

Cumulative Convictions Based on the Same Acts Under the Statute of the I.C.T.Y.

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I. INTRODUCTION

The problem of cumulative convictions¹ under the Statute of the International Criminal Tribunal for the former Yugoslavia² (I.C.T.Y.) arises when an accused is convicted under different provisions of the Statute on the basis of the same underlying act or acts. For example, an accused may be found guilty of wilful killing as a grave breach of the Geneva Conventions (article 2), and of murder as a violation of the laws or customs of war (article 3 (common article 3)), because the required elements of each offence are satisfied by the evidence presented before the Trial Chamber.³ An accused may also be found guilty of offences

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1. This issue has also been termed “multiple convictions.”

2. S. Res. 827, U.N. Statute of the International Tribunal, U.N. SCOR, 48th Sess., 3217th mtg., ¶¶ 1-2, U.N. Doc. S/RES/827 (1993), *revised by* U.N. Doc. S/RES/1411 (2002) [hereinafter Statute].

3. *Id.* arts. 2-3; *see also* Geneva Conventions, Aug. 12, 1949, art. 2, 75 U.N.T.S. 31, 32-

34. Common articles are articles that constitute a part of all four August 12, 1949, Geneva

punishable under the same article. For example, the evidence may satisfy the elements of rape as a crime against humanity (article 5), as well as torture as a crime against humanity (article 5).⁴

Many Trial Chambers of the I.C.T.Y.⁵ have confronted the issue of cumulative convictions. This issue raises fundamental questions regarding fairness to the accused, fairness to the victims of atrocities, and the Tribunal's objectives. A distinct, but related, issue is cumulative charging. Cumulative charging issues arise when the accused is charged in an indictment under different provisions of the Statute, the charges are based upon the same acts, and the charges are expressed cumulatively rather than alternatively.

On February 20, 2001, the Appeals Chamber rendering the *Celebici* Judgement made a pronouncement on these issues, and articulated a two-pronged test to be applied to the issue of cumulative convictions.⁶ This Article will provide an overview of previous approaches within the I.C.T.Y. on the issues of cumulative convictions and cumulative charging, an examination of the *Celebici* Appeal Judgement and its progeny, and sentencing implications for the accused.

II. OVERVIEW OF APPROACHES PRECEDING *CELEBICI* WITHIN THE I.C.T.Y.

This Part discusses the Trial Chambers' and Appeals Chamber's approaches to the issues of cumulative convictions and cumulative charging prior to the two-pronged test set out in the *Celebici* Appeal Judgement. Although cumulative convictions and cumulative charging are distinct issues, they will be discussed together given the introductory nature of this overview.

Conventions. Hereinafter, all "common article" references refer to the Geneva Conventions: The Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), *id.* at 32-34; the Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), *id.* at 86-88; the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), *id.* at 136-38; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), *id.* at 288-90.

4. Statute, *supra* note 2, art. 5.

5. It should be noted that although the structure and content of the I.C.T.Y. Statute differs from that of the Statute for the International Criminal Tribunal for Rwanda (I.C.T.R.), the problem of cumulative convictions also arises under the I.C.T.R. Statute. The problem mutates from case to case within each Tribunal.

6. Prosecutor v. Delalic (*Celebici* Appeal Judgement), Judgement, U.N. Case No. IT-96-21-A, ¶¶ 412-413, at 138 (Feb. 20, 2001), at <http://www.un.org/icty/judgement.htm>.

A. Trial Chamber Approaches⁷

In its first decision addressing the cumulative convictions and cumulative charging issues, one of the I.C.T.Y.'s Trial Chambers dismissed a complaint based on an indictment that charged the accused of various groups of crimes, each group of crimes being based on the same act or acts.⁸ In *Tadic*, the Trial Chamber held:

In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading.⁹

The Trial Chamber thus concluded that the question of cumulative charging should be dealt with at the sentencing stage, but it also stated that the penalty to be imposed would be determined by proven criminal conduct, and not by the manner of pleading. In its judgement, the Trial Chamber convicted the accused cumulatively of several crimes.¹⁰

Subsequent Trial Chambers applied the rationale set out in *Tadic* in considering cumulative charges, as opposed to cumulative convictions. In *Prosecutor v. Delalic*, the Trial Chamber's Decision on Motion by the Accused Zejil Delalic Based on Defects in the Form of the Indictment

7. The author wishes to thank Ms. Claire Harris for her helpful research on the jurisprudence done at an earlier stage.

8. *Prosecutor v. Tadic*, Decision on the Defence Motion on the Form of the Indictment, U.N. Case No. IT-94-1-T, ¶¶ 15, 18 (Nov. 14, 1995). Some of the charges in the amended indictment included, for example:

- 1) Forcible sexual intercourse with F: Counts 2-4: violations of articles 2(b) (inhuman treatment) and 7(1), articles 3 and 7(1) and article 3(1)(a) (cruel treatment) of the Geneva Conventions of 1949, and articles 5(g) (rape) and 7(1).
- 2) Various killings, a beating, and inhumane acts against individuals: Counts 5-11: violations of articles 2(a) (wilful killing) and 7(1), articles 3 and 7(1) and article 3(1)(a) (murder) of the Geneva Conventions, articles 5(a) (murder) and 7(1), articles 2(b) (torture or inhuman treatment) and 7(1), articles 2(c) (wilfully causing great suffering or serious injury to body and health) and 7(1), articles 3 and 7(1) and article 3(1)(a) (cruel treatment) of the Geneva Convention, and articles 5(i) (inhuman acts) and 7(1).

