



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of the  
Former Yugoslavia since 1991

Case No.: IT-96-21-A

Date: 20 February 2001

Original: ENGLISH

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**IN THE APPEALS CHAMBER**

**Before:** Judge David Hunt, Presiding  
Judge Fouad Riad  
Judge Rafael Nieto-Navia  
Judge Mohamed Bennouna  
Judge Fausto Pocar

**Registrar:** Mr Hans Holthuis

**Judgement of:** 20 February 2001

**PROSECUTOR**

**V**

**Zejnir DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC  
and Esad LANDŽO (aka "ZENG")**

**(" ^ELEBICI Case")**

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**JUDGEMENT**

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**Counsel for the Accused:**

Mr John Ackerman and Ms Edina Rešidović for Zejnir Delalic  
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic  
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic  
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

**The Office of the Prosecutor:**

Mr Upawansa Yapa  
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Mr Norman Farrell  
Ms Sonja Boelaert-Suominen  
Mr Roeland Bos

## VI. MULTIPLE CONVICTIONS BASED ON THE SAME ACTS

389. The Trial Chamber found Mucić, Delić, and Landžo guilty both of grave breaches of the Geneva Conventions and of violations of the laws or customs of war based on the same acts. The counts containing convictions under both Articles 2 and 3 of the Statute are as follows:

Mucić: Counts 13 and 14; 33 and 34; 38 and 39; 44 and 45; 46 and 47.

Delić: Counts 1 and 2; 3 and 4; 11 and 12; 18 and 19; 21 and 22; 42 and 43; 46 and 47.

Landžo: Counts 1 and 2; 5 and 6; 7 and 8; 11 and 12; 15 and 16; 24 and 25; 30 and 31; 36 and 37; 46 and 47.

390. Mucić and Delić have appealed against the judgement of the Trial Chamber, stating in the Delić/Mucić Supplementary Brief that these convictions violate the *Blockburger* standard, established by the U.S. Supreme Court in 1932. In *Blockburger v United States*, the Supreme Court held 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 a fact which the other does not.”<sup>609</sup>

391. Although Landžo was also convicted under both Articles 2 and 3 based on the same acts, he did not lodge an appeal on this issue.

392. The crux of the appellants’ arguments is as follows:

Setting aside the question of the applicability of Common Article 3 to international armed conflict and whether Common Article 3 imposes international individual criminal liability, to obtain a conviction under Common Article 3, the elements are identical with one exception. An element of grave breaches of the Geneva Conventions is that the complainant was a person protected by one of the Conventions. Absent such proof, there can be no conviction under the Tribunal’s jurisdiction to try allegations of grave breaches of the Geneva Conventions.

Thus, judgements of conviction for both grave breaches of the Geneva Convention and violations of the laws and customs of war would violate the *Blockburger* standard.<sup>610</sup>

The appellants concede that Articles 2 and 3 differ. Beyond that, however, they provide very little analysis of this issue, merely concluding that the *Blockburger* standard is violated. Their argument appears to hinge on the fact that the requisite proof of protected person status under the grave breaches charge is lacking.

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<sup>609</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (“*Blockburger*”).

<sup>610</sup> Appellants-Cross Appellees Hazim Delić’s and Zdravko “Pavo” Mucić’s Motion for Leave to File Supplemental Brief and Supplemental Brief, 14 Feb 2000, p 13, (footnotes omitted).

393. In their 7 April 2000 Response to the Prosecutor's Supplementary Brief, the appellants restate that the *Blockburger* standard is the appropriate test for double jeopardy.<sup>611</sup> They further claim that under the reasoning of the *Kupreskic* Judgement and of *Ball v United States*, a 1985 U.S. Supreme Court case which applied the *Blockburger* test, multiple convictions based on the same acts are not allowed.<sup>612</sup>

394. In their respective designations of the issues on appeal, Muci} and Deli} reiterate the issue as follows:

Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches for the Geneva Conventions and for violations of the Laws and Customs of War based on the same acts.<sup>613</sup>

The relief sought by the appellants is dismissal of one of the counts; they do not indicate which one.

