

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

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*[Although the issue of cumulative offences (concursum delictorum) is well developed in various national criminal justice systems, concursum delictorum 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 concursum delictorum. 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.]*

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## I INTRODUCTION TO CUMULATIVE CHARGES AND CONVICTIONS

The statutes of the International Criminal Tribunal for the Former Yugoslavia ('ICTY'),<sup>1</sup> the International Criminal Tribunal for Rwanda ('ICTR')<sup>2</sup> and the

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<sup>1</sup> *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 (3217<sup>th</sup> mtg), UN Doc S/Res/827 (1993), 32 ILM 1203 (1993) ('*Statute of the ICTY*').

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

International Criminal Court ('ICC')<sup>3</sup> contain provisions with respect to the three major crimes at international law: genocide,<sup>4</sup> crimes against humanity,<sup>5</sup> and war crimes.<sup>6</sup> War crimes emerged first, followed by crimes against humanity and genocide.<sup>7</sup>

These three crimes have the potential to overlap in certain factual circumstances.<sup>8</sup> 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 (*concursum 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.<sup>9</sup> In fact, in the common law system, a jury may find that a criminal transaction involves multiple criminal acts, and that each act

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<sup>3</sup> *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*').

<sup>4</sup> For a definition of genocide, see *Statute of the ICTR*, art 2; *Statute of the ICTY*, art 4; *Statute of the ICC*, art 6.

<sup>5</sup> 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.

<sup>6</sup> 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.

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

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

<sup>9</sup> See generally M Cherif Bassiouni, *Substantive Criminal Law* (1978) 500–12.

constitutes a separate crime.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

On the other hand, the civil law system requires, as an extension of its principles of legality,<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

Although the notion is well developed in various national legal systems, *concursum 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 *concursum 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*

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

<sup>11</sup> Decker, above n 10, [1.19].

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

<sup>13</sup> The principles of legality are accepted in 'all the world's major legal systems': M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2<sup>nd</sup> 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.

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

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

the ICC relating to *concursum delictorium* and the way in which the ICC could address this complex issue.

## II THE 'MATERIAL ELEMENT' APPROACH TO *CONCURSUM 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*,<sup>17</sup> prevent an accused from being subject to multiple prosecutions or punishments for the same offence.<sup>18</sup> These principles not only prohibit successive trials for the same offence, but also multiple punishment at one or successive trials.<sup>19</sup>

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*.

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<sup>17</sup> 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.

<sup>18</sup> *Ibid.*

<sup>19</sup> 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 (2<sup>nd</sup> Cir, 1966); *Kennedy v United States*, 330 F 2d 26, 27–9 (9<sup>th</sup> Cir, 1964).

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.<sup>20</sup>

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).<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> Thus a problem arises in determining penalties for each crime.<sup>24</sup>

Conventional international criminal law does not specify a hierarchy of the crimes in the jurisdictions of the ICTY, ICTR or the ICC. Customary

<sup>20</sup> See Decker, above n 10, [1.21].

<sup>21</sup> See Danner, above n 13, 437–8; M Cherif Bassiouni, *Substantive Criminal Law*, above n 9, 96.

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

<sup>23</sup> 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.

<sup>24</sup> This problem is also likely to occur at the ICC.

international law also fails to provide guidance on this issue. Although all three crimes have the status of *jus cogens*,<sup>25</sup> thus holding the highest hierarchical position among all international norms and principles,<sup>26</sup> 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.’<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> The quantitative harm resulting from genocide and crimes against humanity would support their ranking immediately below the crime of ‘aggression’<sup>31</sup> within the category of international crimes. The three crimes and aggression are ‘the most serious of all

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<sup>25</sup> 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.

<sup>26</sup> Rozakis, above n 25, 22.

<sup>27</sup> Bassiouni, ‘The Sources and Content of International Criminal Law’, above n 7, 42.

<sup>28</sup> *Ibid* 95–100.

