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SCSL-04-14-A
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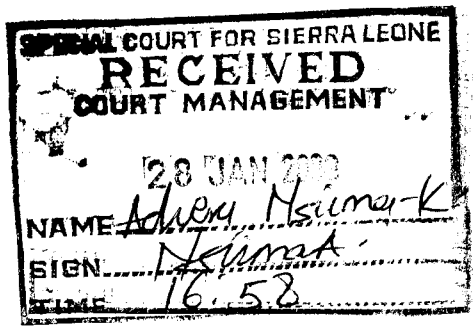
SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBERS

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando
Hon. Justice J. Kamanda

Registrar: Mr. Herman Von Hebel

Date Filed: 28th January 2008



THE PROSECUTOR **Against** **MOININA FOFANA**
ALLIEU KONDEWA

Case No. SCSL-04-14-A

Public

KONDEWA REPLY TO PROSECUTION RESPONSE TO THE KONDEWA APPEAL BRIEF.

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i. Introduction

1.1 Pursuant to Rule 113 of the Rules of Procedure and Evidence, Counsel for Mr. Kondewa files this Reply Brief to the **Prosecution Response Brief to the Kondewa Appeal Brief** filed on the 21st January 2008. The submissions in support of the Kondewa Grounds of Appeal are contained in the Kondewa Appeal filed on the 11th December 2007. This Reply Brief does not therefore address issues which are considered adequately addressed in the Kondewa Appeal Brief.

1. Reply to Prosecution Response to Kondewa's Appeal Ground One (Bonthe)

1.1. This section of the Reply Brief responds to paragraphs 2.1 to 2.52 of the Prosecution's Response Brief.

1.2. With regards to Bonthe Town, the Defence submitted that the Trial Chamber erred ***both in law and in fact*** that Kondewa was individually criminally responsible as a superior, pursuant to Article 6(3), for the crimes committed in Bonthe Town and in the surrounding areas under Counts 2, 4, 5, and 7.[1] This specific reference quotes the Trial Chamber's conclusion in its Judgement. By disputing the Trial Chamber's conclusion, the Defence also takes issue with those facts and considerations that were involved in coming to that conclusion. Thus, all considerations used to reach that conclusion – facts, observations, and evidence – are impugned.

1.3. In paragraphs 2.3 and 2.4, the Prosecution states that the ground of appeal is solely confined to "whether the Trial Chamber erred in finding the existence of a superior-subordinate relationship between Kondewa and Kondewa's alleged subordinates." The Prosecution suggests that what this meant was that Kondewa did not take issue with the fact that the criminal acts in question were committed by Kondewa's alleged subordinates, or the Trial Chamber's findings that Kondewa knew or had reason to

[1] Kondewa Appeal Brief, para. 7.

know that criminal acts were about to occur or the Trial Chamber's findings that Kondewa failed to take the necessary and reasonable measures to prevent the criminal acts or punish the offenders thereof.

1.4. In paragraphs 2.14 to 2.17, the Prosecution similarly interpreted the Defence's intent to exclude all factors listed within these paragraphs.

1.5. The Defence disagrees with the Prosecution's limited interpretations. The existence of a superior-subordinate relationship between Kondewa and Kondewa's alleged subordinates was but only one specific and apparent aspect the Defence took issue with. The Prosecution appears to have misread that the Defence might have only been taking issue with the first element of the 3-part test to invoke individual criminal responsibility under Article 6(3).

1.6. The Defence again submits that it disputes the Trial Chamber's conclusion as stated in paragraph 1.2 and in paragraph 7 of the Kondewa Appeal Brief that Kondewa was individually criminal responsible ***as a superior pursuant to Article 6(3)***. Thus, it is not specifically only the superior-subordinate relationship that the Defence disputes, but Kondewa's ***responsibility as a superior***. Had the Defence intended to solely confine itself to take issue with the superior-subordinate relationship, which is only submitted for the sake of argument, then perhaps the Prosecution's limited reading of the Defence's challenge to the Trial Chamber's decision might be correct. However, given that the Defence disputes the Trial Chamber's ***conclusion*** with regards to Kondewa's role as a superior, all considerations used to reach that conclusion are invoked.

1.7. Moreover, determining whether Kondewa was a superior by nature necessitates the consideration as to whether Kondewa had reason to know or whether Kondewa took the necessary steps to prevent the crime be examined. These are part of the 3-part test and were even used by the Prosecution despite its assertion that it would only confine itself solely to the issue of the existence of a superior-subordinate relationship.

1.8. Thus, when stating that the Trial Chamber erred in law and in fact with regards to the crimes in questions committed in Bonthe Town, the Defence was taking issue with the Trial Chamber's finding because the facts and evidence did not conclusively satisfy or prove Kondewa's guilt beyond a reasonable doubt. The Defence's reference to the Trial Chamber's finding does not necessarily exclude or preclude the Defence from taking issue with other acts in question that occurred in Bonthe Town.

1.9. The legal requirements the Trial Chamber stated in its 3-part test, referenced in Kondewa's Response Brief in paragraph 8, that must be satisfied beyond a reasonable doubt to invoke individual criminal responsibility under Article 6(3) of the Statute are:

> 1) the existence of a superior-subordinate relationship between the superior and the offender of the criminal act;
>
> 2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
>
> 3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the offender thereof.[2]

1.10. The Prosecution states that the applicable law is in paragraphs 2.5 through 2.13. These paragraphs reference paragraphs 236-241 of the Trial Chamber's Judgement. The Prosecution then states 5 factors used to determine whether a superior-subordinate exists, which are taken from paragraphs 236-241 in the Trial Chamber's Judgement.

1.11. The Defence firstly disagrees that these principles accurately and comprehensively state the applicable law. The Defence does not necessarily dispute whether paragraphs 236-241 of the Judgement are correct *per se*. However, the Defence does take issue with the fact that the Prosecution focused solely on these paragraphs. These paragraphs explained the 3-part test and guiding principles for analysis. Thus,

[2] Trial Chamber Judgement, para. 235.

by focusing on the guiding principles, the Prosecution bypassed the ***legal*** requirements necessary to establish guilt.

1.12. Secondly, the Defence emphasizes that the 3-part test for Article 6(3) of the Statute is a ***conjunctive*** rather than disjunctive test. The existence of a superior-subordinate relationship cannot in and of itself render an individual guilty. The requisite *mens rea* must also exist as well as the foreseeability that the act would be accomplished.

1.13. Moreover, all 3 elements ***must be proven beyond a reasonable doubt*** to render an individual criminally responsible as a superior under Article 6(3). As stated in the Defence's Response Brief, for a doubt to be reasonable, the doubt must arise from the evidence or from the want of it. The doubt cannot be an imaginary doubt or conjecture unrelated to the evidence. Reasonable doubt "is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence ... [where] they cannot say they *feel an abiding conviction of the truth of the charge*".[3]

1.14. In *Prosecutor v. Delalić et al.*, the Trial Chamber stated that proof beyond a reasonable doubt need not reach certainty, but it must carry a high degree of probability.

> Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.[4]

1.15. That these elements must be proven is primary and foremost aside from the principals stated in paragraphs 2.5 to 2.13. These paragraphs, which refer back to the

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[3] West Pub. 2002 (emphasis added).

[4] *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, para. 601 (1998) (quoting Lord Denning in *Miller v. Minister of Pensions* [1947] 1 All ER 372, 373-74) (***Delalić* Judgement**).

Judgement, only provide guiding principles on how to analyse the legal test set forth in paragraph 235 of the Trial Chamber's Judgement.

1.16. The Prosecution refers to the "effective control" test, which is used to analyze element 1 of the 3-part test. The Prosecution stated in paragraph 2.7 that this test is used when assessing the degree of control, which the Prosecution and Defence agree is the test that should be applied. This test assesses the degree of control an individual had in the sense of a material ability to prevent or punish criminal conduct.[5] The Defence affirms its submission from the Response Brief that the Trial Chamber did not correctly apply the "effective control" test. This is also true as to whether or not a *de jure* or *de facto* status existed, as stated in paragraph 2.8.

1.17. Paragraphs 2.9 and 2.10 also state that the hierarchy need not be a formal organisational structure and that a superior-subordinate relationship may be of a military or civilian character so long as the effective control is met. This is again stated in paragraph 2.32 and 2.51. However, as stated in the Defence's Response Brief in paragraph 28, there is no precedent in the *ad hoc* tribunals jurisprudence of an individual being held criminally liable on the basis of command responsibility where the position of the accused did not fall within a hierarchy or chain of command in which the individual's position within that chain of command referred directly to their ability to issue orders and to control their decisions the actions of those beneath them.

1.18. The Prosecution states in paragraph 2.11 that the effective control must be established on a case-by-case basis and in paragraph 2.12 that it is not necessary that the superior be a commander of the subordinate. The argument that effective control be established on a case-by-case basis does not lend to proving Kondewa's guilt beyond a reasonable doubt. The fact that it must be established on a case-by-case basis in fact lends more to the argument that the fact finder carefully abide by these high burdens of proof so as to prevent insubstantial conclusions.

[5] *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, para. 26 (2006).

1.19. The Trial Chamber referred to the *Bagilishema* Appeal Judgement on this issue, which stated that:

> [...] for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective", and the superior must have the "material ability" to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of *de jure* authority". The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other ***persons of influence***.[6]

The court stated that the absence of formal appointment is not fatal to a finding of criminal responsibility, *provided certain conditions are met*. The *Čelebići* case held that "[...] *the doctrine of superior responsibility extends to civilian superiors* ***only to the extent*** *that they exercise a degree of control over their subordinates* ***which is similar to that of military commanders***."[7]

1.20. The Defence submits that prior case law establishes that the *de facto* status must first be established before stating that it merely existed. The "trappings" of a de jure status must still be met, which include awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. As such, the Defence submits that Kondewa never had a *de facto* status as a superior.

1.21. Thus, the Defence submits that the Prosecution only focused on the guiding principles of analysis without reference to the legal test set forth by the Trial Chamber. As such, the Prosecution imprecisely alleged what should take primary concern, when in fact such concerns were only complementary, if not subsidiary, to the legal requirements that must be met.

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[6] *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Judgement, para. 53 (2002) (quoting *Delalić* Judgement, para. 53).
[7] *Delalić* Judgement, para. 376.

1.22. The Defence disagrees with the Prosecution's assertions set forth in paragraphs 2.14 through 2.51. The Defence's submissions with regards to 2.1 to 2.14 are made above.

1.23. In paragraphs 2.14 to 2.21, and in general until 2.51, the Prosecution submits facts that illustrate Kondewa's role as a superior. The Prosecution states facts also in paragraphs 2.14 to 2.21 and 2.33, 2.34, 2.35, 2.36, 2.37, 2.48, 2.49, 2.50 that indicate the facts that establish Kondewa's status as a superior. The Defence disagrees that these facts would leave open to a reasonable trier of fact to conclude that Kondewa was a superior. The Defence submits that a reasonable of trier of fact would not be able to conclude beyond a reasonable doubt that a superior-subordinate relationship existed based on the facts.

1.24. The Prosecution focuses in paragraph 2.29 and onwards on the existence of control and that it does not matter how an individual's control is exercised, whether it be civilian, military or in a formalised structure so long as the evidence as a whole establishes one's control. However, the control needed to establish guilt under Article 6(3) must be that control whereby the individual has the ***material ability to prevent or punish criminal conduct***. Thus, there must be an ability to prevent, punish or control, and that ability or control must be ***material***. The Prosecution points to evidence that states that Kondewa had control, however, the evidence does not conclusively show that any alleged control was in fact material.

1.25. Evidence relied on by the Trial Chamber exists to illustrate that Kondewa did not in fact have any effective control, let alone any status as a superior. Paragraph 856(iii), for example, states that Kondewa tried to stop the harassment of civilians and the free movement of boats, and wrote a letter to this effect to all Kamajor commanders around Bonthe. "The agreement did not work."[8] Paragraph 856(x) states that the

[8] Trial Chamber Judgement, para. 856(iii).

delegations "had not listened to his advice and had done what they had done. Kondewa apologized on their behalf."[9]

1.26. Moreover, not all of the facts set forth in the Prosecution's Response Brief were used by the Trial Chamber to make its legal findings. Paragraph 856 of the Trial Chamber's Judgement listed the facts it relied on. "In addition to the facts, listed in paragraphs 72 (i) to (viii) and 765 (i) to (iii) above, the Chamber outlines below the facts as found in Sections V.2.2, V.2.6.2 and V.2.6.3 of the Factual Findings, upon which it will rely to make its legal findings on the individual criminal responsibility pursuant to Articles 6(1) and 6(3) of ... Kondewa...."[10] The Trial Chamber listed those facts in 12 paragraphs. In comparing the facts the Trial Chamber relied on and the facts used by the Prosecution in its Response Brief, not all of the facts correlate with the other. Thus, paragraphs 292 to 301, mentioned in paragraph 2.14 of the Prosecution's Appeal Brief, were not all used by the Trial Chamber. The same is true of other facts used the Prosecution in paragraphs 2.16, 2.18, 2.19, and 2.21.

1.27. The Prosecution in paragraphs 2.41 to 2.47 disputes the Defence's submissions that there was no evidence to establish Kondewa's status as a superior and that it was "unclear" how the Trial Chamber determined that Kondewa's status as a superior was established. Based on the foregoing, the Defence again submits and affirms its position as stated in the Kondewa Appeal Brief that a reasonable trier of fact could not have established Kondewa's status as a superior beyond a reasonable doubt.

1.28. In response to paragraph 2.26, the Defence did submit that the Trial Chamber correctly identified the effective control ***as*** the appropriate test. This is different, however, from the Defence's point that the Trial Chamber did not correctly ***apply*** that test to the facts. Thus, the Prosecution's observation contains no merit. Despite the Prosecution's suggestion that there is an inconsistency with the Defence's

[9] Trial Chamber Judgement, para. 856(x).
[10] Trial Chamber Judgement, para. 856.

submission, there is a distinguishable difference between identifying the correct applicable test and applying that test to the facts

1.29. The Prosecution seeks to disregard the focus in finding the superior-subordinate relationship in paragraphs 2.28 and 2.29 and to trivialize the importance that the court must maintain a high degree of caution when deeming a civilian as a superior. The Prosecution states that that the law does not draw any distinction between "military" and "civilian" commanders. The law does draw a distinction in the legal analysis that must be applied in that the finding of an individual within a military hierarchical structure will be more apparent than with an individual in a less formalised structure. As such, the rigors in determining the latter are higher.

1.30. As stated above, the *Bagilishema* Appeal Judgement stated that:

> the exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of *de jure* authority". The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other ***persons of influence.***[11]

The court stated that the absence of formal appointment is not fatal to a finding of criminal responsibility, *provided certain conditions are met.* The *Čelebići* case held that "[...] *the doctrine of superior responsibility extends to civilian superiors* ***only to the extent*** *that they exercise a degree of control over their subordinates* ***which is similar to that of military commanders.***"[12]

1.31. Thus, the fact that there may *ultimately* be a similarity between a civilian and military commander does not necessarily mean that there is not a clear distinction between the two. The trier of fact must *first* conclude beyond a reasonable doubt that the civilian accompanied the "trappings of the exercise of *de jure* authority." This involves the

[11] *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Judgement, para. 53 (2002) (quoting *Čelebići* (*Prosecutor v. Zejnil Delalić et al.)*, Case No. IT-96-21-A, Judgement, para. 43 (2001)).
[12] *Delalić* Judgement, para. 376.

exercise of distinguishing and separating the possibility that the individual was a rabble-rouser or person of influence. This extra step necessitates a high degree of caution. That it is "much more difficult" as sated by the Prosecution in paragraph 2.28 is not an inference created by the Defence. Case law and precedent have created and established multiple legal analyses that must be satisfied prior to establishing that the person was a superior and prior to establishing that a superior-subordinate relationship existed. Such safeguards ensure that the court is satisfied beyond a reasonable doubt that such an individual was in fact a superior prior to subjecting that individual to the jurisdiction and judicial processes of the court.

1.32. The Prosecution submits that "The fact that Trial Chambers in various cases before the ICTY and ICTR have found that the legal requirements were not satisfied on the evidence in those other cases is immaterial to the present case".[13] This is a distortion of the law. Counsel refers the Chambers to Article 20(3) of the Statute of the Special Court and Rule 72 *bis* of the Rules. Article 20(3) provides:

> *"The Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the International Tribunal for the former Yugoslavia and for Rwanda".*

Counsel submits that the Chambers of the Special Court can only depart from the decisions of the ICTR and ICTY "for cogent reasons in the interest of justice"[14].

1.33. Thus, the Defence submits that the Prosecution's suggestion in paragraphs 2.17 and 2.20 are incorrect and that that the 3 elements within Article 6(3) of the Statute were not satisfied beyond a reasonable doubt. Kondewa did not have effective control as a superior because the evidence itself does not deduce that conclusion and moreover because the Trial Chamber did not use the facts determined by the Prosecution to be relevant. Despite the Prosecution's suggestion, a reasonable trier of fact could not conclusively state that all 3 requirements of the 3-part test had been established.

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[13] Para. 2.27 of Prosecution Response Brief.
[14] Aleksovski Appeals Judgement, 24th March 2000, paras. 107 – 110.