395. According to the Prosecution, the *Kupreskic* Judgement represents an unwarranted departure from the prior practice of both the Tribunal and the ICTR.<sup>614</sup> In *Kupreskic*, the Trial Chamber held that the primary applicable test is whether each offence contains an element not required by the other.<sup>615</sup> An additional test, which ascertains whether the various provisions at issue protect different values, can be used in conjunction with and in support of the primary test.<sup>616</sup> The Trial Chamber in *Kupreskic* found that an individual cannot be convicted of both murder as a crime against humanity and murder as a war crime, because murder as a war crime does not require proof of elements that murder as a crime against humanity requires.<sup>617</sup>

396. The Prosecution maintains that the solution should be sought in the practice of the International Tribunals, rather than in particular national systems, although the latter contain useful terminology that can be employed in an analysis of the issues.<sup>618</sup> After discussing the terminology found in various national systems, the Prosecution examines in detail the practice

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<sup>611</sup> Appellant-Cross Appellees Zdravko Muci} and Hazim Deli}'s Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 7 Apr. 2000, para 21.

<sup>612</sup> *Ibid* at para 24.

<sup>613</sup> Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, p 4; Appellant Zdravko Muci}'s Final Designation of His Grounds of Appeal, 31 May 2000, para 7.

<sup>614</sup> Prosecution Response to the Appellants' Supplementary Brief, 25 Apr. 2000, para 4.5.

<sup>615</sup> *Kupreskic* Judgement, para 682.

<sup>616</sup> *Ibid* at para 693-695.

<sup>617</sup> *Ibid* at para 700-701.

<sup>618</sup> Prosecution Response to Supplementary Brief, para 4.7.

of this Tribunal and the ICTR, and concludes that the "*Tadic-Akayesu* test is consistent with the weight of precedent in both Tribunals, and consistent with international standards of justice."<sup>619</sup>

397. In *Tadic*, the Prosecution states, the Trial Chamber rejected the challenge to the cumulative charges in the indictment and convicted the accused cumulatively of a number of crimes.<sup>620</sup> The Trial Chamber imposed concurrent sentences upon the accused.<sup>621</sup> The Prosecution appealed on various grounds, and the *Tadi}* Appeal Judgment resulted in the accused being convicted cumulatively under two or three articles of the Statute.<sup>622</sup> Under the *Tadic* test, according to the Prosecution, the "accused can be charged with and convicted of as many crimes as the facts of the case disclose"<sup>623</sup> if there is "ideal concurrence." Ideal concurrence describes the situation "where a single act of an accused contravenes more than one provision of the criminal law."<sup>624</sup>

398. Further, the Prosecution explains that the ICTR Trial Chamber in *Akayesu*<sup>625</sup> held that cumulative convictions are acceptable:

1. where the offences have different elements;
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 to fully describe what the accused did.<sup>626</sup>

399. The Prosecution finally states that the *Tadic* and *Akayesu* tests can be reconciled if "the *Akayesu* test is considered as a test for distinguishing between cases of ideal concurrence and cases of apparent concurrence."<sup>627</sup>

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<sup>619</sup> *Ibid* at para 4.94.

<sup>620</sup> *Ibid* at paras 4.9, 4.10.

<sup>621</sup> *Id.*

<sup>622</sup> *Ibid* at paras 4.11-4.12.

<sup>623</sup> *Ibid* at para 4.78(1).

<sup>624</sup> *Ibid* at para 4.8.

<sup>625</sup> *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 Sept. 1998.

<sup>626</sup> Prosecution Response to Supplementary Brief, para 4.50.

<sup>627</sup> *Ibid* at para 4.83. According to the Prosecution, the relevant principles under a combined "*Tadi}*-*Akayesu*" test would be as follows: (1) In cases of ideal concurrence [...], the accused can be charged with and convicted of as many crimes as the facts of the case disclose. The fact that multiple counts relate to the same conduct is considered relevant only at the post-conviction stage, in relation to sentencing. (*Tadi}* test). (2) Two crimes will stand in a relationship of ideal concurrence [...] (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. (*Akayesu* test.). *Id.*

## A. Discussion

### 1. Cumulative Charging

400. 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.

### 2. Cumulative Convictions

401. Before examining the relevant provisions of the Statute of the International Tribunal, the jurisprudence of the Tribunal and of national jurisdictions may be considered for guidance on this issue.

402. During the proceedings in the present case, a bench of the Appeals Chamber had to decide whether the accused Delić's complaint, that he was being charged on multiple occasions throughout the indictment with two different crimes arising from one act or omission, justified the granting of leave to appeal.<sup>628</sup> The bench quoted the reasoning of the Trial Chamber in *Tadić*,<sup>629</sup> and stated that it did not consider that the reasoning in *Tadić* revealed an error, much less a grave one, justifying the granting of leave to appeal.<sup>630</sup>

403. Based upon the Prosecution's appeal from the Trial Chamber judgment in *Tadić*, the Appeals Chamber overturned the acquittal of Tadić on all relevant Article 2 counts and on four cumulatively charged counts relating to the killing of five victims from the village of Jaskici.<sup>631</sup> The Appeals Chamber did so even though all of the Article 2 counts related to conduct for which the accused had already been convicted under other provisions of the Statute, namely Articles 3 and 5. As a result, Tadić was cumulatively convicted with respect to the same

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<sup>628</sup> *Prosecutor v Delalić et al.*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, paras 35-6, 6 Dec. 1996.