<sup>29</sup> *Ibid* 97.

<sup>30</sup> *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.

<sup>31</sup> 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 (2319<sup>th</sup> 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* (2<sup>nd</sup> ed, 1999) vol 1, 313.

international crimes in terms of their impact on humankind, evidenced by the severity of the harm they have produced throughout history.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

The definition of a war crime distinguishes it from genocide and crimes 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.<sup>36</sup> 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.<sup>37</sup> 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

<sup>32</sup> Bassiouni, ‘Sources and Content of International Criminal Law’, above n 7, 58.

<sup>33</sup> 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.

<sup>34</sup> Bassiouni, ‘The Normative Framework of International Humanitarian Law’, above n 8, 210.

<sup>35</sup> *Ibid* 213.

<sup>36</sup> Bassiouni, *Crimes against Humanity in International Criminal Law*, above n 13, 72.

<sup>37</sup> 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.

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*,<sup>38</sup> it subsequently rejected it in *Prosecutor v Tadic*.<sup>39</sup> Since *Tadic*, the ICTY has continued to reject this notion of ranking crimes in international criminal law.<sup>40</sup> However, the jurisprudence also reveals that a number of judges at the ICTY hold opposing views on this issue.<sup>41</sup>

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).<sup>42</sup> Notwithstanding the inconsistent jurisprudence of the ad hoc Tribunals, neither the *Statute of the ICTY* nor the

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<sup>38</sup> *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].

<sup>39</sup> *Prosecutor v Tadic (Judgment in Sentencing Appeals)*, Case No IT-94-1-A and IT-94-1-Abis (26 January 2000) [69] ('*Tadic*').

<sup>40</sup> 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.

<sup>41</sup> *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].

<sup>42</sup> 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*').

*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 *concoeurs d'infraction*. This principle has two applications: firstly, when the same set of facts gives rise to the application of multiple criminal provisions (*concoeurs 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 *concoeurs 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*<sup>43</sup> 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.<sup>44</sup>

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.'<sup>45</sup> 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.<sup>46</sup>

<sup>43</sup> *Prosecutor v Kupreskic (Trial Chamber Judgment)*, Case No IT-95-16-T (14 January 2000) ('*Kupreskic*').

<sup>44</sup> *Ibid* annex A [3]–[10].

<sup>45</sup> *Ibid* [637].

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

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*.<sup>47</sup> It found that the process should be guided by two principles: that the rights of the accused should be fully safeguarded,<sup>48</sup> 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.<sup>49</sup> 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 than cumulative charges whenever an offence appears to breach more than one provision;<sup>50</sup> 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*.<sup>51</sup>

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.<sup>52</sup> 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

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<sup>47</sup> 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*').

<sup>48</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [724].

<sup>49</sup> Ibid.

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

<sup>51</sup> 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.'

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

same act or transaction breached various rules of international criminal law and cases where instead only one rule was violated.<sup>53</sup>

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.<sup>54</sup> This ‘legal situation’ can be distinguished from that in which one act or transaction simultaneously breaches two or more legal provisions.<sup>55</sup>

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.<sup>56</sup> In particular, the Trial Chamber noted the Massachusetts Supreme Court case of *Morey v Commonwealth*<sup>57</sup> 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

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<sup>53</sup> 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 Nuremberg, as well as various military sittings in Nuremberg after World War II: at [675].

<sup>54</sup> 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.

<sup>55</sup> 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; *Venditelli v Italy* (1994) 293–A Eur Court HR (ser A) 3, 11.

<sup>56</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [680].

<sup>57</sup> 108 Mass 433, 434 (1871).

under either statute does not exempt the defendant from prosecution and punishment under the other.<sup>58</sup>

The opinion further notes that the Massachusetts decision has been followed in subsequent US jurisprudence,<sup>59</sup> most notably the case of *Blockburger v United States*,<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup>

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).'<sup>63</sup> 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.'<sup>64</sup> 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.'<sup>65</sup>

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.'<sup>66</sup> The court noted that 'traces of this test can be found in both the common law and civil law systems.'<sup>67</sup> 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.'<sup>68</sup> However, the Trial Chamber noted that the

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<sup>58</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [680].

