and crimes against humanity.

As discussed in section 2.2 the theoretical starting point is that both provisions are applicable at the same time and that a court should accumulate the charges. However, as noted, this is only a starting point with several important exceptions.

Subsidiarity clauses. First, there are no subsidiarity clauses in either the Terrorism Penal Act or the Act of 2014.

Preparatory works. Second, it must be assessed whether the legislator has given any guidance in the preparatory works to the legislation. Chapter 18 of the legislative proposition to the Act of 2014, aims to clarify the issues regarding concurrence of norms or offences, but sadly does not give any practical or helpful guidance. It is stated that in relation to the Terrorism Penal Act, the starting point is that both provisions are applicable (as discussed above), but it does not give any further guidance. The chapter concludes by stating that issues regarding concurrence of norms or offences should be dealt with in accordance with the general principles following from the Swedish legislation.[45] Neither does the preparatory works to the Terrorism Penal Act contain any real guidance.

The above leads to the conclusion that the legislator has not taken an active stance on the issue regarding concurrence of norms or offences and hence, such issues have been left to the courts, who now only have the general principles to rely on.

General Principles. Unless there are any general principles that indicate that a provision consumes the other, the provisions should be accumulated.

Even if there is some common applicability, the similarities in penal scale (all four years to life imprisonment) indicates that it is not possible to assess that any of the provisions could be declared subordinate to another.

Neither of the legislative acts have the same primary legal background. The criminalization of genocide mainly aims to protect collective groups as such, rather than individuals. Crimes against humanity has rather both individuals and human dignity as such as its focus. Lastly, war crimes aim to minimize the unnecessary carnage and suffering caused by armed conflicts. None of these overlap with the background to the Terrorism Penal Act, which seeks to protect the nation state and international organizations and the integrity of these from attacks, rather than the physical individuals who are likely to suffer during such attacks. Additional support for the lack of overlap is background found in the preparatory works to the Act of 2014, where it is stated that the primary values that the legislations are trying to protect differs, even if they can be committed partially by the same underlying acts.[46]

The last possibility for the provisions to be consumed is if one of the crimes could be characterized into a more severe degree, due to the other crime being committed. However, none of the provisions are separated into different grades of severity, with the exception of war crimes. Is it therefore possible to view the

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[45] Prop. 2013/14:146, p. 223-226.

[46] Prop. 2013/14:146, p. 224.

fact that an underlying act is also a crime according to the Terrorism Penal Act as an element that could make a court view more harshly the severity of the committed war crime?

It is not an easy question to answer, since both war crimes and crimes under the Terrorism Penal Act have a large amount of possibly different underlying acts, which could qualify into both of the provisions. However, if the discussion starts in the scenario described in section 4.2, there are good arguments as to why the war crimes cannot consume the terrorism related charges. The war crime will already be deemed as particularly severe in its own right, if the charges relate to fatal violence against civilians, as stated in the preparatory works of the Act of 2014. This means that there is in practice never an issue of concurrence of norms or offences between the terrorism related charge and war crimes of the normal degree, but only between crimes under the Terrorism Penal Act on the one hand, and particularly severe war crimes on the other. Since the war crime is not separated into different degrees of severity in respect of this situation, it is not possible to consume the charge under the Terrorism Penal Act by reference to the degree of severity of the war crime.

The conclusion is therefore that, according to the Swedish principles governing concurrence of norms or offences, charges under the Act of 2014 and the Terrorism Penal Act should accumulate and, provided sufficient evidence exists, the court should sentence the perpetrators under both provisions.

The above is true for all crimes under the Act of 2014. It is, however, closer to hand to imagine situations where the concurrence of norms or offences concerns the Terrorism Penal Act and war crimes, rather than crimes against humanity and genocide. However, the United Nations Human Rights Council has argued that Islamic States crimes against the yazides constitute crimes against humanity.[47]

4.5 Concurrence of Norms or Offences regarding the Terrorism Penal Act and Act on Criminal Responsibility for Genocide

What has been said above in section 4 also apply to the relationship between the Terrorism Penal Act and Act on Criminal Responsibility for Genocide. There are no explicit subsidiarity clauses and the preparatory works offer little to no guidance. There is no common applicability or similar legal background that might justify one provision consuming the other. None of the crimes are separated into different degrees of severity. The conclusion is that the provisions shall be used cumulatively.

4.6 Concurrence of Norms or Offences between Different Categories of Crimes in the Act of 2014

There may be situations where issues regarding concurrence of norms or offences regards war crimes, crimes against humanity and genocide, in each case in respect of each other (or, even in respect of itself, as one underlying act may

[47] United Nations Human Rights Council, *"They Came to Destroy": Isis Crimes against the Yazidis*, A/HRC/32/CRP.2, 15 June 2016, p. 31.

breach several different elements, each being a war crime). The preparatory works foresee this possibility and state that depending on the situation in the particular case, it can be relevant to use more than one of the provisions of the Act of 2014 in respect of a single underlying act.[48]

In addition, it is also stated in the preparatory works that the principles regarding concurrence of norms or offences in the Swedish legislation are similar enough to the corresponding principles in international criminal law, that no separate regulation is required in the Act of 2014.[49]

It remains unsaid whether the legislator by this is trying to say that the Swedish principles shall be sovereign, or whether case law from international tribunals shall be the main guidance. As discussed in section 3, the possibilities to accumulate charges seem to be wider within international criminal law, compared to the Swedish system. It can therefore be questioned if the imagined overlap between the two system actually exists, at least to the degree suggested by the preparatory works.