Prosecutor v. Tadic, Second Amended Indictment, Case No. IT-94-1-I, ¶¶ 5-6 (Dec. 14, 1995), at <http://www.un.org/icty/ind-e.htm>.

9. *Prosecutor v. Tadic*, Decision on the Defence Motion on the Form of the Indictment, U.N. Case No. IT-94-1-T, ¶ 17 (Nov. 14, 1995), at <http://www.un.org/icty/ind-e.htm>.

10. *Prosecutor v. Tadic*, Opinion and Judgement, U.N. Case No. IT-96-21-A, ¶ 285-86 (May 7, 1997), at <http://www.un.org/icty/judgement.htm>. For example, for a beating in the Omarska Camp, Tadic was convicted under both Count 13 (article 3, cruel treatment) and Count 14 (article 5, inhumane acts). *Id.* ¶ 263, at 92. Numerous other examples exist.

followed the *Tadic* Trial Chamber's reasoning in its Indictment Decision and dismissed a cumulative charging complaint.¹¹

In the *Krnjelac* decision of February 24, 1999, the Trial Chamber dismissed the argument that crimes against humanity (article 5), grave breaches of the Geneva Conventions (article 2), and violations of the laws and customs of war (article 3) are mutually exclusive, and that the Prosecution may not rely upon them all in relation to the same facts.¹² The Chamber stated that each article protects different values, and that each requires proof of a particular element that is not required by the others.¹³ The Chamber also noted:

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 criminal conduct, so that the punishment imposed will do the same. Of course, great care must be taken in sentencing that an offender convicted of different charges arising out of the same or substantially the same facts is not punished more than once for his commission of the individual acts (or omissions) which are common to two or more of those charges. But there is no breach of the double jeopardy principle by the inclusion in the one indictment of different charges arising out of the same or substantially the same facts.¹⁴

However, in *Kupreskic*, the Trial Chamber followed the approach articulated by the United States Supreme Court in *Blockburger v. United States*,¹⁵ in which the Supreme Court ruled that the test 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."¹⁶ When

11. Prosecutor v. Delalic, Decision on Motion by the Accused Zejnir Delalic Based on Defects in the Form of the Indictment, U.N. Case No. IT-96-21, ¶ 24 (Oct. 2, 1996), at <http://www.un.org/icty/ind-e.htm>.

12. Prosecutor v. Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment, U.N. Case No. IT-97-25-PT, ¶ 8 (Feb. 24, 1999), at <http://www.un.org/icty/ind-e.htm>.

13. *Id.* In *Kordic*, the Trial Chamber applied a similar test, concluding 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." Prosecutor v. Kordic, Decision on Defence Motion to Dismiss or Alternatively to Order the Prosecutor to Elect Between Counts, U.N. Case No. IT-95-14/2-PT (Mar. 1, 1999), at 2, at <http://www.un.org/icty/ind-e.htm>.

14. *Id.* ¶ 10.

15. 284 U.S. 299, 304 (1932).

16. Prosecutor v. Kupreskic, Judgement, U.N. Case No. IT-95-16-T, ¶ 681, at 270-72 (Jan. 14, 2000), at <http://www.un.org/icty/judgement.htm> (quoting *Blockburger*, 284 U.S. at 304) (emphasis added).

the *Blockburger* test is not met, the Trial Chamber reasoned, “one of the offences falls entirely within the ambit of the other offence.”¹⁷ Choosing between the two provisions “is dictated by the maxim *in toto iure generi per speciem derogatur* (or *lex specialis derogat generali*), whereby the more specific or less sweeping provision should be chosen.”¹⁸ The *Kupreskic* Trial Chamber also discussed a further test, which consists of “ascertaining whether the various provisions at stake protect different values,”¹⁹ but ultimately concluded that this test was unlikely to alter the conclusions reached through the application of other tests, such as the *Blockburger* test.²⁰

Unlike other Trial Chambers, the *Kupreskic* Chamber held that an accused cannot be convicted of both murder under article 3 (war crimes) and murder under article 5(a) (crimes against humanity).²¹ It explained that “while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated. As a result, the *Blockburger* test is not fulfilled.”²² The Chamber further stated that the difference in values protected by articles 3 and 5 “would seem to be inconsequential.”²³ With respect to convictions for inhumane acts under article 5(i) and cruel treatment under article 3, the Chamber similarly found that the *Blockburger* test was not satisfied.²⁴ The *Kupreskic* Trial Judgement thus represented a departure from previous I.C.T.Y. pronouncements on this issue.