1.34. Paragraphs 2.38 to 2.41 respond to the Defence's challenge that the Trial Chamber's relied on evidence of Kondewa's effective control over Kamajors in Bonthe District in August 1997. The Defence submits that it is relevant that the acts did occur outside of the timeframe of the Indictment. The Defence submits that it is counterintuitive for the Prosecution to assert that the differences as to the dates should not matter. "The indictment has to fulfill the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence."[15] Additionally, even *if* the evidence was relevant and probative, evidence as relevant cannot establish guilt a reasonable doubt.

1.35. Effective control must be established at the time when the acts charged in the indictment were committed. Counsel submits that the impugn pieces of evidence cannot establish "effective control" over alleged subordinates 6 months after their occurrence. The Trial Chamber itself held that "In order to hold a commander liable for the acts of troops who operated under his command on a temporary basis it must be shown that the time when the acts charged in the indictment were committed, these troops were under the effective control of that commander"[16].

1.36. Counsel submits that the Prosecution's proposition that "that even where an accused cannot be convicted of conduct occurring outside the timeframe of an indictment, evidence of matters occurring outside the timeframe of the indictment may nonetheless be taken into account where relevant to and probative of the individual responsibility of the accused for conduct that ***did*** occur within the timeframe of the indictment" cannot be supported in law. The Trail Chamber by its own pronouncement rendered evidence occurring outside the scope of the indictment worthless and irrelevant[17]. The pieces of evidence of incidents occurring outside the timeframe of the indictment in Talia that were used to convict Kondewa are inadmissible, irrelevant and of no probative value. Counsel submits that inadmissible

[15] *Prosecutor v. Bagaragaza*, ICTR-2005-86-I, Decision on the Prosecutor's Application for Leave to Amend the Indictment Rule 50 of the Rules of Procedure and Evidence, para. 11 (2006).
[16] Trial Chamber Judgement, para. 240.
[17] Trial Chamber Judgement, para. 240.

evidence admitted in error can subsequently be expunged by an appellate chamber. The Chamber is referred to the Sierra Leonean case of JOHN & LAMIN V. JOHN[18] where it was held that:

".... where a document is wrongly is wrongly received in evidence, it is still the duty of the judge sitting without a jury, even where the document was in without objection, to reject the document; and a court of appeal has the like duty: see Jacker v. International Cable Co. Ltd[19]., where all the judges were of that opinion. As it was put by Lopes, L. J.: '....In cases where evidence was improperly admitted before a Judge without a jury, it was the duty of this Court to disregard it, though it has been received without objection, as they ought to decide the case upon legal evidence"[20].

Conclusion

1.37. For the foregoing reasons, the Defence respectfully requests that the Prosecution Response to Kondewa's Appeal Ground One be rejected.

[18] [1957 – 60] African law Report(Sierra Leone Series) 77 (decision of the west African Court of Appeal).
[19] (1888), 5 T. L. R. 13.
[20] Dictum of Bairamian C. J. at 81.

2. Reply to Prosecution Response to Kondewa's Appeal Ground Two (Moyamba)

2.1. This section of the Reply Brief responds to paragraphs 3.1 to 3.20 of the Prosecution Response Brief.

2.2. As stated in paragraph 70 of the Kondewa Response Brief, the Defence submits that the Trial Chamber erred in both law and fact in finding that the Prosecution had proven beyond a reasonable doubt that Kondewa was individually criminally responsible as a superior pursuant to Article 6(3) for pillage under Count 5 in the Moyamba District. The Defence incorporates paragraphs 1.12 and 1.13 with respect to the standard that must be established for beyond a reasonable doubt.

2.3. In response to paragraph 3.5 of the Prosecution Response Brief, the Defence incorporates paragraphs 1.8 to 1.20.

2.4. In paragraphs 3.11 and 3.12, the Prosecution again considerably limited, as it did in its response to Ground One, what the Defence took issue with. Paragraph 70 specifically references the Trial Chamber's conclusion in its Judgement. By disputing the Trial Chamber's conclusion, the Defence also takes issue with those facts and considerations that were involved in coming to that conclusion. Thus, all considerations used to reach that conclusion – facts, observations, and evidence – are invoked. Although the focus may remain on the superior-subordinate relation, such focus does not necessarily preclude or exclude other considerations. Thus, the Defence submits that the Prosecution's interpretation of the Defence's submission was incorrect.

2.5. With regards to the Defence's submission that a superior-subordinate relationship did not exist, the Defence incorporates paragraphs 1.8 to 1.20. The Defence submits that the Prosecution is incorrect and that the Trial Chamber did err by holding Kondewa individually criminally responsible as a superior pursuant to Article 6(3) under Count 5 in the Moyamba District.

2.6. The Prosecution suggests in paragraph 3.13 that the Trial Chamber found on the basis of the evidence as a whole, and its predicate finding of fact, that Kondewa did have effective control over the specific Kamajors who committed the Moyama looting incident. The Prosecution continues in paragraph 3.14 that it is possible consistent with logic and principle for Kondewa to have had effective control. The Defence disagrees and submits that regardless, the legal 3-part test must still be established to prove guilt beyond a reasonable doubt and that the elements were not established.

2.7. In paragraphs 3.15 and 3.16, the Prosecution places importance on the fact that the direct perpetrators stated they were "Kondewa's Kamajors"[21] and Prosecution asserts in paragraph 3.13 that the Trial Chamber correctly found that Kondewa did have effective control over the specific Kamajors who committed the Moyamba looting incident. TF2-073 stated that the individuals identified themselves as "Steven Sowa, Moses Mbalacaolor, and Mohamed Sankoh" and as "Kamajors under the control of Kondewa." However, the fact that these individuals identified themselves as "Kondewa's Kamajors" does not mean that they in fact were. Counsel submits that phrase "Kondewa's Kamajors' is not sufficient to link Kondewa to Steven Sowa, Moses Mbalacaolor, and Mohamed Sankoh. The phrase is ambiguous and is open to several interpretation. It could mean Kamajors initiated by Kondewa without more.

2.8. Counsel submits that in reply to paragraphs 3.14 and 3.19 of the Prosecution Appeal Brief that the finding of the Trial Chamber about the relationship between Kondewa and "the Kamajors" that operated in Moyamba is quite clear and unambiguous. The Trial Chamber found that "**the evidence is inconclusive** to establish beyond reasonable doubt that Kondewa had an effective control over the Kamajors, in a sense that he had the material ability to prevent or punish them for their criminal conduct in Moyamba District"[22]. In other words, the Trial Chamber concluded that not a single

[21] Trial Chamber Judgement, paras. 645, 951(i).
[22] Ibid para. 951 (emphasis added).

one of the Kamajors that operated in the Moyamba District was under the "effective control" of Kondewa.

2.9. The Defence affirms its submission as reference in paragraph 77 of the Kondewa Appeal Brief that the Trial Chamber was correct in concluding that such evidence was "inconclusive." Kondewa's apparent status came from the belief that he possessed mystical powers. Thus, the Trial Chamber's assessment is correct in that Kondewa's role within the CDF was not that of a commander or of a leader with the capacity to control or issue orders to the Kamajors. Although his role as a spiritual leader vested in him at most influence over the Kamajors, this was akin to a "fortune teller"[23] rather than a commander with effective control over his subordinates.

2.10. The Defence incorporates paragraphs 1.19 to 1.21 with regards to Kondewa's alleged status as a superior.

2.11. The Prosecution also states in paragraph 3.16 that it is immaterial that Kondewa was seen in the stolen car after the Moyabama looting. The Defence disagrees and submits that this is a material observation of fact. The Prosecution attenuouly links these two points to conclude that a superior-subordinate relationship did exist. However, neither is enough to conclusively establish 1) Kondewa as a superior per the 3-part test and 2) Kondewa's guilt under Count 5.

Conclusion

2.12. For the foregoing reasons, the Defence respectfully requests that the Prosecution Response to Kondewa's Appeal Ground Two be rejected.

[23] Trial Chamber Judgement, para. 345.

3. Reply to Prosecution Response to Kondewa's Appeal Ground Three (Talia / Base Zero)

3.1. This section of the Reply Brief responds to paragraphs 4.1 to 4.31 of the Prosecution Response Brief.

3.2. Paragraphs 4.2 to 4.11 in sum state that the Trial Chamber considered the alleged killing of the two town commanders, but that the language did not specifically clarify as to whether Kondewa himself was in fact individually responsible for both. The Prosecution states that the Trial Chamber only found Kondewa individually responsible for the killing of one of the town commanders, namely the one that Kondewa was alleged to have shot.

3.3. The Defence is in agreement with the Prosecution that in looking at the language of the Trial Chamber Judgement, it is not absolutely clear as to whether the conviction rested on the murder in question as to one or to both of the town commanders. The Trial Chamber based its conviction on the events referred to in paragraph 921(iii) of its Judgement, which states:

> *Sometime towards the end of 1997, two "Town Commanders" were brought to Talia. Kondewa took a gun from Kamoh Bonnie, Kondewa's priest, shot and killed one of the two commanders. The next morning witness saw two graves where the bodies of the two town commanders were buried.*

Thus, reference was made to two graves, but specific reference to Kondewa's alleged connection to the murder in question was to only one of the town commanders.

3.4. Paragraph 934 states that "[t]he Chamber finds that the incident listed under 921(iii) constitutes ***an*** intentional killing perpetrated by Kondewa. The Chamber further finds that ***those two men*** were killed because they were considered to be 'collaborators'...." Thus specific reference again was made to Kondewa, but then a general reference was made as to the two town commanders. The fact that the Chamber stated that is found Kondewa individually criminally responsible "for committing murder" as opposed to the murders charged under Count 2 does not

clarify their intent, since that particular phrase was in reference to the general crime of murder irrespective of the specific events alleged.

3.5. However, the Defence is not in agreement with the Prosecution as to the effect of whether the Trial Chamber intended to convict Kondewa based on the alleged killing of one or two of the town commanders. The Prosecution states that either way, regardless of whether the Trial Chamber intended to convict Kondewa of the murder of both or one town commander, this should not ultimately make a difference. Had the Trial Chamber intended to convict Kondewa with regards to both town commanders, the credibility of such findings is undermined. No evidence was adduced at all with regards to Kondewa's connection to the alleged murder of the second town commander. That Kondewa murdered the second town commander could not have been established beyond a reasonable doubt. Even the Prosecution stated that it "would concede that no reasonable trier of fact could have concluded on the basis of the evidence before it that Kondewa was individually criminally responsible for killing (by personally committing) the second of the two town commanders."[24]

3.6. Thus, were the Appeals Chamber to find that the Trial Chamber convicted Kondewa for the killing of both town commanders, the Defence disagrees with the Prosecution that "this should not result in any reduction in the sentence imposed on Kondewa."[25] Such a finding would in fact bring about a reduction in the sentence imposed because there was no evidence to prove beyond a reasonable guilt any link between Kondewa and the alleged murder of the town commander.

3.7. Moreover, had the Trial Chamber based its conviction on both town commanders, a question arises as to the credibility of the evidence used to convict Kondewa. As the Defence submitted in its Appeal Brief, the Trial Chamber erred in relying on the testimony of one Prosecution witness whose testimony was inadequate at best. A

[24] Prosecution Response Brief, para. 4.9.
[25] Prosecution Response Brief, para. 4.10.

conviction based on negligible evidence with regards to the first town commander and on no evidence with regards to the second commander is an abuse of discretion that led to error that was not harmless. Additionally, the finding of a conviction based on no evidence with regards to the second commander brings into question the validity of the finding of the first town commander.

3.8. The Defence maintains that the evidence relied on to convict Kondewa for the murder(s) of the town commander(s) in Talia was weak, insufficient and tenuous. The prosecution did not adduce any evidence of the names of the commanders, the town they came from nor whether the TF2-096 had known them previously. Counsel submits that the evidence that were adduced in the cases in the *ad hoc* tribunals that failed to earn convictions on the uncorroborated hearsay evidence related to an accused participation in murder were much stronger than the evidence of TF2-096 in the present case.[26] The Tribunal stated that such hearsay evidence lacks sufficient "indicia of reliability" to prove that the individuals were in fact killed as the witness could not provide eye witness evidence that there had been a murder.[27]

3.9. In response to paragraphs 4.12 to 4.16, the Defence maintains that the evidence was insufficient to support the conviction of Kondewa for personally shooting and killing

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[26] See for example, *Imanishimwe* Trial Judgement and Sentence, paras. 403 and 404: "The Chamber emphasises that Witness LC's account of Imanishimwe's participation in the murder of the three Hutu boys is uncorroborated hearsay. In addition to his testimony being uncorroborated, Witness LAI did not specify the basis of knowledge for his account of Imanishimwe's participation in the killing of Second Lieutenant Mbakaniye...Consequently, the Chamber will not take into account the evidence of these witnesses on these matters in making its findings because such evidence is unreliable..."; See also *Gacumbitsi* Trial Judgement para 196: "However, the hearsay evidence of Witness TAS is insufficient, failing corroboration, to establish that the Accused ordered the murder of Marie and Béatrice."

[27] *Muhimana* Trial Judgement, para. 206: "The Prosecution relies on the evidence of Witness AV to establish the allegation that two Tutsi girls, Alphonsine and Colette, were disembowelled and killed on the orders of or in the presence of the Accused... 208. However, Witness AV did not give any eyewitness evidence as to whether the girls were killed, since after watching the rape of Agnes, she crawled away on her stomach. The Chamber finds that Witness AV's hearsay evidence lacks sufficient indicia of reliability to prove that Alphonsine and Colette were killed. 209. The Chamber finds insufficient evidence to establish that two Tutsi girls called Alphonsine and Colette were disembowelled and killed on the orders of or in the presence of the Accused. Consequently, the Chamber dismisses the allegation in Paragraph 7 (b) (i) of the Indictment."

one of the town commanders in the Talia killing incident. Although the Prosecution suggests in paragraph 4.13 that the Defence failed to consider the "sum total" of the evidence, the references made in paragraph 104 of the Kondewa Appeal Brief were in relation to the facts in the Judgement upon which the Trial Chamber relied. The Trial Chamber relied on paragraph 921(iii) to convict Kondewa. Although this does not necessarily include the sum of all of TF2-096's statement, the sum of the evidence ***used*** by the Trial Chamber were presented in relation to paragraph 921(iii).

3.10. The Prosecutions states in paragraphs 4.13 to 4.16 and paragraph 4.19 that the evidence must be addressed as a whole. The Trial Chamber stated that in some instances, only one witness has given evidence on a material fact which does not require corroboration and must be examined very carefully in light of the overall evidence before placing reliance upon it.[28] The Defence agrees that this is a correct statement of the law. The Defence does not agree with the Prosecution's focus therein on the "overall evidence" as the most relevant aspect of the rule, for example as suggested in paragraph 4.19, or the Prosecution's suggestion that upon looking at the "overall evidence" it is apparent that Kondewa's guilt is undeniable.

3.11. The Defence submits that in addition to and perhaps even more importantly than assessing the "overall evidence" is requirement to assess the credibility and probative value of the witness's testimony in such circumstances. When stating its rule in paragraph 265, the Trial Chamber referred to *Prosecutor v. Limaj et al.*, *Prosecutor v. Aleksovi*[29], *Prosecutor v. Vasiljević*,[30] and *Prosecutor v. Kronojelac*, all of which focus on the scrutiny and heightened care that must be utilized upon examining such evidence.

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[28] Trial Chamber Judgement, para. 265.

[29] "The testimony of a single witness on a material fact does not require, as a matter of law, any corroboration. The only Rule directly relevant to the issue at hand is Rule 89. In particular, sub-Rule 89(C) states that a Chamber 'may admit any relevant evidence ***which it deems to have probative value***', and sub-Rule 89(D) states that a Chamber 'may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'." *Prosecutor v. Aleksovski*, Appeal Judgement, para. 62 (2000).

[30] "In such a situation [where one witness has given evidence of an incident', the Trial Chamber has scrutinised the evidence of the Prosecution witness with great care before accepting it as sufficient to make a finding of guilt against the Accused." *Prosecutor v. Vasiljević*, IT-98-32-T, Judgement, para. 21 (2002). The court in *Prosecutor v. Krnojelac* stated the same statement in para. 71.

3.12. In response to paragraph 4.21 the fact that the Defence Counsel did not object to Prosecuting Counsel's question, which was in any event implying a fact not in evidence, was not a failure on its part and should not indicate in any way that all parties agreed that the victim had died.

3.13. Paragraphs 4.19 to 4.25 suggest that the evidence given by TF2-096 was sufficient to establish Kondewa's guilt beyond a reasonable doubt. The Defence submits that TF2-096's account was insufficient to conclusively establish Kondewa's guilt beyond a reasonable doubt.

3.14. These elements are ***conjunctive*** rather than disjunctive, and thus ***all*** elements must be established beyond a reasonable doubt by the Prosecution. The testimony of TF2-096 does not establish guilt beyond a reasonable doubt, especially given that TF2-096 was ***told*** that the two people dancing the day prior were the two in the graves. Based on the Prosecution's assertion that the TF2-096's testimony and the evidence as a whole should be assessed, the evidence does not conclusively establish beyond a reasonable doubt Kondewa's guilt. The Defence incorporates for reference paragraphs 1.12 and 1.13 with respect to the standard that must be established for beyond a reasonable doubt.