So far, it is clear from Swedish case law that the charges accumulate. However, it is not clear whether this is a result from the Swedish courts applying traditionally Swedish principles regarding concurrence of norms or offences, or whether it is a result from the more liberal rules applied by international tribunals. In the *Berinkindi*-case the court refers to case law from the ITCR, finding that the charge of genocide shall not consume the charge of war crimes, indicating that the court is relying on international principles, rather than Swedish.[50]

In the *Mbanenande*-case the Svea Court of Appeal refers to the preparatory works of the Act of 2014, rather than directly to the relevant international case law, when the court is to rule on the question of concurrence of norms or offences.[51] As in *Berinkindi* and *Tabaro* the question centers around whether the alleged perpetrators should be sentenced accumulatively for genocide and crimes against international law. The relevant preparatory work does, however, in turn refer to case law for the ICTR, which can be viewed as a form of incorporation of the international principles into the Swedish jurisdiction, creating a form of hybrid between the two. In the above mentioned *Tabaro*-case the court finds that genocide and crimes against international law should be used accumulatively, referring to the *Berinkindi*-judgement, further underlining the usage of international case law in the Swedish prosecution under international criminal law.[52]

In cases where the Swedish courts do apply the international principles, it would be natural to expect them to follow the statements made by the ICTY in the *Čelebići*-judgement.

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48 Prop. 2013/14:146 p. 224.

49 Prop. 2013/14:146, p. 226.

50 *Åklagaren ./. Berinkindi*, Stockholm tingsrätt, Case B 12882-14, Judgement 16 May 2016, p. 136; *Åklagaren ./. Berinkindi*, Svea Hovrätts decision 2017-02-15, Case B 4951-16.

51 *Mbanenande*, 2014-06-19, p. 20.

52 *Åklagaren ./. Tabaro*, Stockholms tingsrätt, Case B 13688-16, Judgement 27 June 2018, p. 178.; *Åklagaren ./. Tabaro*, Svea hovrätts decision 2019-04-29, Case B 6814-18, p. 66-67.

No matter to what degree the Swedish courts apply the international principles regarding concurrence of norms or offences it is clear that the legislator in the preparatory works has accepted the possibility that genocide, crimes against humanity and war crimes may be used cumulatively where possible. In conclusion, the main rule is that these charges do not consume each other and if the elements are prerequisites are there, the court should accumulate the charges.

5 Conclusion

This review of the Swedish principles regarding concurrence of norms or offences as concerns the prosecution of crimes under international criminal law and crimes under the Terrorism Penal Act shows that such principles do not give support to any other conclusion than that the charges should be used cumulatively. This mean that, going back to the situation discussed in section 4.2, the perpetrators committing such crimes should be sentenced both under the Terrorism Penal Act, and under the relevant crime under the Act of 2014, most likely war crimes.

There are several advantages with accumulating the charges. It will, as previously stated, allow for a more complete and a more nuanced picture of the perpetrator's criminal activities. Regarding the type of major organization discussed in this text, such as the Islamic State or the Al-Nusra Front, it is likely a fairer representation of the organization to describe their acts as both terrorist attacks and crimes under international law, rather than just one or the other. In addition, as the purpose of international criminal law is to, *inter alia*, (i) gather evidence to create a credible historical archive over conflicts, and (ii) give reparations and acknowledgement to the victims, applying the Terrorism Penal Act together with the Act of 2014 serves both these purposes.[53]

It can be concluded that the principles controlling concurrence of norms or offences in the sphere of international criminal law have had a large influence of the prosecution of such crimes, especially with the conception of the Act of 2014. This is not in itself without complications. The legislator has assumed that the Swedish principles regarding concurrence of norms or offences largely overlap with the corresponding principles used by international tribunals and that such overlap will ensure that there are no divergencies within the legal application.[54] There are, however, reasons to dispute that conclusion. The *Čelebići*-test brings that the alleged perpetrator should be convicted under all provisions containing materially distinct elements.[55] This indicates that the two systems largely start from the same place, i.e. that in cases of interference should both provisions be used, but as the Swedish system also allows for the consuming of charges in a

[53] Bådagård, Lovisa and Klamberg, Mark, *The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court*, Georgetown Journal of International Law, vol. 48, 2016, p. 656ff.

[54] Prop. 2013/14:146 p. 226.

[55] Friman, 2013, p. 428.

large number of additional situations, the systems quickly diverge.[56] This may create confusion in the prosecution of these crimes, especially since the parallel application of the Terrorism Penal Act means that it is difficult to classify a crime as purely one under international criminal law, or one under the national Terrorism Penal Act.

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[56] Boas, 2009, p. 327f. It was concluded already in the *Čelebići*-judgement by judges David Hunt and Mohamed Bennouna in their dissenting opinions that the view of the majority meant that the possibilities to cumulate charges would be, in their opinion, to wide; see *Čelebići*, A. Ch., Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, 20 February 2001, para. 15, 17, 20 and 27.