<sup>59</sup> *Ibid* [681].

<sup>60</sup> 284 US 299 (1932).

<sup>61</sup> *Ibid* 304.

<sup>62</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [682].

<sup>63</sup> *Ibid* [683].

<sup>64</sup> *Ibid*.

<sup>65</sup> *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].

<sup>66</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [693].

<sup>67</sup> *Ibid*.

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

review of national case law indicates that this test is generally used together with the other elements of the *Blockburger* test.<sup>69</sup>

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.'<sup>70</sup>

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)';<sup>71</sup> 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.'<sup>72</sup>

Based on 'the marginal difference in values protected' between the two offences,<sup>73</sup> 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.<sup>74</sup>

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);<sup>75</sup> 'inhumane acts' under article 5(i) and 'cruel treatment' under article 3;<sup>76</sup> and inhumane acts (or cruel treatment) and the charges for murder.<sup>77</sup>

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.<sup>78</sup> In addition, Josipovic was found guilty of other inhumane acts under article 5(i), while the

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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.

<sup>69</sup> Ibid [695].

<sup>70</sup> Ibid [699] (emphasis in original).

<sup>71</sup> Ibid [700].

<sup>72</sup> Ibid.

<sup>73</sup> Ibid [704].

<sup>74</sup> Ibid.

<sup>75</sup> Ibid [705]–[710].

<sup>76</sup> Ibid [711]. These charges were presented in the alternative.

<sup>77</sup> Ibid [712].

<sup>78</sup> Ibid [822]–[824].

cruel treatment violation under article 3, which was based on the same facts, was dismissed by the Trial Chamber.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> 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).<sup>83</sup>

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

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid [831]–[833].

<sup>81</sup> Ibid.

<sup>82</sup> 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 Trial 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).

<sup>83</sup> Ibid [718] (emphasis in original).

decision concerning the issue of cumulative charging and convictions in *Kupreskic* was overturned by the Appeals Chamber in October 2001.<sup>84</sup>

### B Akayesu Case

The ICTR first encountered the issue of cumulative charging and convictions in *Prosecutor v Akayesu*.<sup>85</sup> The accused, Akayesu, was a *bourgmestre* in the commune of Taba and, in that capacity, was responsible for maintaining law and public order.<sup>86</sup> 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.<sup>87</sup> 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*.<sup>88</sup>

In *Akayesu* the Trial Chamber took a different approach to the issue of *concursum 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.<sup>89</sup> 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.'<sup>90</sup> 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*.<sup>91</sup>

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<sup>84</sup> *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 Jelusic (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].

<sup>85</sup> *Prosecutor v Akayesu (Trial Chamber Judgment)*, Case No ICTR-96-4-T (2 September 1998) ('*Akayesu*').

<sup>86</sup> *Ibid* [180].

<sup>87</sup> *Ibid* [181].

<sup>88</sup> *Ibid* 'Indictment' [12]–[23].

<sup>89</sup> See generally Bassiouni, 'Sources and Content of International Criminal Law', above n 7, 17.

<sup>90</sup> *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].

<sup>91</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [467].

On the basis of this ‘national and international law and jurisprudence’,<sup>92</sup> 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.<sup>93</sup>

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.<sup>94</sup>

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.<sup>95</sup>

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.<sup>96</sup> 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.’<sup>97</sup> 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

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<sup>92</sup> Ibid [468].

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid [469]–[470].

<sup>96</sup> 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.