In *Krstic*, the Trial Chamber examined a Defence submission stating that the acts underlying Counts 7 and 8 (deportation under article 5 and inhumane acts (forcible transfer) also under article 5) were identical to those underlying Count 6 (persecution under article 5), and that the accused should have been charged with one or the other, but not both.²⁵ The Chamber overruled the Defence’s objection, remarking that the Tribunal’s jurisprudence on cumulative charging was still in a state of

17. *Id.* ¶ 683, at 272.

18. *Id.*

19. *Id.* ¶ 693, at 275.

20. *Id.* ¶ 695, at 275-76.

21. *Id.* ¶ 701, at 277.

22. *Id.*

23. *Id.* ¶ 703, at 278.

24. *Id.* ¶ 711, at 280-81.

25. Prosecutor v. Krstic, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Counts 7-8, U.N. Case No. IT-98-PT (Jan. 28, 2000), at <http://www.un.org/icty/ind-e.htm>.

development.²⁶ It further stated that heretofore the Trial Chambers had generally held that any overlap in charges was a matter to be addressed at the end of the trial.²⁷ Notwithstanding this pronouncement, the Chamber maintained that there were good reasons for considering the matter of cumulative versus alternative charging at the beginning of a trial.²⁸ The Chamber noted:

If the issues are clarified and narrowed at the outset, it may help in making the proceedings, which have heretofore lasted months and even years, more focused and efficient. In addition, it may aid the defendant in the preparation of his case to know which charges will ultimately be considered to cover the same [] 'offence' for purposes of conviction and sentencing.

... In many instances, it may be useful to consider before the trial begins which charges should be considered in the alternative rather than cumulatively because it is clear that one offence charged includes all the elements of another.²⁹

However, as to the Defence's argument, the Chamber held that the scope of the overlap was not entirely clear at that stage,³⁰ and that the objectionable charges did not present such a "clear-cut example of unduly cumulative charging" as would require alternative pleading at that stage.³¹

In *Blaskic*, the Trial Chamber explicitly acknowledged that "crimes other than the crime of persecution brought against the accused rest[ed] fully on the same facts as those specified under the other crimes for which the accused [was] being prosecuted."³² However, the Chamber convicted the accused under different provisions of the Statute, based on the same acts, and held that because it was generally impossible to identify which acts would relate to which of the various counts, a single sentence for all the crimes would be imposed.³³ The Chamber did not question the practice of cumulative convictions.³⁴

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. The Chamber noted, however, that "[a]s the Tribunal's case law develops and the elements of each offence become more well-defined, it may become easier to analyse the overlap in the particular charges before trial." *Id.*

31. *Id.*

32. Prosecutor v. Blaskic, Judgement, U.N. Case No. IT-95-14-T, ¶ 807, at 266 (Mar. 3, 2000), at <http://www.un.org/icty/judgement.htm>.

33. *Id.*

34. *Id.*

B. Appeals Chamber Approaches

In the *Celebici* Appeal Judgement, the Appeals Chamber examined previous Appeals Chamber approaches to this issue. It noted that during prior proceedings in *Celebici*, the bench of the Appeals Chamber was confronted with Delic's complaint that he was being charged on numerous occasions throughout the indictment with two different crimes arising from one act or omission, and that he should be granted leave to appeal.³⁵ The bench followed the reasoning of the Trial Chamber in *Tadic*³⁶ and concluded that "it did not consider that the reasoning in *Tadic* revealed an error, much less a grave one, justifying the granting of leave to appeal."³⁷

The Appeals Chamber in *Celebici* then observed that following the Prosecution's appeal from the Trial Chamber Judgement in *Tadic*, the Appeals Chamber in that case "overturned the acquittal of Tadic on all relevant Article 2 counts and on four cumulatively charged counts relating to the killing of five victims from the village of Jaskici."³⁸ The Appeals Chamber entered these convictions despite the fact that "all of the Article 2 counts related to conduct for which the accused had already been convicted under other provisions of the Statute, namely Articles 3 and 5."³⁹ Consequently, Tadic was "cumulatively convicted with respect to the same conduct, based on numerous different groups of counts."⁴⁰ The Chamber did not address the issue of cumulative convictions.⁴¹

35. *Celebici* Appeal Judgement, ¶ 402, at 135; see also Prosecutor v. Delalic, Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), U.N. Case No. IT-96-21-AR72.5, ¶¶ 35-36 (Dec. 6, 1996), at <http://www.un.org/icty/ind-e.htm>.

36. In *Tadic*, the Trial Chamber held:

In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading.

Prosecutor v. Tadic, Decision on Defence Motion on Form of the Indictment, U.N. Case No. IT-94-I-T, ¶ 17 (Nov. 14, 1995).