3.15. "[Relative] to the death of civilians, there are other inferences possible from circumstantial evidence."[31] Mr. Kondewa was found guilty of "[taking] a gun from Kamoh Bonnie, and [shooting] one of the Town Commanders."[32] Additionally, the witness only saw two graves and was told that the two Town Commanders one of whom had been shot had been buried there.[33] The witness, however, was only ***told*** that the two men had 1) died and 2) been buried there. At the time of the shooting,

[31] Final Trial Brief of Third Accused, Allieu Kondewa, para. 74.
[32] Trial Chamber Judgement, para 623 citing Transcript of 8 November 2004, pp. 24-26.
[33] Trial Chamber Judgement, para. 623 citing Transcript of 8 November 2004, TF2-096, p. 27.

the witness in fact had run away, leaving the bucket at the well.[34] Thus, the witness had not observed whether the two had in fact died or buried there.

3.16. The Defence disagrees with the Prosecution's suggestion in paragraph 4.24 that "TF2-096's eyewitness account of seeing Kondewa shoot ***and kill*** one town commander would of itself be sufficient basis on which a reasonable trier of fact could reach this conclusion." First, this statement is incorrect in that TF2-096 allegedly saw Kondewa shoot, not kill, the town commander. Second, this statement undermines the Prosecution's suggestion that all of the evidence as a whole need be evaluated.

3.17. As stated prior, hearsay evidence is not inadmissible *per se*, it must be approached with caution and be subject to "tests of relevance, probative value and reliability."[35] The Prosecutions states in paragraphs 4.13 to 4.16 and paragraph 4.19 that the evidence must be addressed as a whole. However, in instances where circumstantial and hearsay evidence is used and relied upon, "the inferences reasonably to be drawn from the evidence must not only be consistent with his guilt but inconsistent with every reasonable hypothesis of his innocence."[36] The room to find other reasonable hypotheses of Mr. Kondewa's innocence and to find other alternative explanations exists. Thus, the Defence submits that the evidence, on its own or as a whole, fail to prove beyond a reasonable doubt the 3-part test to satisfy that Mr. Kondewa is guilty of Count 2.

3.18. The Prosecution asserts in paragraphs 4.26 to 4.30 that the events occurred during the time of the Indictment, despite the fact that TF2-096's statement that the events occurred "at the end of 1997" is inconclusive and vague. Even if they did not, the Prosecution submits that 1) the acts still fall within the Indictment period because it

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[34] Transcript of TF2-096, 8 November 2004, p. 26.
[35] Bagilishema Judgement, para. 25.
[36] Rent v. United States, 209 F.2d 893, 899 (5th Cir. 1954). *State v. Slaughter* similarly held that for convictions based on circumstantial evidence, the "evidence not only must occur to show defendant guilty, but also must be inconsistent with any other rational conclusion and exclude every other reasonable theory or hypothesis except that of guilt." State v. Slaughter, 425 P.2d 876, 879 (1967).

occurred "between about October 1997 and December 1999"[37] or, alternatively, that 2) the difference of the date pleaded in the Indictment and the date on which that event occurred does not mean that the Accused must be acquitted of that crime.

3.19. The Defence submits that it is relevant whether the event occurred prior to the timeframe of the Indictment. "At the end of 1997" does not substantially or conclusively establish that the event occurred after October. Moreover, "about October 1997" should not leave open the ability to include any and every event having occurred one or two months prior. Reliance on such vagueness prejudices the Accused by failing to put the Accused on notice for the offences for which the Accused will be tried. Similar to the problems of paragraph 28 of the Indictment, the vagueness in "about October 1997" suddenly subjects the Accused to a multiplicity of allegations for which the Accused will have had no notice of.

3.20. Similarly, the Defence submits as it did above that it is counterintuitive for the Prosecution to assert that the differences as to the dates should not matter. "The indictment has to fulfill the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence."[38] An event that is inconclusive as to when it occurred cannot be brought into the timeframe of the indictment. Nor can the Accused be found guilty of a crime without establishing the correct timeframe, and then have the guilt upheld after discovering that the acts did not occur within the timeframe alleged. Utilizing the linguistic vagueness to probe for crimes for which an individual could have committed undermines the fairness and integrity of justice. The Indictment should allow the Accused to know ahead of time the nature, the place and the timeframes of the crimes alleged against him.

Conclusion

[37] Prosecution Response Brief, para. 4.27 (quoting Indictment, para. 25(f)).
[38] *Prosecutor v. Bagaragaza*, ICTR-2005-86-I, Decision on the Prosecutor's Application for Leave to Amend the Indictment Rule 50 of the Rules of Procedure and Evidence, para. 11 (2006).

3.21. For the foregoing reasons, the Defence respectfully requests that the Prosecution Response to Kondewa's Appeal Ground Three be rejected.

4. Reply to Prosecution Response to Kondewa's Appeal Ground Four: Conviction of Kondewa for aiding and abetting crimes in Tongo Field

4.1. This section of the Reply Brief responds to paragraphs 5.1 to 5.50 of the Prosecution's Response Brief.

4.2. The Kondewa Defence adopts paragraphs 124 – 159 of the Kondewa Appeal Brief in reply to Ground four of the Prosecution Response Brief. Counsel submits that the propositions of law and analysis of the ICTR and ICTY jurisprudence on aiding and abetting contained in the Kondewa Appeal Brief adequately answer the Prosecution's contentions.

Trial Chamber's Finding in respect of the actus reus of aiding and abetting

4.3. The Defence for Kondewa concedes that it was only the Trial Chamber's error in relation to the mens rea of aiding and abetting that it raised in Ground 4 of the Kondewa Notice of Appeal. The Defence would therefore seek leave of this Chamber to amend its Ground 4 to read:

"The Majority of the Trial Chamber erred in law in failing to establish the correct actus reus and mens rea requirement for aiding and abetting and the determination of individual criminal responsibility pursuant to Article 6(1) for Counts 2, 4 and 7 in Tongo Fields".

Conclusion

4.4 For the reasons contained in paragraphs 124 – 159 of the Kondewa Appeal Brief, the Defence respectfully requests that the Prosecution Response to Kondewa's Appeal Ground Four be rejected.

5. Reply to Prosecution Response to Kondewa's Appeal Ground Five: Cumulative convictions

5.1 This section of the Reply Brief responds to paragraphs 6.1 to 6.28 of the Prosecution's Response Brief.

5.2 As regard the Prosecution's argument at paragraph 6.6 of the Prosecution's Response Brief, it is submitted that this argument fails to address the fact that convictions based on the same conduct require an element materially distinct from the other and proof of a fact not required by the other. The indictment pleaded the offences in counts 2 - 5 for count 7. That being the case, a conviction against Kondewa cannot properly be entered for counts 2, 4 & 5 and count 7 respectively since in those circumstances Kondewa would be convicted twice for the same conduct without any materially distinct element proven in relation to count 7.

5.3 The Prosecution Response it would seem ignores the basis of the arguments canvassed in the Kondewa Appeal Brief[39]. It is submitted that the basis of the arguments canvassed in ground 5 of the Kondewa Appeal Brief borders firstly, on the Trial Chamber considering matters not pleaded in the indictment. Secondly, extending the definition of punishment. Thirdly, failing to find that the evidence fails to show that the definition of murder, cruel treatment and pillage does not contain an element requiring proof of a fact not required by the elements of collective punishment. The Trial Chamber examined the position as regard cumulative conviction which the Defence acknowledge as correct:

> *"The issue of cumulative convictions arises when more than one conviction is imposed for the same conduct. The Chamber is of the view that an Accused may only be convicted of multiple criminal convictions under different statutory provisions, but based on the same conduct, "if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other". In other words, multiple convictions may only be upheld if both of the provisions require proof of an element that is not required by the other provision. If an additional element is only required for one of the provisions, then*

[39] In relation to paragraph 6.8 of the Prosecution's Response Brief

the Accused will be convicted on that count, but not on the other count for which no distinct element is required[40]

5.4 In reply to the Prosecution's contention[41] that the Trial Chamber was right in holding that *"The actus reus of the offence of collective punishment therefore does not necessarily include the commission of the actus reus of any of the crimes of murder, pillage or cruel treatment"*[42]. It is submitted that this statement is erroneous. The Trial Chamber, was stating how its mind worked as regard the consideration of the actus reus of the offence of collective punishment. In the process of its consideration, the Trial Chamber took into account factors which were not pleaded in the indictment. Contrary to the Prosecution's submission that the Trial Chamber did not *"...indicate that it would in this specific case take into account in relation to count 7 any acts other than those that had been pleaded in relation to counts 2, 4 and 5"*[43]. The Trial Chamber did consider acts outside the confines of the indictment in relation to count 7[44].

5.5 The Defence submits that the starting point in the analysis of an accused's criminal conduct is a consideration of the fact that may establish the material elements or actus reus of the crime. Thus if the Trial Chamber proceeded erroneously to establish as 'actus reus' elements which are outside the confines of the indictment, this it is submitted amounts to the Trial Chamber acting on an improper foundation thereby rendering its conviction wrong. The Trial Chamber created a materially distinct element in relation to count 7 of the indictment in order to ground a conviction.

5.6 The Prosecution pleaded in the indictment that count 7 is based on the facts enumerated in relation to counts 1-5[45]. This suggested that punishment in relation to count 7 has no distinct element from that of counts 1-5. By extending the definition of punishment outside the pleadings in the indictment and also extending the actus reus considered under count 7, the

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[40] Trial Chamber Judgment para 974
[41] Ibid para 6.10
[42] Ibid para 978
[43] Ibid para 6.10
[44] Trail Chamber Judgment para 978
[45] prosecution Response Brief, para. 6.10.

Trial Chamber created a materially distinct element where one does not and should not have existed. This shift is one of the errors which the Kondewa Defence takes issue with. The Trial Chamber stated no reasons other than those for which the Defence takes issue for its decision[46]. This amounts to a shifting of the standard of proof from the elements of counts 2, 4 and 5 in insofar as count 7 is concerned. Conduct which formed the basis of a conviction cannot also form the basis of another conviction if there is no materially distinct element in it that is not required in the case of the previous count.

5.7 The offences in counts 2, 4, and 5 have overlapping material elements[47]. The Defence acknowledge that it is possible for the same person to engage in the same criminal conduct that could satisfy the elements of counts 2, 4 and 5 of the indictment as well as count 7. However, the Defence submits by way of illustration in relation to the issue of cumulative convictions and proof of the elements of the various counts that if an accused murders a person, and is charged with murder, cruel treatment and wilful killing, the fact that separate elements are required to be proven for these crimes does not change the material elements of the killing. By parity of reasoning, the fact that the Trial Chamber found that Kondewa was guilty of murder, cruel treatment and pillage should not have formed the basis of a conviction for collective punishment under count 7 based on the same facts without proof of a further materially distinct element or fact not required in proof of the former offences. The Trial Chamber should therefore have convicted Kondewa for only one of these crimes[48] depending to which of them the specific additional element applies.

5.8 Therefore if for instance a person murders a civilian protected under the Geneva Convention IV, and that murder is also a deliberate attack on that civilian this violates the laws and customs of war. That person should not be found guilty of more than one war crime. If the killing is committed by the perpetrator as part of a systematic policy, it could be deemed a crime against humanity. But it should not be both a war crime under the grave breaches regime, and a war crime committed against the laws and customs of war. If in addition to the accused's intent to kill a civilian, the act of killing is carried out with the specific intent to

[46] Replying to para 6.15
[47] They are all based on the facts pleaded in paragraphs 22-27 of the Indictment
[48] Either under counts 2, 4 and 5 or under count 7 but not cumulatively

carry out the extermination, in whole or in part, of an ethnic, religious, or racial group, it could constitute genocide. However, it should not also be a crime against humanity, grave breach, or violation of the laws or customs of war, simply because genocide has a specific mens rea.

5.9 In the *Čelebići* case[49], which it is submitted is the leading authority on cumulative charges, convictions and sentences, the Appeals Chamber having examined the previous authorities on the issue of cumulative convictions in the jurisprudence of the ad hoc tribunals and national jurisdictions, stated:

"Reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple conviction, lead to the conclusion that multiple criminal convictions entered under different statutory provision but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other"[50].

The Appeals Chamber in the said case adopted the first two test laid down by the Appeals Chamber in the *Akayesu* case[51] to wit:

"it is acceptable to convict an accused person of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; (2) where the provisions creating the offences protect different interests ..."

The opinion of the Chamber in the *Čelebići* case it is submitted is the approach which the CDF Trial Chamber[52] attempted to follow but failed to carry out to its full extent.

5.10 The Appeals Chamber in the *Čelebići* case examined four pairs of double convictions to better explain its reasoning: 'wilful killing' under article 2[53] and 'murder' under article 3; 'wilfully causing great suffering or serious injury to body or health' under article 2, and

[49] Prosecutor v. Delalić (Appeals Chamber Judgment) (*Čelebići*) Case No IT-96-21-A (20 February 2000) para 296.
[50] Ibid para 412; See also para 974 of the Trial Chamber Judgment See also Prosecutions Response Brief footnote 209
[51] Prosecutor v. Akayesu, case No ICTR-96-4-T (2 September 1998) , Judgment Appeals Chamber, para 467 references to Article is this regard mean article under the Statute of the ICTY
[52] Ibid para 974
[53] All references in this paragraph relate to the Statute of the ICTY

'cruel treatment' under article 3; 'torture' under article 2, and 'torture' under article 3; and 'inhumane treatment' under article 2, and 'cruel treatment' under article 3[54]. It is submitted that the analysis of the first pair of convictions is illustrative of the majority decision and help in simplifying the Defence's argument in relation to this ground. The Appeals Chamber stated:

> *"The definition of willful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities. However, the definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of willful killing under Article 2. Therefore, the first prong of the test is not satisfied, and it is necessary to apply the second prong. Because willful killing under Article 2 contains an additional element and therefore more specifically applies to the situation at hand, the Article 2 conviction, must be upheld, and the Article 3 conviction dismissed"*[55].

The Chamber similarly applied the reasoning to the other pairs of double convictions. In the end only article 2 convictions were upheld by the Appeals Chamber, while article 3 convictions were dismissed. This test has been applied by the ad hoc tribunals in the cases of the Prosecutor v. Jelisić[56] and Prosecutor v. Krstić[57]

5.11 Based on the reasoning of the Appeals Chamber in the *Čelebići* case, it is submitted that the definition of collective punishment under Article 3 (b) of the Statute contains a materially distinct element not present in the definition of murder under Article 3 (a) of the Statute, cruel treatment under Article 3 (a) of the Statute and pillage under Article 3 (f) of the Statute, that is, the requirement that the imposition of punishment be done on a collective basis. This requirement necessitates proof of a fact not required by the elements of murder, cruel

[54] Ibid paras 422-426
[55] Ibid para 423
[56] Ibid Prosecutor v. Jelisić Case No IT-95-1-T (14 December 1999) Judgment, Trial Chamber, para 137 approved by the Appeals Chamber in the same case- Jelisić Appeal Judgment, Case No IT-95-10-A (5 July 2001) para 93
[57] Ibid Prosecutor v. Krstić, case No IT-98-33, Judgment, Trial Chamber (2 August 2001) para 679

treatment and pillage. Since the definition of collective punishment includes, yet goes beyond what is meant by 'the death of the person by the act or omission of the Accused'[58], 'causing serious mental or physical suffering or injury to a person not taking part in the hostilities'[59] and the 'unlawful appropriation of property without the consent of the owner'[60], it contains a materially distinct element not present in the definitions of murder, cruel treatment and pillage[61] on the one hand.

5.12 On the other hand the definition of murder under Article 3 (a), cruel treatment under Article 3 (a) and pillage under Article 3 (f) does not contain an element requiring proof of a fact not required by the elements of collective punishment. The facts on which the respective offences are based are the same. The first part of the test is therefore not satisfied which renders it unnecessary for a consideration of the second part of the test.

5.13 The Defence submits that because collective punishment contains an additional element and thus more specifically applies to the facts as accepted by the Trial Chamber in this case the conviction for collective punishment under Article 3 (b) of the Statute should have been entered instead of a conviction under Articles 3 (a) for murder, 3(a) for cruel treatment and 3 (f) for pillage. The Trial Chamber in extending the definition of punishment outside the confines of the indictment as pleaded in respect of counts 1 - 5 created a materially distinct element and fact in relation to count 7. In doing so the Trial Chamber committed an error within the meaning of Article 20 (1) (a) and (b) of the Statute.

5.14 While the Defence acknowledge that with regard conviction for the same conduct under different statutory provisions there must be present a materially distinct element not required by the other, it is submitted that the analysis should not end there. Proof of a fact not required by the other is also a requirement in this regard. The Trial Chamber, having examined the issue of proof of a specific element required in relation to the different statutory provisions failed to proceed beyond that examination. It failed to examine the issue of whether the

[58] In relation to murder under count 2
[59] In relation to cruel treatment under count 4
[60] In relation to pillage under count 5
[61] See para 6.16 and its accompanying table as regard the elements of the crimes under counts 2, 4, 5, and 7 respectively.

definitions of murder, cruel treatment and pillage do not contain an element requiring proof of a fact not required by the elements of collective punishments.