<sup>629</sup> The Trial Chamber in *Tadić* stated: "In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading." *Prosecutor v Dusko Tadić*, Decision on the Defence Motion on the Form of the Indictment, Case No. IT-94-1-T, 14 Nov. 1995, p. 10.

<sup>630</sup> *Prosecutor v Delalić et al.*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, paras 35-6, 6 Dec. 1996.

<sup>631</sup> *Tadić* Appeal Judgement, p 144.

conduct, based on numerous different groups of counts.<sup>632</sup> The problem of multiple convictions was not addressed as such by the Chamber. The multiple convictions were however taken into account in the *Tadic* Sentencing Appeal Judgement, where the Appeals Chamber imposed concurrent sentences on the accused.<sup>633</sup>

404. During the *Aleksovski* Appeal, the Appeals Chamber briefly addressed the issue of multiple convictions for the same acts, in connection with sentencing.<sup>634</sup> The Trial Chamber in that case had acquitted the accused on Counts 8 and 9 of grave breaches of the Geneva Conventions but convicted him on Count 10 of a violation of the laws or customs of war.<sup>635</sup> The Appeals Chamber stated:

The material acts of the Appellant underlying the charges are the same in respect of Counts 8 and 9, as in respect of Count 10, for which the Appellant has been convicted. Thus, even if the verdict of acquittal were to be reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant's sentence. Moreover, any sentence imposed in respect of Counts 8 and 9 would have to run concurrently with the sentence on Count 10.<sup>636</sup>

405. This analysis of the Tribunal's jurisprudence reveals that multiple convictions based on the same acts have sometimes been upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase. The Appeals Chamber of the ICTR has not made any pronouncements on the issue of multiple convictions as yet.

406. National approaches vary with respect to cumulative convictions. Some countries allow such convictions, letting the record reflect fully each violation that occurred, and preferring to address any allegations of unfairness in the manner of sentencing. Other countries reserve such convictions for acts resulting in the most severe of crimes, whereas still others require differing

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<sup>632</sup> The counts and convictions were as follows:

(1) Counts 8, 9, 10, and 11: Various beatings of prisoners; Convictions: Article 2(b) (inhuman treatment); Article 2(c) (wilfully causing great suffering or serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).

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

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

<sup>633</sup> *Prosecutor v Tadic*, Case No. IT-94-1A and IT-94-1-Abis, Judgement in Sentencing Appeals, p 33, 26 Jan. 2000.

<sup>634</sup> *Aleksovski* Appeal Judgement, pp 59-60, 24 Mar. 2000.

<sup>635</sup> *Id.* at 59. The counts are as follows.

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

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

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

<sup>636</sup> *Aleksovski* Appeal Judgement, at 60.

statutory elements before cumulative criminal convictions may be imposed. A few examples will demonstrate these different approaches.

407. Under German law, for example, the judgment of the court details every crime that has been perpetrated as a result of a single act. In cases of ideal concurrence:

the perpetrator receives only one sentence, but because he is convicted of all crimes committed by him, or of the multiple commissions of a crime, the judgement documents which crimes have been fulfilled or how often the perpetrator has fulfilled a crime.<sup>637</sup>

408. In Zambia, on the other hand, multiple convictions based on the same act can only be imposed for capital crimes. Under the Zambian Penal Code:

[a] person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.<sup>638</sup>

409. In the United States, by contrast, the *Blockburger* ruling establishes that multiple convictions can be imposed under different statutory provisions if each statutory provision requires proof of a fact which the other does not.<sup>639</sup> This test has been more recently affirmed in the *Rutledge* case decided by the U.S. Supreme Court in 1996.<sup>640</sup>

410. Another approach, that of a United States military tribunal established at the end of World War II to prosecute persons charged with crimes against peace, war crimes, and crimes against humanity, is also instructive. According to the Law Reports of Trials of War Criminals, the United States Military Tribunal established pursuant to Allied Control Council Law No. 10 was of the opinion that:

war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may also amount to crimes against humanity.<sup>641</sup>

411. The Law Reports note that it seemed as if the tribunal “was willing to agree that acts taken in pursuance of the *Nacht und Nebel Plan* constituted crimes against humanity as well as

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<sup>637</sup> Prosecution Response to Supplementary Brief, para 4.92 (citing A. Schönke/H. Schröder, *Strafgesetzbuch: Kommentar* 697 (25th ed. Munich: 1997) (counsel’s translation)).