37. *Celebici* Appeal Judgement ¶ 402, at 135; see also Prosecutor v. Delalic, Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), ¶ 36 (Dec. 6, 1996), at <http://www.un.org/icty/icty/ind-e.htm>.

38. *Celebici* Appeal Judgement ¶ 403, at 135; see Prosecutor v. Tadic, Judgement, U.N. Case No. IT-94-1-A, at 144 (July 15, 1999), at <http://www.un.org/icty/judgement.htm>.

39. *Celebici* Appeal Judgement ¶ 403, at 135.

40. *Id.* at 135-36. The counts and convictions were as follows:

(1) Counts 8, 9, 10, and 11: Various beatings of prisoners; Convictions: Article 2(b) (inhuman treatment); Article 2(c) (wilfully causing great suffering or

The Appeals Chamber in *Celebici* also mentioned the *Tadic* Judgement in Sentencing Appeals of January 26, 2000, where the Appeals Chamber pronounced concurrent sentences on the accused, thereby taking into consideration the cumulative convictions that were imposed.⁴²

Finally, the *Celebici* Appeals Chamber discussed the *Aleksovski* case, in which the Appeals Chamber briefly considered the matter of cumulative convictions based on the same conduct, in relation to sentencing.⁴³ The Trial Chamber had previously “acquitted the accused on Counts 8 and 9 of grave breaches of the Geneva Conventions but convicted him on Count 10 of a violation of the laws or customs of war.”⁴⁴ The Appeals Chamber in *Aleksovski* stated:

The material acts of the Appellant underlying the charges are the same in respect of Counts 8 and 9, as in respect of Count 10, for which the Appellant has been convicted. Thus, even if the verdict of acquittal were to be reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant’s sentence. Moreover, any sentence imposed in respect of Counts 8 and 9 would have to run concurrently with the sentence on Count 10.⁴⁵

serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).

(2) Counts 12, 13, and 14; Counts 15, 16, and 17; Counts 21, 22 and 23; Counts 32, 33, and 34; Convictions: Article 2(c) (wilfully causing great suffering or serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).

(3) Counts 29, 30, and 31; Convictions: Article 2(a) (wilful killing); Article 3 (common Article 3(1)(a) (murder); Article 5(a) (murder).

Id. ¶ 403, at 136 n.632.

41. *Id.* ¶ 403, at 135-36.

42. *Id.* ¶ 403, at 136; see *Prosecution v. Tadic, Judgement in Sentencing Appeals*, U.N. Case Nos. IT-94-1A & IT-94-1-A *bis*, ¶ 76, at 33 (Jan. 26, 2000), at <http://www.un.org/icty/judgement.htm>.

43. See *Prosecutor v. Aleksovski (Aleksovski Appeal Judgement)*, U.N. Case No. IT-95-14/1-A, ¶ 153, at 59-60 (Mar. 24, 2000); *Celebici Appeal Judgement* ¶ 404, at 136.

44. *Celebici Appeal Judgement* ¶ 404, at 136. The counts are as follows:

Count 8: a grave breach as recognized by articles 2(b) (inhuman treatment), 7(1) and 7(3);

Count 9: a grave breach as recognized by articles 2(c) (wilfully causing great suffering or serious injury to body or health), 7(1) and 7(3); and

Count 10: a violation of the laws or customs of war (outrages upon personal dignity) as recognized by articles 3, 7(1) and 7(3).

Aleksovski Appeal Judgement ¶ 1.

45. *Aleksovski Appeal Judgement*, ¶ 153, at 60.

C. Summary

This brief overview of I.C.T.Y. jurisprudence prior to the *Celebici* Appeal Judgement demonstrates that the practice of cumulative convictions based on the same acts has generally prevailed in the I.C.T.Y. In addition, potential issues of unfairness to the accused have generally been addressed at the sentencing phase, either through concurrent sentencing or by the imposition of a single sentence.⁴⁶ The primary exception to this general trend was the *Kupreskic* case. In *Kupreskic*, the Trial Chamber applied the *Blockburger* test and the *lex specialis* principle, declining to convict the accused for murder under both article 3 and article 5.⁴⁷ Further, with respect to cumulative charging, Chambers have held that this practice is justified when the articles of the Statute are designed to protect different values and when each article requires proof of a legal element not required by the others. In addition, the *Krstic* Trial Chamber articulated that there may be good reasons, such as efficiency of the proceedings, for considering the matter of cumulative charging at the beginning of trial.⁴⁸

III. THE *CELEBICI* APPEAL JUDGEMENT—THE APPEALS CHAMBER PRONOUNCES ON CUMULATIVE CONVICTIONS AND CUMULATIVE CHARGING

A. Cumulative Convictions

On February 20, 2001, the Appeals Chamber in the *Celebici* Judgement stated:

Having considered the different approaches expressed on this issue both within [the I.C.T.Y.] and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify [cumulative] convictions, lead to the conclusion that [cumulative] 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.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis

46. *Celebici* Appeal Judgement ¶ 405, at 136.