Conclusion

The Defence for Kondewa submits that for the several submissions made above the error committed by the Trial Chamber in relation to this ground of Appeal[62] can only be corrected by the conviction of Kondewa been overturned and Kondewa's sentence reduced accordingly. As their Lordships in dissenting in the *Čelebići* case noted:

> *"...that "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions" lead to the conclusion that cumulative convictions should not be permitted. We agree that fairness to the accused dictates that cumulative convictions for offences which are not genuinely distinct should not be permitted in respect of the same conduct. It is appropriate to identify what these "reasons of fairness to the accused" are.*
>
> *Prejudice to the rights of the accused – or the very real risk of such prejudice – lies in allowing cumulative convictions. The Prosecution suggests that cumulative convictions "do not cause any substantive injustice to the accused" as long as the fact that such convictions are based on the same conduct is taken into account in sentencing. This does not take into account the punishment and social stigmatisation inherent in being convicted of a crime. Furthermore, the 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*

[62] Which is within the provisions of Article 20 (1) (a) & (b) of the Statute

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 risk of increased sentences and/or to the application of 'habitual offender' laws in case of subsequent convictions in another jurisdiction"[63].

[63] *Čelebići* Appeals Judgment Dissenting Judgment paras 22-23

6. Reply to Prosecution Response to Kondewa's Appeal Ground Six: Conviction of Kondewa for enlisting a child soldier

Conflation of Initiation and Enlistment

6.1. This section of the Reply Brief responds to paragraphs 7.1 to 7.11 of the Prosecution Response Brief.

6.2 The Defence submits that if initiation, as the Trial Chamber correctly held, is not necessarily the same as enlistment[64] and initiation is also not a crime in international law and under the Statute of the Special Court[65], then, initiation should not form the basis of determining the elements of the crime of enlistment. The Trial Chamber cannot therefore reach a conclusion based on the initiation of TF2-021 that the crime of enlistment was committed but in the case of other initiations there were no enlistments.

6.3. In reply to the Prosecution's submission' that Kondewa was not convicted for initiating children but for enlisting child soldiers[66], Counsel submits that the evidence is clear that all what Kondewa did was conduct or supervise initiations and prepare herbs. The evidence is clear that Kondewa was an initiator and an herbalist who prepare herbs for the Kamajors.

"Kondewa's job was to prepare herbs which the Kamajors smeared on their body to protect them from bullets. Kondewa was not a fighters, he himself never went to the warfront or into active combat .... "[67]

There was no evidence before the Trial Chamber to establish the inference that Kondewa recruited, conscripted and/or enlisted children to take part actively in hostilities. This Chamber is also referred to an excerpt form the testimony of Albert

[64] Trial Chamber Judgment 969; See also Prosecution Response Brief 7.5
[65] Prosecution Response Brief para 7.5
[66] Ibid para 7.5 referencing Trial Chamber Judgment para 971
[67] Trial Chamber Judgement, para 345

Nallo described by the Trial Chamber as "..... the single most important witness in the Prosecution evidence on the alleged superior responsibility of the Accused"[68].

> *"Q. Basically you can have somebody going through the Kamajor initiation but not opting for military recruitment?*
> *A. Yes, My Lord"*[69].

6.4. Counsel submits that if initiation is not a crime under the Statute, it cannot therefore serve as the first step for the determination of what is a crime under the Statute. Initiations into the Kamajor society did not necessarily amount to enlistment, parents sent their children for initiation for other purposes[70]. The Prosecution's submission also ignores the fact that there is the training aspect which is a perquisite for a Kamajor before been sent to the battle field.

6.5. The Prosecution's referencing the Trial Chamber's Judgment and acknowledgment that after initiation, the initiates were subsequently given military training acknowledges the fact that the initiates had to undergo military training which was not part of the initiation process but a separate and distinct activity conducted by trained and qualified military personnel. Kondewa's role with the initiates was terminated once the process of initiation was completed. Those initiates who upon successful completion of the initiation process wished to engage in active combat then opted for military service. This is a clear indication that initiation and enlistment are materially different and unrelated concepts.

6.6. Contrary to paragraph 7.28 of the Prosecution's Response Brief what the Defence has done in raising this issue is to rightly highlight that the Trial Chamber in referencing the second initiation of TF2-021 into the Avondo society was suggesting that a person already found to have been enlisted (which the Defence disagrees with) can be re-enlisted into the same CDF movement a second time.

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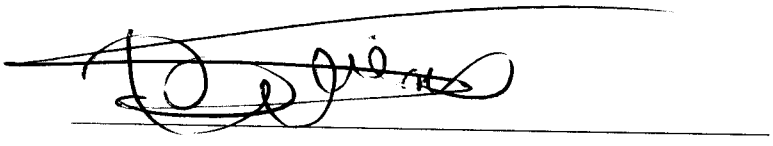
[68] Trial Chamber Judgement, para 279.
[69] Transcript of 15 March 2005 TF2-014, Albert Nallo at p 11, lines 8-10
[70] Trial Chamber Judgement, para. 969.

6.7 In reply to paragraph 7.32 of the Prosecution Response it is submitted that when TF2-021 was captured by the Kamajor and made to carry looted property, this amounted to conscription of the witness.

Conclusion

6.8. For the foregoing reasons, the Defence respectfully requests that the Prosecution Response to Kondewa's Appeal Ground Six be rejected.

28th January 2008



Yada Williams

Counsel for Allieu Kondewa

APPENDIX A

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APPENDIX A

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CUMULATIVE CHARGES, CONVICTIONS AND SENTENCING AT THE AD HOC INTERNATIONAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

Attila Bogdan

CUMULATIVE CHARGES, CONVICTIONS AND SENTENCING AT THE AD HOC INTERNATIONAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

ATTILA BOGDAN[*]

[Although the issue of cumulative offences (concursus delictorum) *is well developed in various national criminal justice systems,* concursus delictorium *is only at the formative stages of its development in international criminal law. Through an examination of the jurisprudence of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, this article highlights various approaches that can be taken to the issue of* consursus delictorium. *Importantly, the adoption of a certain approach to this issue has direct implications with respect to the rights of those accused standing trial in The Hague or Arusha. In addition, the jurisprudence that emerges from the ICTY and ICTR will, no doubt, play an important role in the future development of this concept in both academic theory, and the future jurisprudence of the International Criminal Court.]*

I INTRODUCTION TO CUMULATIVE CHARGES AND CONVICTIONS

The statutes of the International Criminal Tribunal for the Former Yugoslavia ('ICTY'),[1] the International Criminal Tribunal for Rwanda ('ICTR')[2] and the International Criminal Court ('ICC')[3] contain provisions with respect to the three major crimes at international law: genocide,[4] crimes against humanity,[5] and war crimes.[6] War crimes

emerged first, followed by crimes against humanity and genocide.[7]

These three crimes have the potential to overlap in certain factual circumstances.[8] For example, widespread or systematic war crimes perpetrated against a civilian population, whether domestic or foreign, may also be deemed to be crimes against humanity. However, when committed with the intent to exterminate (in whole or in part) a certain ethnic, national or religious group, such acts become genocide. Distinguishing between these crimes for the purposes of charging, convicting and sentencing a given offender is problematic.

The issue of cumulative offences (*concursus delictorium*) is approached differently under the common law and civil law systems. In the former, it is possible to charge a defendant with multiple crimes cumulatively or in the alternative, leaving it to the judge or jury to decide of which crime the accused should be found guilty.[9] In fact, in the common law system, a jury may find that a criminal transaction involves multiple criminal acts, and that each act constitutes a separate crime.[10] It is also possible for a jury to find that multiple acts are part of the same criminal transaction, thus concluding that only one crime has been committed.[11] This creates uncertainty in sentencing. Possible sentences include: a single sentence for a single crime; a single sentence for multiple crimes (including aggravating circumstances); or a sentence for multiple crimes running consecutively or concurrently.[12]

On the other hand, the civil law system requires, as an extension of its principles of legality,[13] that the prosecutor charge the offender with the crime that has been committed under law, thus precluding cumulative charging or charging in the alternative as part of prosecutorial strategy.[14] In the French legal system, as in other civil law systems, the situation where the same facts give rise to multiple crimes is called *concours d'infraction*. If the *concours* is also *idéal*, meaning that the elements of several crimes are present in the commission of one act, then it is possible to charge a defendant for each of those crimes, but with a view to convicting the accused for only one crime.[15] If that is made impossible due to the nature of the facts, and a conviction is returned for all three charges, then the defendant's sentence will be the greater of the penalties.[16]

Although the notion is well developed in various national legal systems, *concursus delictorium* is only at the formative stages of its development in international criminal law. Through an examination of the jurisprudence of the ICTY and ICTR, this article will attempt to highlight the various approaches that can be taken to the issue of *consursus delictorium*. The jurisprudence that emerges from the ICTY and ICTR will, no doubt, play an important role in the future development of this concept in both academic theory and in its practical application at the ICC. Importantly, the adoption of a certain approach to this issue has direct implications for the accused standing trial in the Hague or Arusha. Finally, the article will briefly examine the provisions of the *Statute of the ICC* relating to *concursus delictorium* and the way in which the ICC could address this complex issue.

II THE 'MATERIAL ELEMENT' APPROACH TO *CONCURSUS DELICTORIUM*

The starting point in the analysis of an accused's criminal conduct is a consideration of the facts that may establish the material element of a crime, or *actus reus*. It is possible for several criminal laws to share a common material element, but be distinguished by the mental element required, or other factors such as the identity of the victim. The principle of 'double jeopardy', and the related principle of *non bis in idem*,[17] prevent an accused from being subject to multiple prosecutions or punishments for the same offence.[18] These principles not only prohibit successive trials for the same offence, but also multiple punishment at one or successive trials.[19]

War crimes, crimes against humanity and genocide are examples of international crimes with overlapping material elements. It is possible for the same person to engage in separate criminal conduct that satisfies the essential elements of all three crimes. However, if a person kills a number of people, the fact that separate elements are required for these crimes does not change the material element of the killings. Thus the court should find that person guilty of only one of these crimes, depending on which of the specific additional elements applies.

For example, if a person murders a civilian who is protected under *Geneva Convention IV*, and that murder is also a deliberate attack on a civilian that violates of the laws or customs of war, that person should not be found guilty of more than one war crime. If the killing is committed by the perpetrator as part of a systematic policy, it could also be deemed a crime against humanity. But it should not be both a war crime under the grave breaches regime, and a war

crime committed against the laws or customs of war. If, in addition to the accused's intent to kill a civilian, the act of killing is carried out with the specific intent to carry out the extermination, in whole or part, of an ethnic, religious, or racial group, it could constitute genocide. However, it should not also be a crime against humanity, grave breach, or violation of laws or customs of war, simply because genocide has a specific *mens rea.*

This situation is akin to vertically related crimes in domestic law, where all crimes have the same material element, but differ as to the intent, the nature of the victim, or the manner in which the crime was committed.[20]

The relationship between war crimes, crimes against humanity and genocide may be further examined by an analysis of their ranking in international criminal law, and within the *Statute of the ICTY* and *Statute of the ICTR.*

III RANKING OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

The priority ranking of genocide, crimes against humanity and war crimes (as well as other international crimes) is essential for the determination of the sentences to be prescribed for each. However, in most legal systems, sentencing is not only based on the significance of the crime (unless the system is essentially retributive), but also on the actual harm that has resulted and the personality of the offender (which reflects the rehabilitation or re-socialisation theories of punishment).[21]

No international crime contains, in conventional international criminal law, a pre-determined sentence. This is due to the historical assumption that international criminal law is enforced through indirect means; by the states themselves, rather than directly through international tribunals.[22] The absence of a priority ranking of international crimes and penalties in conventional international criminal law is consistent with the indirect enforcement system, as it leaves the task of ranking the crimes and prescribing the penalties to national legislatures.

The establishment of the ICTR and ICTY gave rise to a new problem. The ICTY and ICTR are, for the most part, direct enforcement systems whereby penalties are determined by judges following the finding of guilt against an accused on one or more charges. However, the *Statute of the ICTY* and *Statute of the ICTR* fail to provide for a ranking of genocide, crimes against humanity and war crimes, or a range of sentences that can be imposed for each. The sentencing provisions in both statutes only outline factors which should be considered when sentencing.[23] Thus a problem arises in determining penalties for each crime.[24]

Conventional international criminal law does not specify a hierarchy for the crimes in the jurisdictions of the ICTY, ICTR or the ICC. Customary international law also fails to provide guidance on this issue. Although all three crimes have the status of *jus cogens*,[25] thus holding the highest hierarchical position among all international norms and principles,[26] there is no clear guidance on the ranking of the three crimes within this classification. It has been suggested that *jus cogens* crimes are 'characterized explicitly or implicitly by state policy or conduct, irrespective of whether it is manifested by commission or omission.'[27] Genocide and crimes against humanity, unlike war crimes, require the existence of a state policy, since they involve a large number of victims and are carried out on a widespread or systematic basis. Within the category of *jus cogens* crimes, the ranking of genocide and crimes against humanity before war crimes is therefore warranted.

Bassiouni has proposed a classification of international offences based on an assessment of the severity of harm suffered by the international community.[28] In considering the severity of international crimes, Bassiouni's proposed evaluation of the offences considers the following factors:

(a) the social interest sought to be protected;

(b) the harm sought to be averted;

(c) the intrinsic seriousness of the violation;

(d) the dangerousness of the transgressor manifested by the commission of a given transgression;

(e) the degree of general deterrence sought to be manifested;

(f) the policy of criminalization; and

(g) the policy choices reflected in the opportunity of criminal prosecution.[29]

Based on a consideration of these factors, Bassiouni classifies international offences into three categories: international crimes; international delicts; and international infractions. Genocide, crimes against humanity and war crimes are in the category of 'international crimes', with genocide as the most serious, followed by crimes against humanity, then war crimes.[30] The quantitative harm resulting from genocide and crimes against humanity would support their ranking immediately below the crime of 'aggression'[31] within the category of international crimes. The three crimes and aggression are 'the most serious of all international crimes in terms of their impact on humankind, evidenced by the severity of the harm they have produced throughout history.'[32]

Working within this ranking, there are several characteristics that distinguish the three crimes from one another. All things being equal, what is referred to in civil legal systems as the 'protected social interest' (*le bien social protégé*) is the most important distinguishing factor. The protected social interest in respect of genocide is the sanctity of the racial, ethnic, or religious group, irrespective of the degree to which the plan to eliminate the group in whole or in part is accomplished.[33] In relation to crimes against humanity, the protected social interest is the prevention of a widespread or systematic harm committed against any civilian population in pursuit of a state policy or the policy of a non-state actor.[34] The legal element distinguishing genocide from crimes against humanity is that genocide requires a specific intent to eliminate, in whole or in part, a particular group, whereas crimes against humanity do not necessarily require a specific intent. In other words general intent is sufficient for the commission of crimes against humanity.[35]

The definition of a war crime distinguishes it from genocide and crinmes against humanity: the prohibited conduct was committed in the context of an armed conflict, by a combatant against another combatant, a member of the civilian population, a protected person, or a protected target.[36] A person can be guilty of war crimes even though there is no state policy or specific intent; 'knowledge' is a sufficient mental element for war crimes.[37] In practical terms, war crimes can be committed by a single individual without being part of a state policy. Genocide and crimes against humanity, on the other hand, usually involve the existence of a state policy, since they involve a large segment of society and are carried out on a widespread or systematic basis. This is an important factor in objectively distinguishing between these crimes for the purpose of ranking them in an order predicated on the protection of the social interest, the scale of victimisation and the principle of deterrence. Objectively, the protected social interest is greater with respect to genocide and crimes against humanity, since the scale of victimisation, and the consequences for the rest of society, and the international community, are potentially more serious.

Applying Bassiouni's ranking of crimes to the *Statute of the ICTY* and *Statute of the ICTR*, it can be concluded that, in cases where the same set of facts potentially give rise to a violation of all three statutory provisions, the three crimes are vertically related. Genocide, distinguished by the requirement of specific intent, is the most serious offence, while crimes against humanity, grave breaches and violations of laws or customs of war are less serious offences. A conviction for a higher crime should preclude a separate conviction for a lesser one.

A survey of the jurisprudence of the ICTY and the ICTR on the issue of ranking these crimes, and the impact of such ranking on sentences imposed under international criminal law, reveals a sharp discord between the case law of the two Tribunals. Although the ICTY initially embraced the concept of a hierarchy of crimes in *Prosecutor v Erdemovic*,[38] it subsequently rejected it in *Prosecutor v Tadic*.[39] Since *Tadic*, the ICTY has continued to reject this notion of ranking crimes in international criminal law.[40] However, the jurisprudence also reveals that a number of judges at the ICTY hold opposing views on this issue.[41]

Unlike the ICTY, the ICTR jurisprudence clearly suggests, especially for sentencing purposes, the existence of a 'hierarchy' of genocide, crimes against humanity, and war crimes (in that order).[42] Notwithstanding the inconsistent jurisprudence of the ad hoc Tribunals, neither the *Statute of the ICTY* nor the *Statute of the ICTR* expressly adopts a hierarchy of crimes. The Tribunals could follow one of two legal methods in addressing the ranking.

IV ALTERNATIVE APPROACHES TO *CONCURSUS DELICTORIUM*

The first approach is inspired by the principles of legality, or *nullum crimen sine lege* and *nulla poene sine lege*, and requires the ICTY and the ICTR to examine the criminal law of the former Yugoslavia or Rwanda, respectively, to determine how that law deals with the question of ranking. This is the most appropriate method of ensuring that the accused is tried according to a pre-existing law of which he or she had notice. The second approach, which does not correspond as closely with the principles of legality, is to apply the general principles of legal systems similar to that of the nation in question (European civil legal systems). In these systems there are two relevant doctrines. The first is that a person is criminally accountable for the conduct performed, but that the same conduct cannot give rise to multiple convictions because it would violate the principle of *non bis in idem*. The second is the principle known in the French system as *concours d'infraction*. This principle has two applications: firstly, when the same set of facts gives rise to the application of multiple criminal provisions (*concours idéal d'infraction*); and secondly, when the facts could be subject to multiple provisions which differ in nature, but are predicated on the same material element. In both cases, the court cannot find the accused responsible for more than one crime.