<sup>97</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [468].

same set of facts.<sup>98</sup> 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'<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup>

In its judgment the Trial Chamber ruled that the cumulative charges in this case were 'improper' and 'untenable in law'.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> Consequently, both of the accused were found not guilty of the counts brought under article 3 for crimes against humanity.<sup>106</sup>

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<sup>98</sup> Ibid [469].

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

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

<sup>101</sup> Ibid [625].

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

<sup>103</sup> *Kayishema*, Case No ICTR-95-1-T (21 May 1999) [649].

<sup>104</sup> Ibid [637]-[644].

<sup>105</sup> Ibid [648].

<sup>106</sup> Ibid 'Verdict' [1].

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.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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.<sup>110</sup>

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.<sup>111</sup> 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.'<sup>112</sup>

Judge Khan stressed that whilst the purpose of the doctrine of *concoirs 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.<sup>113</sup> As a result, his Honour found that

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

<sup>108</sup> *Ibid* [13] (emphasis in original).

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* [28] (emphasis in original).

<sup>111</sup> *Ibid* [32].

<sup>112</sup> *Ibid* [32].

<sup>113</sup> *Ibid* [34].

no prejudice to the accused resulted from the application of this approach to cumulative charging and convictions.<sup>114</sup>

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.<sup>115</sup>

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 *concoirs d'infractions*.'<sup>116</sup> 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.<sup>117</sup>

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.<sup>118</sup> 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.<sup>119</sup>

Judge Khan's Separate and Dissenting Opinion was affirmed and followed in *Rutaganda*,<sup>120</sup> as well as in *Musema*.<sup>121</sup> Therefore this opinion, combined with

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<sup>114</sup> Ibid [37].

<sup>115</sup> Ibid [52].

<sup>116</sup> Ibid [53].

<sup>117</sup> Ibid [57].

<sup>118</sup> 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.

<sup>119</sup> 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 (2<sup>nd</sup> Cir, 1966); *Kennedy v United States*, 330 F 2d 26, 27-9 (9<sup>th</sup> Cir, 1964).

<sup>120</sup> *Rutaganda*, Case No ICTR-96-3-T (6 December 1999) [117]-[119]:

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*'),<sup>122</sup> both the ICTY and the ICTR Trial Chambers had dealt with the issue of *concursum delictorium* at various levels of proceedings.<sup>123</sup> The jurisprudence of the Tribunals revealed a variety of

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[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 Judgment*.

<sup>121</sup> *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.

<sup>122</sup> Case No IT-96-21-A (20 February 2001).

<sup>123</sup> 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) [III B], 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 Kvočka (Decision on Defence Motions for Acquittal)*, Case No IT-98-30/1-T (15 December 2000), where the Trial Chamber found that:

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*.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup>

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,<sup>128</sup> based on the judgments in *Kupreskic* and *Ball v United States*.<sup>129</sup>

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'.<sup>130</sup> The prosecution also relied on the *Akayesu* judgment, which upheld the finding of cumulative convictions in certain circumstances.<sup>131</sup>

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.<sup>132</sup>

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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.

<sup>124</sup> *Prosecutor v Mucic, Delic, Landžo (Indictment)*, Case No IT-96-21 (21 March 1996).

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

<sup>126</sup> *Ibid.*

<sup>127</sup> *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.

<sup>128</sup> *Celebici*, Case No IT-96-21-A (20 February 2001) [393].

<sup>129</sup> 140 US 118 (1891).

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

<sup>131</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [468].

<sup>132</sup> *Celebici*, Case No IT-96-21-A (20 February 2001) [400].

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*.<sup>133</sup> 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.’<sup>134</sup> 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,<sup>135</sup> 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.<sup>136</sup>

The approaches of German and Zambian law to the issue of cumulative convictions were examined in *Celebici*.<sup>137</sup> The Appeals Chamber also considered the US *Blockburger* standard,<sup>138</sup> 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*.<sup>139</sup> 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.<sup>140</sup>

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

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<sup>133</sup> 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].