47. Prosecutor v. Kupreskic, Judgement, U.N. Case No. IT-95-16-T, ¶¶ 681-683, 695, at 271-72, 275-76 (Jan. 14, 2000), at <http://www.un.org/icty/judgement.htm>.

48. Prosecutor v. Krstic, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Counts 7-8, U.N. Case No. IT-98-PT (Jan. 28, 2000), at <http://www.un.org/icty/ind-e.htm>.

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 [the] provision [requiring the additional materially distinct element].⁴⁹

The Appeals Chamber emphasized the principle of fairness to the accused in its holding and expressed that only distinct crimes may justify cumulative criminal convictions based on the same underlying conduct.⁵⁰ The Appeals Chamber then articulated a two-pronged test that must be applied in cumulative convictions situations.⁵¹

First, the Appeals Chamber stated that cumulative 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.⁵² The Chamber defined an element as being “materially distinct” from another if it *requires* proof of a fact not required by the other element.⁵³ Thus, in the view of the Appeals Chamber, if an element of crime *A* requires proof of “x,” which is not required by any element of crime *B*, and if an element of crime *B* requires proof of “y,” which is not required by any element of crime *A*, then cumulative convictions under both crime *A* and crime *B* are permissible. The word “requires” appears to be an essential aspect of the test. What is required by one crime, but not required by its counterpart, renders the first crime distinct in a material fashion. For example, if an element may be proved by either “w” or “z,” then, it may be argued, neither “w” nor “z” is a requirement in the strict sense of the word, and a Chamber applying this test could not locate the distinct element in either “w” or “z.”

The *Celebici* Appeals Chamber applied this test to crimes falling under article 2 and article 3 (common article 3)⁵⁴ of the Statute.⁵⁵ It took

49. *Celebici* Appeal Judgement ¶¶ 412-413, at 138.

50. *Id.* ¶ 414, at 139.

51. *Id.* ¶¶ 412-413, at 138.

52. *Id.* ¶ 412, at 138.

53. *Id.* (emphasis added).

54. Common article 3 of the Geneva Conventions of 1949 has been incorporated into article 3 of the I.C.T.Y. statute, as held in the *Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, U.N. Case No. IT-94-1-AR72, ¶ 89 (Oct. 2, 1995), at <http://www.un.org/icty/ind-e.htm>. *Tadic* stated, “[I]t can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: . . . (iii) violations of common Article 3 and other customary rules on internal conflicts.” *Id.*

55. *Celebici* Appeal Judgement ¶¶ 421-426, at 141-44.

all of the elements of each offence into consideration, including those contained in the introductory chapeau paragraphs of each article.⁵⁶ For example, in its analysis of article 2, the Appeals Chamber found that the protected person requirement in the chapeau constitutes a materially distinct element not required by common article 3.⁵⁷ An approach that takes into account all of the legal elements of an offence, including those contained in the introductory chapeau paragraphs, appears to be founded on the basis that it is largely the introductory chapeau provisions that designate the crimes contained in the sub-provisions of the articles as international crimes.⁵⁸

Such an approach is corroborated by the definitions of the elements of crimes contained in the Report of the Preparatory Commission for the

56. *Id.*

57. *Id.* ¶ 423, at 142. The Appeals Chamber found:

Common Article 3 of the Geneva Conventions is intended to provide minimum guarantees of protection to persons who are in the middle of an armed conflict but are not taking any active part in the hostilities. Its coverage extends to *any* individual not taking part in hostilities and is therefore broader than that envisioned by Geneva Convention IV incorporated into Article 2 of the Statute, under which “protected person” status is accorded only in specially defined and limited circumstances, such as 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; while protected person status under Article 2 therefore involves not taking an active part in hostilities, it also comprises further requirements. As a result, Article 2 of the Statute is more specific than common Article 3.

Celebici Appeal Judgement ¶ 420, at 141.

58. In a dissenting opinion in the *Celebici* Appeal Judgement, Judges Hunt and Bennouna agreed with the majority approach that cumulative convictions based on the same acts are permissible where each offence contains a distinct element that the other offence does not. *Celebici* Appeal Judgement, Separate and Dissenting Opinion, U.N. Case No. IT-96-21-A, ¶ 24, at 322-23 (Feb. 20, 2001) (Hunt & Bennouna, JJ., dissenting), at <http://www.un.org/icty/judgement.htm>. However, their views diverged from those of the majority on the following points. In determining which elements of offences are to be taken into account at the first step of their two-step test, the dissent opined that only those elements pertaining to the *actus reus* and *mens rea* of the crime are relevant. *Id.* ¶ 33, at 320. Other elements of crimes are apparently to be disregarded at this stage, but it appears that at the second step of their test, these elements may resume their relevance. The dissent further states that, if the first step of the test is not met—that is, each offence does not contain a distinct element that the other does not—a Chamber must decide in relation to which offence it will enter a conviction. *See id.* ¶¶ 36, at 322. The dissent then states that “the crime which more specifically describes *what the accused actually did* in the circumstances of the particular case should be selected.” *Id.* ¶ 37, at 322.