The application of these approaches to *consursus delictorium* will be examined through the jurisprudence ICTY and ICTR.

V JURISPRUDENCE OF THE ICTY AND THE ICTR

A Kupreskic Case

The Trial Chamber's judgment in *Prosecutor v Kupreskic*[43] was the first ICTY judgment to consider the issue of cumulative charging and convictions. In *Kupreskic* the accused were Croatian Defence Council soldiers charged for their alleged involvement in a sustained extermination of Bosnian Muslims living in the village of Ahmici-Santici from October 1992 to April 1993, and an attack on the same village on 16 April 1993.[44]

In *Kupreskic* the prosecutor argued that 'the same act or transaction against one or more victims may simultaneously infringe several criminal rules and can consequently be classified as a multiple crime.'[45] The defence opposed this argument and asserted that cumulative charges in the case of apparent concurrence are not permissible and should be limited to cases of real concurrence.[46]

The Trial Chamber noted that the manner in which charges are to be brought by the prosecution is neither firmly entrenched by the *Statute of the ICTY* nor in the *Rules of Procedure and Evidence of the ICTY*.[47] It found that the process should be guided by two principles: that the rights of the accused should be fully safeguarded;[48] and that the prosecutor should be granted all powers consistent with the *Statute of the ICTY* to ensure that they are able to carry out their duties effectively.[49] Consequently, the Trial Chamber made the following findings: firstly, the prosecutor may make cumulative charges whenever he or she contends that the facts charged simultaneously violate two or more provisions of the *Statute of the ICTY*; secondly, depending on which elements of the crime the prosecution is able to prove, the prosecution should use alternative rather then cumulative charges whenever an offence appears to breach more than one provision;[50] and thirdly, the prosecution should refrain as much as possible from bringing charges based on the same facts but under excessive multiple provisions, whenever it would not seem warranted to contend that the same facts are simultaneously in breach of various provisions of the *Statute of the ICTY*.[51]

This approach to cumulative charging represents a combination of both the civil law and common law approaches to the issue. The first part of the test, which is consonant with the common law approach, gives the prosecution wide latitude in cumulatively charging crimes arising from the conduct of the accused. However, this is restricted by the second part of the test; that alternative rather than cumulative charges should be used whenever the offence appears to breach more than one provision of the *Statute of the ICTY*. The second part of the test is clearly influenced by the civil law approach to the issue. The third part of the test seeks to avoid confusion and potential unfairness to the accused that could arise from multiple charges based on the same facts. The test conforms substantially to *nullum crimen sine lege* insofar as it adopts alternative (rather than multiple) charges. This approach is consistent with the practice of cumulative charging in civil law systems including Yugoslavia and Rwanda.

With respect to cumulative convictions, the Trial Chamber surveyed the various national approaches to the issue, as well as the jurisprudence of the Nuremberg Tribunal, the European Court of Human Rights and the Inter-American Court of Human Rights.[52] The Trial Chamber noted that:

> Under traditional international criminal law it was exceedingly difficult to apply general principles concerning multiple offences so as to identify cases where the same act or transaction breached various rules of international criminal law and cases where instead only one rule was violated.[53]

The Trial Chamber distinguished between two distinct 'legal situations' that may arise in the context of cumulative convictions. The jurisprudence of the European and Inter-American Courts of Human Rights was referred to in order to set out principles governing these legal situations. The first situation is where various elements of a general criminal transaction infringe different legal provisions.[54] This 'legal situation' can be distinguished from that in which one act or transaction simultaneously breaches two or more legal provisions.[55]

The criteria for deciding whether there has been a violation of one or more legal provisions have been established in the case law of national courts and restated by a number of international courts.[56] In particular, the Trial Chamber noted the Massachusetts Supreme Court case of *Morey v Commonwealth*[57] which held that:

> A single act may be an offence against two statutes: and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.[58]

The opinion further notes that the Massachusetts decision has been followed in subsequent US jurisprudence,[59] most notably the case of *Blockburger v United States*,[60] which established what is known as the *Blockburger* test:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of an additional fact which the other does not.[61]

In relation to the *Blockburger* test, the Trial Chamber in *Kupreskic* noted that:

> The test then lies in determining whether each offence contains an element not required by the other. If so, where the criminal act in question fulfils the extra requirements of each offence, the same act will constitute an offence under each provision.[62]

If the *Blockburger* test is not satisfied, 'it follows that one of the offences falls entirely within the ambit of the other offence (since it does not possess any element which the other lacks).'[63] In such a situation 'the relationship between the two provisions can be described as that between concentric circles, in that one has a broader scope and completely encompasses the other.'[64] Furthermore, 'the choice between the two provisions is dictated by the maxim *in toto iure generispeciem derogatur* ... whereby the more specific or less sweeping provision should be chosen.'[65]

Finally, consideration of the values protected by the different legal provisions led the Trial Chamber to add a further test to determine whether 'the various provisions at stake protect different values.'[66] The court noted that 'traces of this test can be found in both the common law and civil law systems.'[67] Under this test, 'if an act or transaction is simultaneously in breach of two criminal provisions protecting different values, it may be held that that act or transaction infringes *both* criminal provisions.'[68] However, the Trial Chamber noted that the review of national case law indicates that this test is generally used together with the other elements of the *Blockburger* test.[69]

In light of the above principles, the Trial Chamber proceeded to analyse the relationship between the single offences in the case, noting that '[i]n order to apply the principles on cumulation of offences ... *specific offences* rather than diverse *sets of crimes* must be considered.'[70]

First, the Trial Chamber examined the relationship between the offences of 'murder' under article 3 (war crimes) and

'murder' under article 5(a) (crimes against humanity). Two relevant questions were identified by the Trial Chamber: firstly, 'whether murder as a war crime requires proof of facts which murder as a crime against humanity does not require, and *vice versa* (the *Blockburger* test)';[71] and secondly, 'whether the prohibition of murder as a war crime protects different values from those safeguarded by the prohibition of murder as a crime against humanity.'[72]

Based on 'the marginal difference in values protected' between the two offences,[73] it was concluded that

> the Trial Chamber may convict the Accused in violating the prohibition of murder as a crime against humanity only if it finds that the requirements of murder under both Article 3 and under Article 5 are proved.[74]

The Trial Chamber proceeded to apply the same reasoning to the other pairs of double convictions, namely: 'persecution' under article 5(h) and 'murder' under article 5(a);[75] 'inhumane acts' under article 5(i) and 'cruel treatment' under article 3;[76] and inhumane acts (or cruel treatment) and the charges for murder.[77]

Ultimately, the Trial Chamber found one of the defendants, Josipovic, guilty of murder as a crime against humanity under article 5(a), but declined to convict him of murder as a violation of article 3 (count 17) because it considered such convictions, based on the same acts, as unacceptably cumulative.[78] In addition, Josipovic was found guilty of other inhumane acts under article 5(i), while the cruel treatment violation under article 3, which was based on the same facts, was dismissed by the Trial Chamber.[79]

Similarly, another defendant, Santic, was found guilty of murder as a violation of article 5(a) of the *Statute of the ICTY*, while the Trial Chamber declined to convict him of murder as a violation of article 3, which was based on the same facts.[80] The Trial Chamber also found Santic guilty of inhumane acts under article 5(i), while declining to enter a conviction based on the same facts under article 3.[81]

Although no 'double convictions' were entered, the Trial Chamber in *Kupreskic* considered the issue of how a double conviction for a single act should be reflected in sentencing.[82] The Trial Chamber held that where

> a Trial Chamber finds that by a single act or omission the accused has perpetrated two offences under two distinct provisions of the Statute, and that the offences contain elements uniquely required by each provision, the Trial Chamber shall find the accused guilty on two separate counts. In that case the sentences consequent upon the convictions for the same act shall be served concurrently, but the Trial Chamber may aggravate the sentence for the more serious offence if it considers that the less serious offence committed by the same conduct significantly adds to the *heinous nature* of the prevailing offence, for instance because the less serious offence is characterised by distinct, highly reprehensible elements of its own (e.g. the use of poisonous weapons in conjunction with the more serious crime of genocide).[83]

This standard is ambiguous. It seems to assume that some offences are more serious than others, without suggesting which factors should be used to determine their relative status. Significantly, the standard recognises a hierarchy of international offences without explicitly labelling it as such.

Neither the reasoning nor the results adopted by the Trial Chamber were followed by subsequent Chamber decisions. In fact, the Trial Chamber's decision concerning the issue of cumulative charging and convictions in *Kupreskic* was overturned by the Appeals Chamber in October 2001.[84]

B Akayesu Case

The ICTR first encountered the issue of cumulative charging and convictions in *Prosecutor v Akayesu*.[85] The accused, Akayesu, was a *bourgmestre* in the commune of Taba and, in that capacity, was responsible for maintaining law and public order.[86] At least 2000 Tutsis were killed in Taba between 7 April 1994 and the end of June 1994, during which time the accused was in power.[87] As a result of these events, Akayesu was charged with multiple counts of genocide, crimes against humanity and violations of common article 3 of the *Geneva Conventions*.[88]

In *Akayesu* the Trial Chamber took a different approach to the issue of *concursus delictorium* from that taken by the ICTY Trial Chamber in *Kupreskic*. The difference may be due to the fact that the ICTR Trial Chamber was more influenced by French civil law concepts, while the ICTY took an approach akin to the common law's pragmatic approach.[89] In *Kupreskic* the ICTY partially relied on Yugoslavian criminal law, while in *Akayesu* the ICTR relied on the criminal law of Rwanda, which was originally derived from Belgian law, in turn influenced by French law. In *Akayesu* the problem was posed in terms of the civil law doctrine of *concours idéal d'infractions*.

The Trial Chamber's judgment referred to the approach taken by the ICTY in *Tadic*, where it was held that 'what is to be punished is proven criminal conduct and that will not depend upon technicalities of pleading.'[90] The Trial Chamber also noted that civil law systems, including the Rwandan legal system, allow multiple convictions in accordance with the principle of *concours d'infractions*.[91]

On the basis of this 'national and international law and jurisprudence',[92] the Chamber concluded that

> it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did.[93]

However, the Trial Chamber also found that it is not justifiable to convict an accused of more than one offence arising from the same facts where

> (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.[94]

With regard to the crimes contained in the *Statute of the ICTR*, the Trial Chamber found that genocide, crimes against humanity and violations of common article 3 of the *Geneva Conventions* are provisions which protect different interests and are not coextensive. Therefore cumulative convictions were found to be acceptable.[95]

The standard adopted in this case provides three alternatives that allow for the imposition of cumulative convictions. The first two alternatives were essentially adopted in the *Kupreskic* decision.[96] However, in *Akayesu* the requirements of the test are in the alternative, whereas in *Kupreskic* the 'protection of values' aspect of the test is auxiliary to the 'same elements' component of the test. Also, the *Akayesu* judgment articulates a third alternative by adding that it is acceptable to convict the accused of two offences in relation to the same set of facts where conviction for both offences is necessary to describe fully the conduct of the accused. Therefore the test adopted in *Akayesu* is much broader than the *Kupreskic* test adopted by the ICTY. The *Akayesu* judgment fails to justify the adoption of such a liberal standard, citing only the vague notion of 'national and international law and jurisprudence.'[97] Although the first two alternatives are articulated in national and international jurisprudence, it is difficult to ascertain the source of the third alternative. The adoption of such a broad test in *Akayesu* might not, therefore, satisfy the principles of legality.

Certain views expressed by the Trial Chamber in *Akayesu* seem to conflict. It is acknowledged in the judgment that the offences of genocide, crimes against humanity and war crimes have different elements and are intended to protect different interests, but that these crimes are never 'co-extensive' in relation to the same set of facts.[98] An attempt to justify the recording of more than one offence, on the basis that doing so reflects the crimes that an accused has committed, fails to consider the prejudice caused to the accused by the imposition of double convictions, such as the availability of early release or the application of 'habitual offender' statutes in cases of future convictions.

It is also difficult to reconcile the Chamber's position that 'genocide may be considered the gravest crime'[99] with its approval of cumulative convictions based on the same facts. Further, if genocide is considered the gravest crime (the position adopted by subsequent ICTR judgments), this necessarily implies that, with regard to the same set of facts, crimes against humanity and war crimes are *lex generalis*, or lower offences, thereby precluding the adoption of double or even triple convictions.

C Kayishema Case

In *Kayishema* the Trial Chamber of the ICTR endorsed the first two elements of the *Akayesu* test relating to concurrence of crimes, and found that the other elements are only applicable where offences have differing elements, or where the laws in question protect differing social interests.[100] However, the application of the test produced different results from those in *Akayesu*.

In *Kayishema* the accused was charged cumulatively with, inter alia, genocide, crimes against humanity (extermination) and crimes against humanity (murder). These charges were based on the same conduct.[101] All three crimes were committed in the territory of Rwanda during the month of April 1994, where hundreds of men, women and children were killed and a large number of persons wounded.[102]

In its judgment the Trial Chamber ruled that the cumulative charges in this case were 'improper' and 'untenable in law'.[103] In so ruling, the Trial Chamber found that the criminal elements required to prove genocide, extermination and murder in this particular case were the same, and that the evidence used to prove the three crimes was also the same.[104] The Trial Chamber held that the counts of extermination and murder (brought as crimes against humanity) were 'subsumed fully' by the counts brought under article 2 in relation to genocide.[105] Consequently, both of the accused were found not guilty of the counts brought under article 3 for crimes against humanity.[106]

The majority in *Kayishema* declined to follow the third alternative in the *Akayesu* test that allows cumulative convictions for the purposes of fully describing the actions of the accused. This position was probably adopted in recognition of the fact that this third alternative might not comply with the principles of legality. Finally, the ruling that charges brought as crimes against humanity were fully subsumed by the counts of genocide brought under article 2 is also consonant with the hierarchy of crimes discussed earlier. The reasoning adopted by the Trial Chamber represents a clear understanding of the relationship between genocide, crimes against humanity and war crimes. Unfortunately, this reasoning was not followed in the subsequent jurisprudence of the ICTR, nor that of the ICTY.

Judge Khan dissented on the issue of cumulative charging and convictions in *Kayishema*. His Honour noted that the jurisprudence of Rwandan national courts and the views of legal commentators on the issue of concurrence are mixed.[107] Notwithstanding the perceived lack of uniformity, Judge Khan relied on the jurisprudence of the ICTY on the issue and affirmed the ICTY's emphasis on the 'overlap of the accused's *culpable conduct*', and not the overlapping elements of the cumulatively charged crimes.[108] His Honour noted that:

> What must be punished is culpable conduct; this principle applies to situations where the conduct offends two or more crimes, whether or not the factual situation also satisfies the distinct elements of the two or more crimes, as proven.[109]

As to the issue of cumulative charging, his Honour suggested that:

> At the start of trial it was too early to assess concurrence. Whether the crimes *as proved* suffer from concurrence is a question that is best determined after a trial chamber has accepted or rejected the evidence adduced – only then will a chamber be fully seized of the culpable conduct and the elements applicable to the charges in question.[110]

Thus, once the prosecution has been permitted to bring charges that may or may not overlap, the Trial Chamber is obligated to address the criminal responsibility on each charge.[111] This is particularly important because the offences of genocide and crimes against humanity 'are intended to punish different evils and to protect different social interests.'[112]

Judge Khan stressed that whilst the purpose of the doctrine of *concours d'infractions* is to protect the accused from prejudice where the same facts support a conviction for more than one crime, any real prejudice could only arise from the length of the sentence imposed, rather than the pronouncement of multiple convictions by the Trial Chamber.[113] As a result, his Honour found that no prejudice to the accused resulted from the application of this approach to cumulative charging and convictions.[114]

In conclusion his Honour stated that his approach to the issue (which is also the approach adopted by the ICTY)

> properly avoids entering into the legal quagmire of overlapping acts, elements and social interests at the stage of conviction. Rather, it concentrates upon the criminal conduct at the stage of sentencing. In doing so, it ensures that the accused's culpable conduct is reflected in its totality and avoids prejudice through concurrent sentencing.[115]

Based on this reasoning, his Honour would have found both of the accused guilty under each count of genocide, murder and extermination, despite the fact that these crimes 'suffer from *concours d'infractions*.'[116] Interestingly, and in departure from the ICTR's traditional view of genocide as the most severe crime, Judge Khan would have ordered sentences of equal length for both genocide and crimes against humanity, to be served concurrently by both of the accused.[117]

Unlike the majority in *Kayishema*, Judge Khan continued to adhere to the third alternative of imposing cumulative convictions where necessary fully to describe the accused's actions (as articulated in *Akayesu*). However, like the Trial Chamber in *Akayesu*, his Honour failed to explain the sources for the inclusion of this alternative. Furthermore Judge Khan's finding that the accused would suffer no prejudice failed to consider other possibilities for prejudice, such as the availability of early release or impeachment in future trials.[118] Finally, his Honour's approach to the principle of double jeopardy fails to acknowledge that the concept is not concerned solely with successive trials, but also with multiple punishment for the same offence at one or more trials.[119]

Judge Khan's Separate and Dissenting Opinion was affirmed and followed in *Rutaganda*,[120] as well as in *Musema*. [121] Therefore this opinion, combined with the *Akayesu* Judgment, reflects the prevailing view on the issue of cumulative charges and convictions at the ICTR.