<sup>134</sup> *Celebici*, Case No IT-96-21-A (20 February 2001) [405].

<sup>135</sup> *Tadic*, Case No IT-94-1A and No IT-94-1-Abis (26 January 2000) [144].

<sup>136</sup> Ibid [33].

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

<sup>138</sup> Ibid [409].

<sup>139</sup> US Military Tribunal, Nuremberg (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].

<sup>140</sup> *Celebici*, Case No IT-96-21-A (20 February 2001) [412].

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.<sup>141</sup>

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’.<sup>142</sup> 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’.<sup>143</sup> 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*.<sup>144</sup>

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.<sup>145</sup> 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.<sup>146</sup>

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<sup>141</sup> Ibid [413].

<sup>142</sup> Ibid [416]–[420].

<sup>143</sup> 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].

<sup>144</sup> 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].

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

<sup>146</sup> Ibid [423].

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.<sup>147</sup> 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.’<sup>148</sup> 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<sup>149</sup> 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.<sup>150</sup>

In their Separate and Dissenting Opinion, Judges Hunt and Bennouna agreed with the majority’s ruling that cumulative charges are generally permitted.<sup>151</sup> 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.’<sup>152</sup> Judges Hunt and Bennouna did not find any such prejudice with regard to cumulative charging in this case.<sup>153</sup>

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’.<sup>154</sup> The judges found that the accused could suffer a ‘very real risk’ of prejudice to their rights if convicted cumulatively.<sup>155</sup> 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.<sup>156</sup>

The major point of difference between the Separate and Dissenting Opinion and the majority judgment was in the application of the ‘different elements’ test

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<sup>147</sup> Ibid [423].

<sup>148</sup> 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*.

<sup>149</sup> Ibid [431].

<sup>150</sup> Ibid [710].

<sup>151</sup> 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’.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid [22].

<sup>155</sup> Ibid [23].

<sup>156</sup> Ibid.

expounded by the majority.<sup>157</sup> 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.’<sup>158</sup> 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’.<sup>159</sup> Rather, it should focus on the ‘substantive elements which relate to an accused’s conduct, including their mental state.’<sup>160</sup> 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.<sup>161</sup>

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.<sup>162</sup>

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.’<sup>163</sup> 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.<sup>164</sup> Interestingly, Judges Hunt and Bennouna rejected the majority’s finding of a ‘gradation of specificity among the Articles of the Statute’.<sup>165</sup>

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

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<sup>157</sup> Ibid [24].

<sup>158</sup> Ibid [26] (emphasis in original).

<sup>159</sup> Ibid.

<sup>160</sup> 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].

<sup>161</sup> Ibid [33].

<sup>162</sup> Ibid [37] (emphasis in original).

<sup>163</sup> Ibid (emphasis in original).

<sup>164</sup> Ibid [38].

<sup>165</sup> Ibid [41]–[42].

offence of 'wilfully causing great suffering or serious injury to body or health under Article 2 and that of cruel treatment under Article 3'.<sup>166</sup> 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.<sup>167</sup>

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.<sup>168</sup>

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.<sup>169</sup>

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.<sup>170</sup> 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

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<sup>166</sup> *Ibid* [53].

<sup>167</sup> *Ibid* [53].

<sup>168</sup> *Ibid* [57].

<sup>169</sup> *Ibid* [58].

<sup>170</sup> *Ibid* [30]–[31].

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 *Jelusic*, 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).<sup>171</sup> 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 Jelusic Case

The indictment in *Jelusic* 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, Jelusic, entered the main hangar of Luka and interrogated, beat and often killed detainees.<sup>172</sup> Jelusic was charged with genocide.<sup>173</sup>

The Trial Chamber acquitted the accused of genocide, ruling that the prosecutor had failed to prove beyond a reasonable doubt that Jelusic acted with the required intent to destroy, in whole or in part, a national, ethnic or religious group.<sup>174</sup> 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’.<sup>175</sup> 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.<sup>176</sup>

<sup>171</sup> This is because the accused encounters a pre-existing law of which they had notice.