The dissent then attempted to apply this criterion to the following pairs of crimes: wilfully causing great suffering or serious injury to body or health under article 2 and cruel treatment under article 3; inhuman treatment under article 2 and cruel treatment under article 3. *Id.* ¶¶ 49-57, at 327-30. However, with respect to the other pairs of crimes at issue in the case, torture under article 2 and torture under article 3, as well as wilful killings under article 2 and murders under article 3, the dissent abandoned this criterion, finding that they could not apply it, and reverted to a criterion based on the specificity of the offence in relation to the crimes committed in that case. *Id.* ¶¶ 48, 58, at 326-27, 331.

International Criminal Court.⁵⁹ The Report's Finalized Draft Text of the Elements of Crimes defines each crime in a manner in which those elements corresponding to the chapeau provisions in the Statute are listed as elements of crimes,⁶⁰ together with other elements relating to, for example, the *actus reus* or *mens rea*.⁶¹

However, as noted by Judge Shahabuddeen, those aspects of the chapeau paragraphs relating to jurisdictional requirements, which must be present before the Tribunal may even be seized of the case, would not be taken into consideration in the application of the *Celebici* test.⁶² Thus, for example, the jurisdictional requirement of an armed conflict under

59. *Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes*, U.N. Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

60. For example, the Report defines the crime against humanity of extermination as consisting of the following elements:

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Id. at 10.

61. *Id.* Furthermore, in his partially dissenting opinion in the *Jelusic* Appeal Judgement, in which he dissented on other issues, Judge Shahabuddeen supported the majority's approach in *Celebici*. He stated:

The elements of a crime do not of course embrace jurisdictional and procedural requirements; these delimit and regulate the power of the forum to deal with the crime and presuppose the existence of the crime. But, shutting out such requirements, it seems obvious that, in creating a crime, the legislator uses certain elements to define the conduct from which he wishes to defend society (including the victim). The crime cannot be understood without reference to all of its component elements: it is made up of its elements and is in turn defined by them. An accused whose conduct involves the commission of a crime has committed the crime as defined by all of its elements. Each element of the crime is relevant to the determination of the criminality of his conduct. It is difficult to disaggregate the elements of a crime and to say that some are relevant to the criminal conduct of the accused and others not. Leaving alone the problems of subjectivity which that would involve, it appears to me that, once something is accepted to be an element of the crime as defined by the legislation, that element has to be dutifully taken into account by the courts in making any comparison of elements for the purpose of determining whether cumulative convictions are possible.

It seems to me that it is only by proceeding in this way that a criminal justice system can take account of all of the public interests which are intended to be protected.

Prosecutor v. *Jelusic* (*Jelusic* Appeal Judgement), Partial Dissenting Opinion of Judge Shanabuddeen, U.N. Case No. IT-95-10-A, ¶¶ 41-42, at 60-61 (July 5, 2001), at <http://www.un.org/icty/judgement.htm>.

62. *Jelusic* Appeal Judgement ¶¶ 41-42, at 60-61.

articles 2, 3, and 5 of the Statute would not be taken into account.⁶³ However, the requirement in articles 2 and 3 of a nexus between the acts of the accused and the armed conflict is an element of the crime that may be taken into account; it does not pertain to jurisdiction.⁶⁴

In *Celebici*, the Appeals Chamber found that the first prong of the test was not satisfied.⁶⁵ While the crimes falling under article 2 of the Statute each contained a materially distinct element requiring proof of a fact not required by any element of common article 3,⁶⁶ the reverse was not the case.⁶⁷ Thus, it became necessary to apply the second prong of the *Celebici* test, which states that “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.”⁶⁸ In *Celebici*, the article 2 offences contained an additional, materially distinct element because of the protected person requirement. Thus, the Chamber upheld the article 2 convictions, and dismissed the common article 3 convictions.⁶⁹

Therefore, applying this test to pairs of crimes such as wilful killing under article 2 and murder under common article 3, torture under article 2 and torture under common article 3, and inhuman treatment under article 2 and cruel treatment under common article 3, only the article 2 convictions would be retained. However, it does not follow that, as between common article 3 and any other article of the Statute, the common article 3 convictions must always be dismissed. The test must be applied to each set of cumulative or double convictions at issue.

This is illustrated by the *Kunarac* Trial Judgement, rendered only two days after *Celebici*, wherein the Trial Chamber held that double convictions under both article 3 (common article 3) and article 5 are permissible.⁷⁰ The Trial Chamber isolated the close nexus between the crime and the armed conflict as a requirement of common article 3 that is not required by article 5.⁷¹ It further identified the widespread and systematic attack against a civilian population as a requirement of article 5 that is not required by common article 3.⁷² Thus, the Trial Chamber

63. See Statute, *supra* note 2, arts. 2-3, 5.

64. See *id.* arts. 2-3.

65. *Celebici* Appeal Judgement ¶ 423, at 142.