D Celebici Case

Before the Appeals Chamber decision in *Prosecutor v Delalic (Appeals Chamber Judgment)* ('*Celebici*'),[122] both the ICTY and the ICTR Trial Chambers had dealt with the issue of *concursus delictorium* at various levels of proceedings.[123] The jurisprudence of the Tribunals revealed a variety of approaches to the issue which were, in many cases, inconsistent with one another.

In *Celebici* the indictment charged the accused, Delalic, Mucic, Delic and Landžo, with a total of 49 counts under articles 2 and 3 of the *Statute of the ICTY*.[124] It was alleged that in 1992 Bosnian Muslim and Bosnian Croat forces took control of villages containing predominantly Bosnian Serbs in and around the Konjic municipality of central Bosnia and Herzegovina.[125] Those detained during these operations were held in the Celebici prison camp where they were tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhuman treatment.[126] On 16 November 1998 the Trial Chamber found three of the accused, Mucic, Delic and Landžo, guilty of both grave breaches of the *Geneva Conventions* and violations of laws or customs of war based on the same facts. Delalic was found not guilty of all charges.[127]

On appeal, the defence argued that the convictions imposed by the Trial Chamber violated the US Supreme Court's *Blockburger* standard. It argued against the imposition of multiple convictions for the same act,[128] based on the judgments in *Kupreskic* and *Ball v United States*.[129]

The prosecution relied on the decision in *Tadic*, which permits cumulative charging and conviction where there is *idéal concurrence*; that is, where an act 'contravenes more than one provision of the criminal law'.[130] The prosecution also relied on the *Akayesu* judgment, which upheld the finding of cumulative convictions in certain circumstances. [131]

On the issue of cumulative charging, the Appeals Chamber held that:

> Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will

> be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.[132]

With respect to the issue of cumulative convictions based on the same facts, the Appeals Chamber examined the previous jurisprudence of the ICTY and selected national jurisdictions, as well as the relevant provisions of the *Statute of the ICTY*.[133] The Appeals Chamber noted that the jurisprudence of the ICTY reveals that multiple convictions based on the same facts have 'sometimes been upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase.'[134] For example, in *Tadic*, the Appeals Chamber stated that it had overturned the acquittal of Tadic on all relevant article 2 charges and on four cumulatively charged counts,[135] even though all of the article 2 counts related to conduct of which the accused had already been convicted under articles 3 or 5. Thus Tadic was cumulatively convicted with respect to the same conduct. In spite of this, the issue of multiple convictions was not addressed in that judgment. However, the Appeals Chamber in *Tadic* took into account the nature of the convictions when it ordered that the sentences imposed be served concurrently.[136]

The approaches of German and Zambian law to the issue of cumulative convictions were examined in *Celebici*.[137] The Appeals Chamber also considered the US *Blockburger* standard,[138] as well as the jurisprudence of the US Military Tribunal established pursuant to *Allied Control Council Law Number 10*, and, in particular, the *Trial of Josef Alstötter*.[139] Having considered the different approaches of both Tribunals and other national courts, the Appeals Chamber held that:

> Reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.[140]

Further, the Appeals Chamber held that in circumstances in which the above test is not satisfied

> the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[141]

The Appeals Chamber distinguished between *Geneva Convention IV*, which safeguards 'protected persons', and common article 3 of the *Geneva Conventions*, which protects 'any individual not taking part in the hostilities'.[142] It concluded that the coverage provided under common article 3 is 'broader than that envisioned by *Geneva Convention IV* incorporated into article 2 of the *Statute of the ICTY*, under which "protected person" status is accorded only in specially defined and limited circumstances'.[143] In other words, the Appeals Chamber found article 2 of the *Statute of the ICTY* to be more specific than common article 3 of the *Geneva Conventions*.[144]

The Appeals Chamber proceeded to examine four pairs of double convictions: 'wilful killing' under article 2 and 'murder' under article 3; 'wilfully causing great suffering or serious injury to body or health' under article 2, and 'cruel treatment' under article 3; 'torture' under article 2, and 'torture' under article 3; and 'inhuman treatment' under article 2, and 'cruel treatment' under article 3.[145] The analysis of the first pair of double convictions is illustrative of the majority's approach. The Appeals Chamber stated that:

> The definition of wilful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities. However, the definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of wilful killing under Article 2. Therefore, the first prong of the test is not satisfied, and it is necessary to apply the second prong. Because wilful killing under Article 2

> contains an additional element and therefore more specifically applies to the situation at hand, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed.[146]

Applying similar reasoning to the other pairs of double convictions imposed by the Trial Chamber, only article 2 convictions were upheld by the Appeals Chamber, while article 3 convictions were dismissed.

The *Celebici* judgment also considered the impact of cumulative convictions on sentencing.[147] It was noted that the goal of sentencing must be to 'ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender.'[148] In light of these guidelines, the Appeals Chamber stated that the matter of sentencing was within the discretion of the Trial Chamber and remanded the issue[149] with the instruction that, in light of the quashed convictions, the sentences imposed upon the accused in relation to the remaining convictions should be adjusted.[150]

In their Separate and Dissenting Opinion, Judges Hunt and Bennouna agreed with the majority's ruling that cumulative charges are generally permitted.[151] Their Honours stressed that the fundamental consideration raised by the issue of cumulative charging is that it is 'necessary to avoid any prejudice being caused to an accused by being penalised more than once in relation to the same conduct.'[152] Judges Hunt and Bennouna did not find any such prejudice with regard to cumulative charging in this case.[153]

On the issue of cumulative convictions, the Separate and Dissenting Opinion is consistent with the majority view that for 'reasons of fairness to the accused' cumulative convictions should not be allowed when offences are not 'genuinely distinct'.[154] The judges found that the accused could suffer a 'very real risk' of prejudice to their rights if convicted cumulatively.[155] Such prejudice would include the stigmatisation associated with being convicted of a crime, the impact of the number of convictions on the availability of early release in the state enforcing the sentence, the potential for cumulative convictions to lead to increased sentences for the convicted person, and the application of 'habitual offender' laws in the event of subsequent convictions in another jurisdiction.[156]

The major point of difference between the Separate and Dissenting Opinion and the majority judgment was in the application of the 'different elements' test expounded by the majority.[157] Judges Hunt and Bennouna argued that the purpose of applying the test is to 'determine whether the *conduct* of the accused genuinely encompasses more than one crime.'[158] The focus of the inquiry should not, as in the majority opinion, be on 'legal prerequisites or contextual elements which do not have a bearing on the accused's conduct'.[159] Rather, it should focus on the 'substantive elements which relate to an accused's conduct, including their mental state.'[160] Therefore, in the opinion of the dissenting judges, the proper application of the 'different elements' test would take into account only those elements relating to the conduct and mental state of the accused.[161]

Judges Hunt and Bennouna expressed agreement with the majority proposition that

> when a choice must be made between cumulatively charged offences, that choice should be made by reference to specificity, but only in the sense that the crime which more specifically describes *what the accused actually did* in the circumstances of the particular case should be selected.[162]

This choice should be made in consideration of 'the evidence given in relation to the crimes charged, in order to describe most accurately the offence that the accused committed and to arrive to the *closest* fit between the conduct and the provision violated.'[163] Where it is still unclear which offence is more appropriate, the Separate and Dissenting Opinion notes that consideration of the legal prerequisites would then be required in order to determine which offence provides the most accurate description of the accused's conduct.[164] Interestingly, Judges Hunt and Bennouna rejected the majority's finding of a 'gradation of specificity among the Articles of the Statute'.[165]

The dissenting judges proceeded to apply the 'different elements' test to the pairs of double convictions presented in the case. The only pair of convictions in which the judges identified a material difference between the elements was the offence of 'wilfully causing great suffering or serious injury to body or health under Article 2 and that of cruel treatment under Article 3.'[166] They noted that:

> The additional element is that cruel treatment may be not only an act or omission which causes serious mental or physical suffering or injury but it may also be characterised as constituting a serious attack on human dignity. The slightly different focus of the other offence is on the great suffering or serious physical injury caused by the relevant acts.[167]

With respect to the offences of inhuman treatment and cruel treatment, the dissenting judges held that:

> The offence of inhuman treatment has been described as an umbrella provision which encompasses various conduct which contravenes the fundamental principle of humane treatment. As cruel treatment under Article 3 is one of the varieties of conduct embraced by inhuman treatment, it may be regarded as more specific and therefore to some degree a more specific and accurate description of what the accused did, and may for that reason be preferred in selecting between Counts 44 and 45 against Mucic and Counts 42 and 43 against Delic. The inflexible majority approach produces the contrary conclusion, that the offence of inhuman treatment, being the Article 2 offence, should be upheld.[168]

Applying this reasoning to the relationship between the offences of murder, wilful killing and torture under both articles 2 and 3, the dissenting judges reached the same outcome as the majority; namely that only article 2 convictions could be upheld.[169]

The Separate and Dissenting Opinion appropriately addresses the issue of cumulative convictions by focussing on the conduct of the accused, rather than the legal elements of the offences in question. After all, wrongful conduct is what criminal law in all legal systems is designed to address and punish.

The test adopted by the dissenting judges also precludes the inappropriate entry of double convictions in charges under articles 2 and 5, or articles 3 and 5. As the dissenting judges recognised, the mechanical application of the test as envisioned by the majority would result, for example, in the entry of convictions under both articles 2 and 5, or articles 3 and 5, for a single act of rape.[170] However, assuming a vertical relationship between the three crimes, the single act of rape cannot be simultaneously a war crime under article 2 and a crime against humanity under article 5. The act was either committed as part of a 'widespread or systematic' attack on any 'civilian' population as part of a state policy, or it was not. If the elements required for the commission of rape as a crime against humanity are present, the Tribunal may properly enter a conviction on this charge. However, the Tribunal may not then proceed to enter another conviction for war crimes based on the same facts, since the war crimes charge is a lesser form of the offence of crimes against humanity. Further, the majority approach fails to consider the implications that flow from the mechanical application of this test, which in turn results in unsustainable double convictions based on a single material element. Although the test as applied 'works' in the case of cumulative charges based on articles 2 and 3, it fails if different provisions of the *Statute of the ICTY* are involved. This problem arose in *Jelisic*, discussed below.

Finally, the test adopted by both the majority and the dissenting judges is essentially founded on the *Blockburger* standard and embraces the common law approach to cumulative convictions. This approach is certainly geared towards expediting proceedings at the Tribunal by removing any future challenges to the issue of cumulative charging. However, the approach more consistent with principles of legality would be the consideration of the criminal provisions of the former Yugoslavia (or Rwanda) at the time of the commission of the offence(s).[171] The second available method (less consistent with the principles of legality), would apply the general principles of law of similar legal systems (namely European legal systems) to Yugoslavia. Under the latter approach, as discussed earlier, the Tribunal cannot find the accused responsible for more than one crime. The adoption of a common law standard to deal with the question of cumulative conviction is inappropriate because it violates the principle of *nullum crimen sine lege*.

E Jelisic Case

The indictment in *Jelisic* alleged that from 7 May 1992 to July 1992, Serb forces were engaged in the surroundings of Brcko in Bosnia and Herzegovina. They allegedly confined hundreds of Muslim and Croat men, and a few women, at a Luka camp in inhumane conditions and under armed guard. The detainees were systematically killed. Almost every day during that time the accused, Jelisic, entered the main hangar of Luka and interrogated, beat and often killed detainees.[172] Jelisic was charged with genocide.[173]

The Trial Chamber acquitted the accused of genocide, ruling that the prosecutor had failed to prove beyond a reasonable doubt that Jelisic acted with the required intent to destroy, in whole or in part, a national, ethnic or religious group.[174] However, the Trial Chamber was satisfied that the accused's guilty plea on the counts of crimes against humanity and violations of the laws or customs of war was made 'voluntarily', was not equivocal, and 'that there [was] a sufficient factual basis for the crime and the accused's participation in it'.[175] Based on these findings the Trial Chamber held that the accused was guilty of all remaining counts in the indictment. The accused was sentenced to 40 years imprisonment.[176]

Allegations of causing bodily harm and separate allegations of murder had been brought against the accused. The allegations were charged both as violations of laws and customs of war (article 3) and as crimes against humanity (article 5).[177] At the appellate level, the defence invited the Appeals Chamber to quash the lesser of each pair of offences for which Jelisic was sentenced,[178] relying on the reasoning in the *Celebici Trial Judgment*.[179] However, the Appeals Chamber followed the reasoning of the majority of the Appeals Chamber in *Celebici* and affirmed the cumulative convictions for violations of laws or customs of war (charged under article 3 of the *Statute of the ICTY*) and for crimes against humanity (charged under article 5). The Appeals Chamber noted that:

> Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other.[180]

The decision of the Appeals Chamber in *Jelisic* clearly follows the mechanical approach of the *Delalic* majority to the issue of cumulative convictions. The concerns raised in obiter by Judges Hunt and Bennouna in *Celebici* (concerning cumulative convictions under articles 3 and 5) became manifest in *Jelisic*, and the accused suffered prejudice as a result of the mechanical application of the reasoning adopted by the *Celebici* majority.

F Krstic Case

The decision in *Prosecutor v Krstic*[181] was handed down by the ICTY on 2 August 2001. General Krstic was the first accused to be found guilty of genocide before the ICTY. He was convicted of this crime for his role in the massacres that occurred in the town of Srebrenica in 1995.

In addition to being charged with genocide under article 4 of the *Statute of the ICTY*, General Krstic was also charged with murder under article 5(a), extermination under article 5(b), murder under article 3 and persecution under article 5 (h),[182] all of which were based on the same facts, relating to the takeover of Srebrenica.

As in *Jelisic*, the *Krstic* judgment adopted the test in *Celebici* on the issue of cumulative convictions.[183] The Trial Chamber analysed the cumulatively charged offences, characterising each criminal act by having regard 'to offences charged under different Articles of the Statute, and then to different offences charged under Article 5.'[184] The Trial Chamber in *Krstic* applied the *Celebici* test to determine firstly, 'whether convictions for the offence of murder, under both Articles 3 and 5, and persecutions (Article 5(h)), committed through murder, are permissible',[185] and secondly, 'whether convictions under both persecutions (Article 5(h)), committed through other inhumane acts (forcible transfer), and other inhumane acts (Article 5(i)), committed through forcible transfer, may be used to punish the same criminal conduct.'[186] With respect to the first point the Trial Chamber entered convictions for murder under article 3, as well as for 'persecution, murders, terrorising the civilian population, destruction of personal property, and cruel and inhumane treatment from 10–13 July in Potocari'.[187]

The Trial Chamber also applied the *Celebici* test to the second category of murders charged against General Krstic, namely the killings that occurred between 13 to19 July 1995. The Trial Chamber noted that:

> It has been decided that these acts fulfil the requirements of genocide sanctioned by Article 4, as well as murder under Article 3, murder under Article 5, extermination and persecutions under Article 5.[188]

As a result the *Celebici* test was applicable only to the extent that 'the offence of persecutions is perpetrated through

murders.'[189]

The Trial Chamber in *Krstic* held that, based on the same conduct,

> it is permissible to enter cumulative convictions under both Articles 3 and 4 and under both Articles 3 and 5. But it is not permissible to enter cumulative convictions based on the executions under both Articles 4 and 5. The Article 4 offence, as the most specific offence, is to be preferred.[190]

Based on these findings, the Trial Chamber found Krstic guilty of genocide, persecution and murder, and imposed a single sentence of 46 years in prison.[191] Appeals against the decision were filed in August 2001.

While the *Krstic* judgment carefully considers the issues of cumulative charging and convictions, the judges fail to consider the fact that some of the 7000 people killed in the June 1995 massacres were civilians, and others were combatants. Although this does not change the material element of the crime, the law that applies to the killing of civilians differs from that which applies to the killing of combatants. This is a legal distinction between the grave breaches, and violations of laws or customs of war. The fact that a person orders the killing of combatants in a conflict of an international character (which constitutes a 'grave breach' of the *Geneva Conventions*), while some of the victims are deemed civilians or not part of the conflict of an international character, does not render the order to kill the group two separate crimes.

Similarly, Krstic's criminal conduct could be deemed a war crime either as a grave breach of the *Geneva Conventions* or a violation of the laws or customs of war. If committed on a widespread and systematic basis, such conduct may become a crime against humanity, and, if it were found that the killing was done with intent to exterminate, in whole or in part, an ethnic, racial or religious group, the acts may be deemed to be genocide. For all of these charges, the criminal conduct remains the same. What changes is the identity of the victims, or the intent of the perpetrator. In light of these considerations, it is difficult to reconcile the reasoning of the Trial Chamber in allowing double convictions under articles 3 and 4, and 3 and 5, but not under articles 4 and 5.[192]

VI CONCURSUS DELICTORIUM AND THE ICC STATUTE

The *Statute of the ICC* does not address the issue of *concursus delictorium*. The *Statute of the ICC* and the *Finalised Draft Text of the Elements of Crimes*[193] also fail to address the overlap between the elements of genocide, crimes against humanity and war crimes.[194] In addition, the *Statute of the ICC* lacks a provision on the material element, or *actus reus*. This will aggravate the problem once the judges are presented with the issues currently arising at the ICTY and ICTR.[195]

Furthermore, articles 77 to 79 of the *Statute of the ICC*, which deal with penalties, do not provide guidance on the issues arising out of a conviction for multiple crimes for the same conduct. Since the *Statute of the ICC* does not address the problem of overlapping crimes, it is theoretically possible that the same conduct will not only give rise to a conviction for more than one crime, but also that this conviction will give rise to multiple penalties.[196]

VII CONCLUSION

The ICTY and the ICTR have both essentially adopted the common law's pragmatic approach to cumulative charging. This approach gives the prosecutor flexibility in presenting multiple charges for the same conduct, even though the underlying elements of the charges may differ. The result is that the problem of specificity of charges is postponed to the sentencing stage of the proceedings.