<sup>172</sup> *Prosecutor v Jelusic (Indictment)*, Case No IT-95-10 (14 December 1999) [1]–[2] (*‘Jelusic Indictment’*).

<sup>173</sup> *Prosecutor v Jelusic (Trial Chamber Judgment)*, Case No IT-95-10-T (14 December 1999) [3] (*‘Jelusic Trial Judgment’*).

<sup>174</sup> *Ibid* [108].

<sup>175</sup> *Ibid* [26].

<sup>176</sup> *Ibid* [138]–[139].

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).<sup>177</sup> At the appellate level, the defence invited the Appeals Chamber to quash the lesser of each pair of offences for which Jelusic was sentenced,<sup>178</sup> relying on the reasoning in the *Celebici Trial Judgment*.<sup>179</sup> 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.<sup>180</sup>

The decision of the Appeals Chamber in *Jelusic* 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 *Jelusic*, 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*<sup>181</sup> 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),<sup>182</sup> all of which were based on the same facts, relating to the takeover of Srebrenica.

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<sup>177</sup> *Jelusic*, Case No IT-95-10-A (5 July 2001) [82].

<sup>178</sup> *Ibid* [80].

<sup>179</sup> *Ibid* [78].

<sup>180</sup> *Ibid* [81]. In the *Jelusic 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’: *Jelusic 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: *Jelusic Appeals Judgment*, Case No IT-95-10-A (5 July 2001) [93].

<sup>181</sup> Case No IT-98-33 (2 August 2001) (‘*Krstic*’).

<sup>182</sup> *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))’.

As in *Jelusic*, the *Krstic* judgment adopted the test in *Celebici* on the issue of cumulative convictions.<sup>183</sup> 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.’<sup>184</sup> 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’,<sup>185</sup> 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.’<sup>186</sup> 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’.<sup>187</sup>

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 to 19 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.<sup>188</sup>

As a result the *Celebici* test was applicable only to the extent that ‘the offence of persecutions is perpetrated through murders.’<sup>189</sup>

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.<sup>190</sup>

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.<sup>191</sup> 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

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<sup>183</sup> Ibid [664].

<sup>184</sup> Ibid [669].

<sup>185</sup> Ibid [673].

<sup>186</sup> Ibid.

<sup>187</sup> Ibid [677].

<sup>188</sup> Ibid [679].

<sup>189</sup> Ibid.

<sup>190</sup> 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].

<sup>191</sup> Ibid [727].

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, Krstić'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.<sup>192</sup>

#### VI CONCURSUS DELICTORIUM AND THE ICC STATUTE

The *Statute of the ICC* does not address the issue of *concursum delictorium*. The *Statute of the ICC* and the *Finalised Draft Text of the Elements of Crimes*<sup>193</sup> also fail to address the overlap between the elements of genocide, crimes against humanity and war crimes.<sup>194</sup> 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.<sup>195</sup>

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.<sup>196</sup>

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<sup>192</sup> The issue of *concursum delictorium* was most recently considered by the Trial Chamber in *Prosecutor v Kvočka (Trial Chamber Judgment)*, Case No IT-98-30/1 (2 November 2001) ('*Kvočka*'). 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 *Kvočka*.

<sup>193</sup> 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*').

<sup>194</sup> Bassiouni, 'The Normative Framework of International Humanitarian Law', above n 8, 229.

<sup>195</sup> 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.

<sup>196</sup> Bassiouni, 'The Normative Framework of International Humanitarian Law', above n 8, 232.

## 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.'<sup>197</sup> 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.

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<sup>197</sup> *Celebici*, Case No IT-96-21-A (20 February 2001) [413].

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 (*concurso 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 is to 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 *concursum 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 *concursum delictorium* 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.