66. *Id.* ¶ 420, at 141.

67. *Id.*

68. *Id.* ¶ 413, at 138.

69. *Id.* ¶ 427, at 144.

70. Prosecutor v. Kunarac, Judgement, U.N. Case Nos. IT-96-23-T & IT-96-23/7-T, ¶ 556, at 198-99 (Feb. 22, 2001), at <http://www.un.org/icty/judgement.htm>.

71. *Id.* ¶ 556, at 198.

72. *Id.*

upheld double convictions under both articles, including, for example, convictions for the crime of torture, present in both articles.⁷³

This outcome was further confirmed by the *Jelusic* Appeal Judgement, rendered on July 5, 2001.⁷⁴ In *Jelusic*, the Appeals Chamber held:

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. As a result, cumulative convictions under both Articles 3 and 5 are permissible.⁷⁵

Thus, the *Jelusic* Appeals Chamber found that double convictions under article 3 (common article 3) and article 5 are permissible.⁷⁶ Using similar reasoning, double convictions would also be permissible under article 2 and article 5 of the Statute. Indeed, article 2 also requires proof of a nexus between the acts of the accused and the armed conflict.⁷⁷ Article 5 does not impose such a requirement.⁷⁸

Only four days after the *Kunarac* Judgement, the *Kordic* Trial Chamber considered the permissibility of cumulative convictions for the same acts under articles 2, 3, and 5 of the Statute.⁷⁹ The Chamber held:

73. *Id.* ¶¶ 556-557, at 198-99. This finding illustrates the error present in the reasoning of the *Kupreskic* Trial Chamber on this issue. See *supra* text accompanying notes 21-24.

74. *Jelusic* Appeal Judgement, U.N. Case No. IT-95-10-A (July 5, 2001).

75. *Id.* ¶ 82, at 27-28; Prosecutor v. Kupreskic, Judgement, U.N. Case No. IT-95-16-A, ¶¶ 387-388, at 142 (Oct. 23, 2001) (following the reasoning of *Jelusic* on the issue of the permissibility of cumulative conviction under articles 3 and 5).

76. *Id.* This would appear to suggest that the notion that article 3 functions as a “residual clause,” as articulated in the *Tadic* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, is limited. U.N. Case No. IT-94-1-AR72, ¶ 91 (Oct. 2, 1995), at <http://www.un.org/icty/ind-e.htm>. In this *Tadic* decision, the Appeals Chamber stated:

Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any “serious violation of international humanitarian law” must be prosecuted by the International Tribunal. In other words, Article 3 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. Article 3 aims to make such jurisdiction watertight and inescapable.

Tadic Appeal Decision, *supra*, ¶ 91. It may be argued that the force of this “residual notion” is reduced when double convictions are found to be permissible under article 3 (common article 3) and 5 of the Statute.

77. Statute, *supra* note 2, arts. 2-3.

78. See *id.* art. 5.

79. Prosecutor v. Kordic, Judgement, U.N. Case No. IT-95-14/2-T, ¶ 820, at 291 (Feb. 26, 2001), at <http://www.un.org/icty/judgement.htm>.

Based on the discussion of the elements of crimes, the Trial Chamber finds that the offences of wilful killing and murder charged under Article 2 and 5 of the Statute (Counts 7 and 8, 14 and 15) each contain an additional element not required by the offence of murder under Article 3 (the requirement that the victim be a protected person for wilful killing under Article 2, and the requirements that the offence be widespread or systematic and directed against any civilian population in the case of a murder charged under Article 5). Thus, where the elements of all these crimes are proved, an accused may not be convicted of the Article 3 offence (Counts 9 and 16). Moreover, the crimes of wilful killing and murder under Articles 2 and 5 each contain an additional legal element not required by the other. Consequently, where all of the elements of both crimes are proved, convictions may be entered on both charges.⁸⁰

The Chamber appeared to reason that because the offences of wilful killing under article 2 and murder under article 5 each contained an additional element requiring proof of a fact not required by article 3 (common article 3), when common article 3 did not contain such an additional element, only convictions under articles 2 and 5 could be entered. However, as between article 3 (common article 3) and article 5, each contains an element requiring proof of a fact not required by the other, as discussed above and as held in the *Jelisić* Appeal Judgement. Hence, when considering the cumulative convictions problem for killings charged under articles 2, 3, and 5, as between articles 2 and 3 (common article 3), the latter should be dismissed; as between articles 2 and 5, convictions may be entered under both articles; and as between articles 3 (common article 3) and 5, convictions may also be entered under both articles. However, in order to ensure fairness to the accused, and to guarantee that he is convicted of only distinct crimes, the common article 3 crime must be removed from the equation so that the accused is ultimately convicted under articles 2 and 5 only.