The adoption of the common law approach to the issue of cumulative charging is not wholly consistent with the principles of legality. First, the principles *nullum crimen sine lege* and *nullum poene sine lege* require examining the criminal law of Yugoslavia and Rwanda in order to determine how those legal systems deal with the question of cumulative charging. It is submitted that this would be the most appropriate approach for the ICTY and ICTR to follow, since it would ensure that the accused encounters a pre-existing law of which he or she has notice. The second

approach, which corresponds less with the principles of legality, is to apply the general principles of law of legal systems similar to those of Yugoslavia and Rwanda (European civil legal systems). The civil law approach to the issue of cumulative charging, which essentially requires the prosecutor to charge the most appropriate offence based on the facts of the case, is more consistent with both the Yugoslavian and Rwandan criminal justice systems.

With respect to cumulative convictions, the approach adopted by the *Celebici* Appeals Chamber requires that in a case where the same set of facts is regulated by two provisions, where one 'contains an additional materially distinct element ... a conviction should be entered under that provision.'[197] The *Celebici* Appeals Chamber concluded that a person cannot be found guilty of both grave breaches of the *Geneva Conventions* and violations of the laws and customs of war for the same criminal conduct. However, the subsequent judgments of the ICTY have failed to follow the same logic, holding that a person can be found guilty of both these crimes and of genocide for the same criminal conduct. This is due to the heavy emphasis the *Celebici* majority places on legal prerequisites or contextual elements which do not have a bearing on the material element (the accused's actual conduct). The logic that the Appeals Chamber applied in *Celebici* — namely that for the same criminal conduct an accused cannot be found guilty of violations of both articles 2 and 3 — should apply equally to articles 4 and 5 of the *Statute of the ICTY.*

As was noted earlier, the starting point in the analysis of an accused's criminal conduct is the consideration of facts that, if proved, may establish the material element of a crime. It is possible for the same person to engage in separate criminal conduct that satisfies all three crimes in the jurisdiction of the ICTY and ICTR. However, where a defendant has committed 'criminal conduct' to which any of these provisions can apply, the cumulation of criminal convictions and sentences for identical conduct violates the principle of double jeopardy.

Furthermore the emphasis on criminal conduct is more consistent with the principles of legality as applied in the ICTY and ICTR because of its similarity to the civil law approach to the issue. This approach requires that, in cases where the same facts can constitute the basis for more than one crime (*concours idéal d'infraction*), a conviction be entered for only those specific crimes which the tribunal ultimately finds have been committed. Where this is factually impossible, the Tribunal is to decide which of the crimes is to apply, depending on which social interest to is be protected.

It is difficult to reconcile the jurisprudence of the ICTR with that of the ICTY on the issues of cumulative convictions and the ranking of crimes. Unlike the ICTY, which does not expressly recognise a hierarchy of crimes, the judgments of the ICTR clearly suggest the existence of a hierarchy which considers genocide 'the crime of crimes', followed by crimes against humanity, and then war crimes. In addition to creating questionable jurisprudence, the differences in these two approaches prevents consistency in the development of international criminal law.

If such a hierarchy is acknowledged and utilised by the ICTR, it follows that the crimes within the jurisdiction of the Tribunal are vertically related. Therefore it is inappropriate to enter cumulative convictions based on the same facts for both the more severe and less severe offence, since this practice would violate the principle of double jeopardy. Thus finding an accused guilty of a war crime as well as genocide, based on the same physical act, is a violation of double jeopardy, even if the convictions are entered in the course of a single trial. Finally, the entry of two or more convictions based on the same conduct also entails collateral consequences for the accused, including the application of 'habitual offender' statutes in the event of a future conviction, the use of the conviction in impeachment, or the availability of early release.

In light of this, one would have hoped that the drafters of the *Statute of the ICC* and the *Elements of Crimes* would have resolved the issue of *concursus delictorium*, especially considering the extensive discussions of this issue at the ICTY and ICTR. This has not happened. Consequently it is highly likely that the judges of the ICC will have to confront the same problems with respect to *concursus delictorum* as their predecessors at ICTY and ICTR.

It can only be hoped that in future, the ICTY and ICTR will develop a body of consistent jurisprudence that can be referred to and applied by the ICC. A person who stands accused before these international criminal tribunals should be entitled to some fundamental guarantees that cannot be modified or abandoned in our eagerness to see justice done to the perpetrators of international crimes.

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[1] *United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committee in the Territory of the Former Yugoslavia*, SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/Res/827 (1993), 32 ILM 1203 (1993) ('*Statute of the ICTY*').

[2] *United Nations Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda*, SC Res 955, 49 UN SCOR (3453rd mtg), UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) ('*Statute of the ICTR*').

[3] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999 (1998) (enters into force 1 July 2002) ('*Statute of the ICC*').

[4] For a definition of genocide, see *Statute of the ICTR*, art 2; *Statute of the ICTY*, art 4; *Statute of the ICC*, art 6.

[5] For a definition of crimes against humanity, see *Statute of the ICTR*, art 3; *Statute of the ICTY*, art 5; *Statute of the ICC*, art 7.

[6] There are two categories of war crimes stemming from the *Geneva Conventions* of 1949: the first category, referred to as 'grave breaches', applies to conflicts of an international character; the second category, referred to as 'violations of laws or customs of war', applies to conflicts of a non-international character: *Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field* (I), opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (II), opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War* (III), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (IV), opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3, 16 ILM 1391 (1977) (entered into force 7 December 1978) ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609, 16 ILM 1422 (1977) (entered into force 7 December 1978) ('*Additional Protocol II*'). The definition of war crimes in both the *Statute of the ICTY* and the *Statute of the ICC* incorporates grave breaches of the *Geneva Conventions* as well as violations of the laws or customs of war. In the *Statute of the ICTR* the definition is limited to violations of the laws or customs of war.

[7] M Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework' in M Cherif Bassiouni (ed), *International Criminal Law* (2nd ed, 1999) vol 1, 3, 62–73.

[8] M Cherif Bassiouni, 'The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities' (1998) 8 *Transnational Law and Contemporary Problems* 199, 201–2.

[9] See generally M Cherif Bassiouni, *Substantive Criminal Law* (1978) 500–12.

[10] Ibid 506–7. See also John Decker, *Illinois Criminal Law: A Survey of Crimes and Defenses* (3rd ed, 2000) vol 1, [1.19].

[11] Decker, above n 10, [1.19].

[12] For an example of approaches to cumulative sentencing in the United States, see Decker, above n 10, [1.19]–[1.25].

[13] The principles of legality are accepted in 'all the world's major legal systems': M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd ed, 1999) 127. Bassiouni states that (at 124):

The purposes of the 'principles of legality' are to enhance the certainty of the law, provide justice and fairness for the accused, achieve the effective fulfillment of the deterrent function of the criminal sanction, prevent abuse of power and strengthen the application of the 'Rule of Law'.

According to the principles of legality, an offence must have been recognised under either national or international law at the time it was committed and the defendant must have sufficient notice in order to guard against 'arbitrary judicial action': Allison Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 *Virginia Law Review* 415, 432.

[14] See generally Jean Pradel, *Droit pénal* (1995); Jean Pradel, *Droit pénal comparé* (1995); and Gaston Stefani, Georges Levasseur and Bernard Bouloc, *Droit pénal général* (15th ed, 1995).

[15] Ibid.

[16] Ibid.

[17] See M Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 235, 288, where Bassiouni distinguishes between double jeopardy and *non bis in idem* as follows:

Double jeopardy is usually held to apply within a given legal system and not as between different legal systems of separate sovereignties. *Non bis in idem* is a right that protects the person from repeated prosecution or punishment for the same conduct, irrespective of the prosecuting system.

[18] Ibid.

[19] See M Cherif Bassiouni, *Substantive Criminal Law*, above n 9, 501–2. See also *Ex parte Lange,* 85 US (18 Wall) 163, 169 (1874); *United States v Benz,* 282 US 304, 307–9 (1931); *United States v Sacco,* 367 F 2d 368, 369 (2nd Cir, 1966); *Kennedy v United States,* 330 F 2d 26, 27–9 (9th Cir, 1964).

[20] See Decker, above n 10, [1.21].

[21] See Danner, above n 13, 437–8; M Cherif Bassiouni, *Substantive Criminal Law*, above n 9, 96.

[22] Edward Wise, 'General Rules of Criminal Law' (1997) 25 *Denver Journal of International Law and Policy* 313, 315–16.

[23] See *Statute of the ICTY*, art 24(2) and *Statute of the ICTR*, art 23(2), which state that the prime consideration in sentencing is that 'the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.' The *Statute of the ICC*, art 78(1) contains an analogous provision: the court shall 'take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.' Thus the *Statute of the ICC* also fails to provide any system for ranking genocide, crimes against humanity, and war crimes. Therefore, the ICC is likely to face the same problem as the ICTY and the ICTR. For a more comprehensive discussion of these issues, see Danner, above n 13.

[24] This problem is also likely to occur at the ICC.

[25] See M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 *Law and Contemporary Problems* 63, 68. See also Christos Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976) 22.

[26] Rozakis, above n 25, 22.

[27] Bassiouni, 'The Sources and Content of International Criminal Law', above n 7, 42.

[28] Ibid 95–100.

[29] Ibid 97.

[30] Ibid 97–8. Note that Bassiouni's classification of 'war crimes' includes 'grave breaches' of the *Geneva Conventions* and *Additional Protocol I*, but excludes 'breaches', as well as violations of common article 3 in the *Geneva Conventions* and *Additional Protocol II*: at 98.

[31] Aggression is defined as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations': *Definition of Aggression 1974*, GA Res 3314, 29 UN GAOR (2319th plen mtg), UN Doc A/Res/3314 (1974) annex, art 1. Aggression is ranked the highest in the category of international crimes. For a discussion of the crime of aggression, see M Cherif Bassiouni and Benjamin Ferencz, 'The Crime against Peace' in Bassiouni (ed), *International Criminal Law* (2nd ed, 1999) vol 1, 313.

[32] Bassiouni, 'Sources and Content of International Criminal Law', above n 7, 58.

[33] Bassiouni, 'The Normative Framework of International Humanitarian Law', above n 8, 212. On the connection between crimes against humanity and war crimes, see Bing Bing Jia, 'The Differing Concepts of War Crimes and Crimes against Humanity' in Guy Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law* (1999) 243. See also Theodor Meron, *War Crimes Law Comes of Age: Essays* (1998) 220–4.

[34] Bassiouni, 'The Normative Framework of International Humanitarian Law', above n 8, 210.

[35] Ibid 213.

[36] Bassiouni, *Crimes against Humanity in International Criminal Law*, above n 13 , 72.

[37] See United Nations Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/2/Add.2 (14 April 1998), as extracted in Bassiouni, 'The Normative Framework of International Humanitarian Law', above n 8, 254.

[38] *Prosecutor v Erdemovic (Appeals Chamber Judgment)*, Case No IT–96–22–A (7 October 1997) (Joint and Separate Opinion of Judge McDonald and Judge Vohrah) [20]–[25] ('*Erdemovic Appeal Judgment*'). But see *Erdemovic Appeal Judgment*, Case No IT–96–22–A

(7 October 1997) (Separate and Dissenting Opinion of Judge Li) [18]–[28].

[39] *Prosecutor v Tadic (Judgment in Sentencing Appeals)*, Case No IT–94–1–A and IT–94–1–Abis

(26 January 2000) [69] ('*Tadic*').

[40] See, eg, *Prosecutor v Furundzija (Appeals Chamber Judgment)*, Case No IT–95–17/1–A (21 July 2000) [240]–[243] ('*Furundzija Appeals Judgment*'); *Prosecutor v Krstic*, Case No IT–98–33 (2 August 2001) [700]; *Prosecutor v*

Kunarac (Trial Chamber Judgment), Case No IT–96–23–T (22 Feb 2000). See also *Prosecutor v Blaskic (Trial Chamber Judgment)*, Case No IT–95–14–T (3 March 2000) ('*Blaskic*'), which holds that, as of yet, there is no hierarchy of crimes for sentencing purposes at the ICTY. Further, because the facts supporting each count against the accused are generally similar and the charges against the accused arise from a single set of crimes committed in a given geographic region during a defined time frame, it is appropriate to impose a single sentence for all crimes of which the accused had been found guilty. See also *Prosecutor v Todorovic (Sentencing Judgment)*, Case No IT–95–9–T (31 July 2001), where the accused, Todorovic, pleaded guilty to one count of persecution as a crime against humanity. The Trial Chamber noted that persecution is the only crime in art 5 that requires a discriminatory intent and which may incorporate other crimes. Based on this finding, the Trial Chamber agreed with the Trial Chamber judgment in *Blaskic*, which held that the crime of persecution justifies a more severe penalty. The Trial Chamber imposed a sentence of 10 years imprisonment on the accused.

[41] *Tadic*, Case No IT–94–1–A and IT–94–1–Abis (26 January 2000) (Separate Opinion of Judge Cassesse) [16]–[17]; *Furundzija Appeals Judgment*, Case No IT–95–17/1–A (21 July 2000) (Declaration of Judge Vohrah) [11].

[42] See, eg, *Prosecutor v Musema (Judgment and Sentence)*, Case No ICTR–96–13–T (27 January 2000) [979]–[982] ('*Musema*'). See also the following cases expressing the same proposition: *Prosecutor v Rutaganda (Judgment and Sentence)*, Case No ICTR–96–3–T (6 December 1999) ('*Rutaganda*'); *Prosecutor v Kayishema and Ruzindana (Judgment and Sentence)*, Case No ICTR–95–1–T (21 May 1999), in which genocide is described as 'an offence of the most extreme gravity, an offence that shocks the conscience of humanity': at [9]; *Prosecutor v Kambanda (Judgment and Sentence)*, Case No ICTR–97–23–S (4 September 1998) [14]–[17] ('*Kambanda*').

[43] *Prosecutor v Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) ('*Kupreskic*').

[44] Ibid annex A [3]–[10].

[45] Ibid [637].

[46] Ibid [660]–[661]. See [661]–[665] for a discussion of the concepts of real and apparent concurrence.

[47] Ibid [722]; *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia* (adopted 11 February 1994 and subsequently amended), UN Doc IT/32/Rev.22 ('*Rules of Procedure and Evidence of the ICTY*').

[48] *Kupreskic*, Case No IT–95–16–T (14 January 2000) [724].

[49] Ibid.

[50] Ibid [727]. This paragraph also contains discussion on the issue of when the prosecutor should use alternative rather than cumulative charges.

[51] Ibid. Cf *Prosecutor v Kupreskic (Decision on Defence Challenges to the Form of the Indictment)*, Case No IT–95–16–PT (15 May 1998), where the Trial Chamber stated that 'the Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others.'

[52] *Kupreskic*, Case No IT–95–16–T (14 January 2000) [673]–[675].

[53] Ibid [673]. The Trial Chamber also noted that many defendants were convicted and sentenced for both war crimes and crimes against humanity based on the same acts at the International Military Tribunal at Nuremburg, as well as various military sittings in Nuremburg after World War II: at [675].

[54] Ibid [678]. With respect to this situation, the Trial Chamber noted at [678] that:

(a) [T]he Inter-American Court of Human Rights has repeatedly held that the 'forced disappearance of human beings is a multiple and continuous violation of many rights under the American Convention on Human Rights that the States Parties are obligated to respect and guarantee'. The Court rightly noted that the kidnapping of a person is contrary to Article 7 of the Convention, prolonged isolation and deprivation of communication is contrary to Article 5, while secret execution without trial followed by the concealment of the body is contrary to Article 4. In another case dealing with the illegal detention and subsequent killing of two persons by Colombian armed forces, the Court held that the respondent State had breached Article 7, laying down the right to personal liberty, and Article 4, providing for the right to life.

(b) Similarly, when applying Article 3 of the European Convention on Human Rights referred to below, the European Commission and Court have not ruled out the possibility of a differentiated characterisation of various actions. Thus in the *Greek* case the European Commission held that some actions of the respondent State constituted torture, while other actions amounted to inhuman treatment.

(c) Clearly, in these instances there exist distinct offences; that is, an accumulation of separate acts, each violative of a different provision. In civil law systems this situation is referred to as *concours réel d'infractions*. These offences may be grouped together into one general transaction on the condition that it is clear that the transaction consists of a cluster of offences.

[55] Ibid [679]. The Trial Chamber noted at [679] that 'the European Court of Human Rights has repeatedly held that "one and the same fact may fall foul of more than one provision of the Convention and Protocols".' In addition, the court referred to European Court of Human Rights cases: *Erkner and Hofauer v Austria* (1987) 117 Eur Court HR (ser A) 39, 66; *Poiss v Austria* (1987) 117 Eur Court HR (ser A) 84, 108; *Vendittelli v Italy* (1994) 293–A Eur Court HR (ser A) 3, 11.