In the *Krstić* Trial Judgement, the Trial Chamber also applied the *Celebici* test to determine whether cumulative convictions could be entered with respect to the crimes charged on the basis of the same acts in the case.⁸¹ The Trial Chamber specifically determined that the offence of persecutions as a crime against humanity is more specific than the offence of murder as a crime against humanity.⁸² The Trial Chamber stated that the persecutions offence requires proof of a discriminatory

80. *Id.*

81. Prosecutor v. Krstić (*Krstić* Trial Judgement) Judgement, U.N. Case No. IT-98-33-T, ¶ 664, at 233-34 (Aug. 2, 2001), at <http://www.un.org/icty/judgement.htm>.

82. *Id.* ¶ 675, at 238.

intent not required by the murder offence.⁸³ It held that, as a result, a conviction under the latter offence cannot be entered along with a persecutions conviction.⁸⁴

However, it is also arguable that each of these offences contains a distinct element requiring proof of a fact not required by the other. While murder as a crime against humanity requires proof that the accused caused the death of one or more persons, persecution as a crime against humanity—which need not be proved by killings—requires proof of discriminatory intent. Had this reasoning been followed, double conviction based on the same acts for these offences would have been permissible under the *Celebici* test.

B. Cumulative Charging

On the separate issue of *cumulative charging*, the Appeals Chamber in *Celebici* held:

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.⁸⁵

Therefore, in its holding, the Appeals Chamber expressed a permissive attitude towards cumulative charging because of the difficulty in predicting, prior to trial, which of the charges in an indictment will be proven by the evidence.

IV. IMPLICATIONS FOR SENTENCING

With regard to the impact of the issue of cumulative convictions on sentencing, the *Celebici* Appeals Chamber held:

If, on application of the first prong of the above test, a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider the impact that this will have on sentencing. In the past, before both this Tribunal and the ICTR, convictions for [cumulative] offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently.⁸⁶

83. *Id.*

84. *Id.*

85. *Celebici* Appeal Judgement ¶ 400, at 135.

86. "Such sentences have been confirmed by the Appeals Chamber in *Tadic* and the *Furundzija* Appeal Judgement." *Id.* ¶ 428, at 146 n.661.

It is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive.⁸⁷ In terms of the final sentence imposed, however, the governing criteria is that it should reflect the totality of the culpable conduct (the 'totality' principle),⁸⁸ or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.⁸⁹

The *Celebici* Appeals Chamber emphasized that, in considering the impact of cumulative convictions on sentencing, the overriding consideration is that the final sentence should reflect the seriousness of the crimes and the perpetrator's culpability.⁹⁰ Thus, a Trial Chamber may impose a single sentence, but it is also within its discretion to impose concurrent or consecutive sentences. It would appear to be far simpler, though, in the cumulative convictions situation, to impose a single sentence that reflects the totality of the culpable conduct of the accused.

87. See also U.N. I.C.T.Y. Rules of Procedure and Evidence, Rule 87(C), U.N. Doc. IT/32/REV.22 (2001). Rule 87(C) states:

If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

88. The Appeals Chamber in the *Celebici* Appeal Judgement noted:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is just and appropriate (footnote omitted). D.A. Thomas, *Principles of Sentencing* (Heinemann: London, 1980), p 56; see also *R v Bocskei* (1970) 54 Cr. App. R. 519, at 521: "[. . .] when consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive." Section 28(2)(b) Criminal Justice Act 1991 preserves this principle. It applies in all cases where consecutive sentences are imposed, e.g., *R v Reeves*, 2 Cr. App. R (S) 35, CA; *R v Jones*, [1996] 1 Ar. App. R (S) 153; In Canada see e.g., *R v M* (CA), [1996] 1 SCR 500: "the global sentence imposed should reflect the overall culpability of the offender and the circumstances of the offence"; In Australia: *Postiglione v R*, 145 A.L.R. 408; *Mill v R*, (1988) 166 CLR 59 at 63; *R v Michael Arthur Watts*, [2000] NSWCCA 167 (the court should look at the individual offences, determine the sentences for each of them and look at the total sentence and structure a sentence reflecting that totality); *R v Mathews*, Supreme Court of New South Wales, 16 July 1991.

Celebici Appeal Judgement ¶ 429, at 146 n.663.

89. *Id.* ¶¶ 428-429, at 146.

90. *Id.* ¶ 430, at 146.

V. CONCLUSION

Although the problem of cumulative convictions based on the same set of acts poses complex questions, the problem is not insoluble. In setting out a simple, two-pronged test, the *Celebici* Appeals Chamber has provided future Chambers with guidance on how to approach and treat the issue. The cumulative convictions test is an objective test that may be applied by different Chambers with consistent results, thereby promoting stability and predictability in the jurisprudence of the Tribunal while furthering the Tribunal's two vital objectives: the prosecution and punishment of war criminals and equal justice for all accused.