[56] *Kupreskic*, Case No IT–95–16–T (14 January 2000) [680].

[57] 108 Mass 433, 434 (1871).

[58] *Kupreskic*, Case No IT–95–16–T (14 January 2000) [680].

[59] Ibid [681].

[60] 284 US 299 (1932).

[61] Ibid 304.

[62] *Kupreskic*, Case No IT–95–16–T (14 January 2000) [682].

[63] Ibid [683].

[64] Ibid.

[65] Ibid. The Trial Chamber noted the existence of a similar principle in common law systems (the doctrine of 'lesser included offences') and civil law systems (the principle of consumption). The Trial Chamber also acknowledged the existence of the principle in general international law, particularly in the case law of the European Commission and the European Court of Human Rights: at [687]–[692].

[66] *Kupreskic*, Case No IT–95–16–T (14 January 2000) [693].

[67] Ibid.

[68] Ibid [694] (emphasis in original). The Trial Chamber provided the following example at [694]:

Take the example of resort to prohibited weapons with genocidal intent. This would be contrary to both Article 3 and Article 4 of the Statute. Article 3 intends to impose upon belligerents the obligation to behave in a fair manner in the choice of arms and targets, thereby (i) sparing the enemy combatants unnecessary suffering and (ii) protecting the population from the use of inhumane weapons. By contrast, Article 4 primarily intends to protect groups from extermination. A breach of both provisions with a single act would then entail a double conviction.

[69] Ibid [695].

[70] Ibid [699] (emphasis in original).

[71] Ibid [700].

[72] Ibid.

[73] Ibid [704].

[74] Ibid.

[75] Ibid [705]–[710].

[76] Ibid [711]. These charges were presented in the alternative.

[77] Ibid [712].

[78] Ibid [822]–[824].

[79] Ibid.

[80] Ibid [831]–[833].

[81] Ibid.

[82] Ibid [713]. The judges noted that the Trial Chamber is bound by the provisions of the *Statute of the ICTY* and customary international law. The *Statute of the ICTY*, art 24(1) provides that the Trial Chamber should refer to the practice in the national courts of the former Yugoslavia when determining sentences. The Trail Chamber also noted that art 48 of the former *SFRY Criminal Code* held that where one action gives rise to several criminal offences,

the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments: at [714] (footnotes omitted).

[83] Ibid [718] (emphasis in original).

[84] *Prosecutor v Kupreskic (Appeals Chamber Judgment)*, Case No IT–95–16–A (23 October 2001). Following the Trial Chamber's judgment, both the accused and the prosecution appealed the holding concerning cumulative convictions. In light of the decisions in *Prosecutor v Delalic (Appeals Chamber Judgment)*, Case No IT–96–21–A (20 February 2001) and *Prosecutor v Jelisic (Appeals Chamber Judgment)*, Case No IT–95–10–A (5 July 2001) (both discussed below), the Appeals Chamber overturned the Trial Chamber's finding as to cumulative convictions and reversed the acquittals on counts 17 and 19. Since the prosecution had not sought an increase in the sentences imposed on the accused as a result of these reversals, the Appeals Chamber declined to address the issue of the potential impact on sentencing that the entry of cumulative convictions might have had in relation to counts 17 and 19: at [388].

[85] *Prosecutor v Akayesu (Trial Chamber Judgment)*, Case No ICTR–96–4–T (2 September 1998) ('*Akayesu*').

[86] Ibid [180].

[87] Ibid [181].

[88] Ibid 'Indictment' [12]–[23].

[89] See generally Bassiouni, 'Sources and Content of International Criminal Law', above n 7, 17.

[90] *Prosecutor v Tadic (Decision on Defense Motion on Form of the Indictment)*, Case No IT–94–1–T (14 November 1995) [10], cited in *Akayesu*, Case No ICTR–96–4–T (2 September 1998) [463].

[91] *Akayesu*, Case No ICTR–96–4–T (2 September 1998) [467].

[92] Ibid [468].

[93] Ibid.

[94] Ibid.

[95] Ibid [469]–[470].

[96] See *Kupreskic*, Case No IT–95–16–T (14 January 2000) [682] for a discussion of the first of these alternatives, where the offences contain different elements from each other. See [694] for a discussion of the second alternative, where the provisions creating the offences protect different interests.

[97] *Akayesu*, Case No ICTR–96–4–T (2 September 1998) [468].

[98] Ibid [469].

[99] Ibid [470]. The judgment fails to provide an explanation for considering genocide the gravest crime.

[100] *Prosecutor v Kayishema and Ruzindana*, Case No ICTR–95–1–T (21 May 1999) [627] ('*Kayishema*').

[101] Ibid [625].

[102] *Prosecutor v Kayishema (Indictment)*, Case No ICTR–95–1–I (29 April 1996) [28]–[29], [35]–[36].

[103] *Kayishema*, Case No ICTR–95–1–T (21 May 1999) [649].

[104] Ibid [637]–[644].

[105] Ibid [648].

[106] Ibid 'Verdict' [1].

[107] *Kayishema*, Case No ICTR–95–1–T (21 May 1999) (Separate and Dissenting Opinion of Judge Khan) [11].

[108] Ibid [13] (emphasis in original).

[109] Ibid.

[110] Ibid [28] (emphasis in original).

[111] Ibid [32].

[112] Ibid [32].

[113] Ibid [34].

[114] Ibid [37].

[115] Ibid [52].

[116] Ibid [53].

[117] Ibid [57].

[118] In the US legal system, for example, a previous conviction of the witness may, in certain circumstances, be used to impeach the testimony of the witness in a subsequent, related or unrelated trial. See *Federal Rules of Evidence* (US), art 609(a) which provides that:

For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonest or false statement, regardless of the punishment.

[119] See M Cherif Bassiouni, *Substantive Criminal Law*, above n 9, 509. See also *Ex parte Lange*, 85 US (18 Wall) 163, 169 (1874); *United States v Benz,* 282 US 304, 307–9 (1931); *United States v Sacco*, 367 F 2d 368, 369 (2nd Cir, 1966); *Kennedy v United States*, 330 F 2d 26, 27–9 (9th Cir, 1964).

[120] *Rutaganda*, Case No ICTR–96–3–T (6 December 1999) [117]–[119]:

[T]he Chamber holds that offences covered under the Statute — genocide, crimes against humanity and violations of Article 3 common to Geneva Conventions and of Additional Protocol II — have disparate ingredients and, especially, that their punishment is aimed at protecting discrete interests. As a result, multiple offences may be charged on the basis of the same acts, in order to capture the full extent of the crimes committed by an accused. ... Consequently, in light of the foregoing, the Chamber maintains that it is justified to convict an accused of two or more offences for the same act under certain circumstances and reiterates the above findings made in the *Akayesu Judgement.*

[121] *Musema*, Case No ICTR–96–13–T (27 January 2000) [296]:

This Chamber fully concurs with the dissenting opinion [of Judge Khan in *Rutaganda*] thus entered. It notes that this position, which endorses the principle of cumulative charges, also finds support in various decisions rendered by the ICTY.

[122] Case No IT–96–21–A (20 February 2001).

[123] See *Prosecutor v Kupreskic (Decision on Defence Challenges to Form of the Indictment)*, Case No IT–95–16–PT (15 May 1998): 'the Prosecutor may be justified in bringing cumulative charges when the Articles of the statute referred to are designated to protect different values and when each Article requires proof of a legal element not required by the others'. In *Prosecutor v Krnojelac (Decision on the Defence Preliminary Motion on the Form of the Indictment)*, Case No IT–97–25–PT (24 February 1999) [5]–[10] the Trial Chamber noted at [101] that the prosecution

must be allowed to frame charges within the one indictment on the basis that the tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event, in order to reflect the totality of the accused's conduct so that the punishment imposed will do the same.

It concluded that the same conduct can offend more than one of arts 2, 3 and 5, since they are each 'designed to protect different values, and ... each requires proof of a particular element which is not required by the others': at [8]. In *Prosecutor v Naletilic and Martinovic (Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment)*, Case No IT–98–34–PT (14 February 2001) [IIIB], the issue of cumulative charging was raised in the context of a preliminary objection in so far as it related to a new charge. The Trial Chamber noted that 'the fundamental harm to be guarded against by the prohibition on cumulative charges is to ensure that an accused is not punished more than once in respect to the same criminal act'. However, it warned that a strict prohibition on cumulative charging could interfere with the work of the prosecutor. The Trial Chamber asserted that:

As the Tribunal's case law develops, and the elements of each offence are clarified, it will become easier to identify overlap in particular charges prior to the trial, but at present, and certainly in this case, it is enough that permitting cumulative charging results in no substantial prejudice to the accused.

See also *Prosecutor v Kvocka (Decision on Defence Motions for Acquittal)*, Case No IT–98–30/1–T (15 December 2000), where the Trial Chamber found that:

Issues of cumulative charging are best decided at the end of the case. So long as the proof adduced by the Prosecution could satisfy a reasonable court beyond reasonable doubt that the elements of one of the allegedly cumulative charges had been satisfied, the case continues.

[124] *Prosecutor v Mucic, Delic, Landžo (Indictment)*, Case No IT–96–21 (21 March 1996).

[125] *Prosecutor v Mucic, Delic, Landžo (Trial Chamber Judgment)*, Case No IT–96–21–T (16 November 1998) Annex B [2] ('*Celebici Trial Judgment*').

[126] Ibid.

[127] *Celebici Trial Judgment,* Case No IT–96–21–T (16 November 1998) [1285]. The defendants Mucic and Landžo were convicted by the Trial Chamber of numerous crimes under arts 2 and 3 of the *Statute of the ICTY,* arising from the same facts.

[128] *Celebici*, Case No IT–96–21–A (20 February 2001) [393].

[129] 140 US 118 (1891).

[130] 'Prosecution Response to Supplementary Brief' [4.8], cited in *Celebici*, Case No IT–96–21–A (20 February 2001) [397].

[131] *Akayesu*, Case No ICTR–96–4–T (2 September 1998) [468].

[132] *Celebici*, Case No IT–96–21–A (20 February 2001) [400].

[133] Ibid [401]. The Appeals Chamber recalled the earlier proceedings in the *Celebici* case. There the Appeals Chamber had to decide whether Delic's complaint, that he was being charged throughout the indictment with two different crimes arising from one act or omission, justified granting the leave to appeal. In that decision the Appeals Chamber relied on the decision of the Trial Chamber in *Tadic*, refusing to allow leave for appeal: *Prosecutor v Delalic (Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment))*, Case No IT–96–21–AR72.5 (6 December 1996) [35]–[36].

[134] *Celebici*, Case No IT–96–21–A (20 February 2001) [405].

[135] *Tadic*, Case No IT–94–1A and No IT–94–1–Abis (26 January 2000) [144].

[136] Ibid [33].

[137] *Celebici*, Case No IT–96–21–A (20 February 2001) [407]–[408].

[138] Ibid [409].

[139] US Miltary Tribunal, Nuremburg (3–4 December 1947), extracted in UN War Crimes Commission, *Law Reports of Trials of War Criminals* (1948) vol 6, 1. The Appeals Chamber in *Celebici* noted that the potential for cumulative convictions, at least with respect to war crimes and crimes against humanity, was recognised in *The Justice Trial,* where numerous defendants were found guilty of both these crimes: *Celebici,* Case No IT–96–21–T (20 February 2001) [410]–[411].

[140] *Celebici*, Case No IT–96–21–A (20 February 2001) [412].

[141] Ibid [413].

[142] Ibid [416]–[420].

[143] Such circumstances being 'the presence of the individual in territory which is under the control of the Power in question, and the exclusion of wounded and sick members of the armed forces from protected person status': *Celebici*, Case No IT–96–21–A (20 February 2001) [420].

[144] The opinion also noted that the Appeals Chamber in *Tadic* held that art 3 of the *Statute of the ICTY* functions as 'a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal': *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT–94–1 (2 October 1995) [91]. The opinion also noted that common article 3 is present in all four of the *Geneva Conventions* and is a rule of customary international law, and that its substantive provisions are applicable to both internal and international conflicts: *Celebici*, Case No IT–96–21–A (20 February 2001) [127].

[145] *Celebici*, Case No IT–96–21–A (20 February 2001) [422]–[426]

[146] Ibid [423].

[147] Ibid [423].

[148] Ibid [430]. The Chamber noted at fn 661 that this can be achieved by either the imposition of one sentence in respect to all offences, or several sentences ordered to run concurrently, consecutively, or both. In the past, convictions for multiple offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently. Such sentences have been confirmed by the Appeals Chamber in *Tadic* and in the *Furundzija Appeals Judgment.*

[149] Ibid [431].

[150] Ibid [710].

[151] Ibid (Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna) [12]. In support of this proposition, the opinion also reiterated the Trial Chamber's observation that 'the offences in the Statute do not refer to specific categories of well-defined acts, but to broad groups of offences, the elements of which are not always clearly defined'.

[152] Ibid.

[153] Ibid.

[154] Ibid [22].

[155] Ibid [23].

[156] Ibid.

[157] Ibid [24].

[158] Ibid [26] (emphasis in original).

[159] Ibid.

[160] Ibid. While the former must clearly be proved before an accused can be convicted under the relevant Articles, they are irrelevant to a test to be applied solely for the purpose of determining whether the *criminal conduct* of an accused in any given case can fairly be characterised as constituting more than one crime. (emphasis in original)

The Separate and Dissenting Opinion noted that the elements relating to the international nature of the conflict and protected person status in relation to art 2, or considerations which may arise under art 3, such as the limitation of offences charged under art 3 to 'persons taking no active part in the hostilities', are not, in practice, relevant to the conduct and state of mind of the accused. Although these elements provide for the 'context' in which the offence takes place, the dissenting judges found that '[t]he fundamental function of criminal law is to punish the accused for his criminal conduct, and only for his criminal conduct': at [27].

[161] Ibid [33].

[162] Ibid [37] (emphasis in original).

[163] Ibid (emphasis in original).

[164] Ibid [38].

[165] Ibid [41]–[42].

[166] Ibid [53].

[167] Ibid [53].

[168] Ibid [57].

[169] Ibid [58].

[170] Ibid [30]–[31].

[171] This is because the accused encounters a pre-existing law of which they had notice.

[172] *Prosecutor v Jelisic (Indictment)*, Case No IT–95–10 (14 December 1999) [1] –[2] ('*Jelisic Indictment*').

[173] *Prosecutor v Jelisic (Trial Chamber Judgment)*, Case No IT–95–10–T (14 December 1999) [3] ('*Jelisic Trial Judgment*').

[174] Ibid [108].

[175] Ibid [26].

[176] Ibid [138]–[139].

[177] *Jelisic*, Case No IT–95–10–A (5 July 2001) [82].

[178] Ibid [80].

[179] Ibid [78].

[180] Ibid [81]. In the *Jelisic Trial Judgment* the Trial Chamber noted that the crimes committed by the accused were 'given two distinct characterisations but form part of a single set of crimes committed over a brief time span which does not allow for distinctions between their respective criminal intentions and motives': *Jelisic Trial Judgment*, Case No IT–95–10–T (14 December 1999) [137]. The Appeals Chamber noted that the Trial Chamber imposed a single sentence for all the crimes of which the accused was found guilty: *Jelisic Appeals Judgment*, Case No IT–95–10–A (5 July 2001) [93].

[181] Case No IT–98–33 (2 August 2001) ('*Krstic*').

[182] *Krstic*, Case No IT–98–33 (2 August 2001) [661]. In addition, Krstic was charged with 'persecutions under Article 5(h) and deportation under Article 5(d) (or, in the alternative, other inhumane acts in the form of forcible transfer under Article 5(i))'.

[183] Ibid [664].

[184] Ibid [669].

[185] Ibid [673].

[186] Ibid.

[187] Ibid [677].

[188] Ibid [679].

[189] Ibid.

[190] Ibid [686]. General Krstic was cumulatively convicted under article 5 (persecutions) and article 3 (murder), as well as article 3 (murder) and article 4 (genocide): at [687].

[191] Ibid [727].

[192] The issue of *concursus delictorium* was most recently considered by the Trial Chamber in *Prosecutor v Kvocka (Trial Chamber Judgment)*, Case No IT–98–30/1 (2 November 2001) ('*Kvocka*'). Many of the charges brought in the indictment were cumulative, charging violations of both article 3 and article 5 of the *Statute of the ICTY* on the same underlying facts. The Trial Chamber in this case determined that the applicable test in deciding upon the feasibility of cumulative charges was to search for a materially distinct element in each of the crimes, in accordance with the *Celebici* test: at [213]–[215]. A comprehensive discussion of the Tribunal's findings can be found at [216]–[239] of *Kvocka*.

[193] Preparatory Commission of the International Criminal Court, *Report of the Preparatory Commission of the*

International Criminal Court: Finalised Draft of the Elements of Crimes, UN Doc PCNICC/2000/1/Add.2 (30 June 2000) ('*Elements of Crimes*').

[194] Bassiouni, 'The Normative Framework of International Humanitarian Law', above n 8, 229.

[195] M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell International Law Journal* 443, 454. The lack of a provision on the material element of the crime in the *Statute of the ICC* is due to the fact that the delegates working on the *Statute of the ICC* were unable to agree on distinctions between commission and omission.

[196] Bassiouni, 'The Normative Framework of International Humanitarian Law', above n 8, 232.

[197] *Celebici*, Case No IT–96–21–A (20 February 2001) [413].

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