<sup>638</sup> Republic of Zambia Penal Code Act, Ch. 87 of the Laws of Zambia, p 28.

<sup>639</sup> *Blockburger* at 304.

<sup>640</sup> *Rutledge v. U.S.*, 517 U.S. 292, 297 (1996).

<sup>641</sup> Law Reports of Trials of War Criminals, U.N. War Crimes Commission VI, p 79 (London: 1948).

war crimes.”<sup>642</sup> In the *Trial of Josef Altstötter and Others (The Justice Trial)*, the tribunal found numerous defendants guilty of war crimes as well as crimes against humanity based on exactly the same acts,<sup>643</sup> thus appearing to uphold the possibility of cumulative convictions, at least when war crimes and crimes against humanity are involved.

412. Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds 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.

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

414. In this case, defendants Mucic and Delic have been convicted of numerous crimes under Articles 2 and 3 of the Statute, which crimes arise out of the same acts. The chart below summarises their convictions.

Article 2 (Grave Breaches of Geneva Convention No. IV)	Article 3 (Violations of the Laws or Customs of War—Common Article 3)
1. wilful killings	1. murders
2. wilfully causing great suffering or serious injury to body or health	2. cruel treatment
3. torture	3. torture
4. inhuman treatment	4. cruel treatment

<sup>642</sup> *Id.*

<sup>643</sup> *Ibid* at 75-76. See also Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc S/25274 (“The Commission notes that fundamental rules of human rights law often are materially identical to rules of the law of armed conflict. It is therefore possible for the same act to be a war crime and a crime against humanity.”). However, the Report does not indicate whether *convictions* based on the same acts are possible under provisions for war crimes and crimes against humanity.



Land' o was cumulatively convicted under Articles 2 and 3, as to categories 1, 2, and 3 above (see chart). Although he did not file an appeal on this issue, the Appeals Chamber finds that reasons of fairness and the consideration that only distinct crimes may justify multiple convictions, merit the application of the same principles to his convictions as well.

415. Under Article 2 of the Statute,

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- a. wilful killing;
- b. torture or inhuman treatment, including biological experiments;
- c. wilfully causing great suffering or serious injury to body or health;
- d. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- e. compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- f. wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- g. unlawful deportation or transfer or unlawful confinement of a civilian;
- h. taking civilians as hostages.

416. The appellants have been convicted under Geneva Convention IV. Article 147 of this Convention proscribes grave breaches such as wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health, if committed against persons or property protected by the Convention. The Convention defines "protected persons" as those who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."<sup>644</sup> The ICRC Commentary (GC IV) explains that the term "in the hands of"

is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or hands' of the Occupying Power.... In other words, the expression in the hands of' need not necessarily be understood in the physical sense; it simply means that the person *is in territory which is under the control of the Power in question*.<sup>645</sup>

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<sup>644</sup> Article 4, Geneva Convention IV.

<sup>645</sup> ICRC Commentary (GC IV), p. 47 (emphasis provided). At page 46, the ICRC Commentary lists further limitations to the granting of protected person status. On the territory of belligerent States, protection is accorded under Article 4 to "all persons of foreign nationality and to persons without any nationality," but the following are excluded:

417. The definition of “protected person” under Geneva Convention IV is further limited by the fact that “persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall *not be considered as protected persons within the meaning of the present Convention*.”<sup>646</sup>

418. However, it should be noted that this Tribunal’s jurisprudence has held that “protected persons” may encompass victims possessing the same nationality as the perpetrators of crimes, if, for example, these perpetrators are acting on behalf of a State which does not extend these victims diplomatic protection or to which the victims do not owe allegiance.”<sup>647</sup>

419. Under Article 3 of the Statute, “The International Tribunal shall have the power to prosecute persons violating the laws or customs of war.”<sup>648</sup> The origins of the convictions at issue—murder, cruel treatment, and torture—lie in common Article 3 of the Geneva Conventions, which states in the pertinent part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

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- (1) Nationals of a State which is not bound by the Convention;
  - (2) Nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are;
  - (3) Persons covered by the definition given above [...] who enjoy protection under one of the other three Geneva Conventions of August 12, 1949.  
In occupied territories, protection is accorded to “all persons who are not of the nationality of the occupying State,” but the following are excluded:
    - (1) Nationals of a State which is not party to the Convention;
    - (2) Nationals of a co-belligerent State, so long as the State in question has normal diplomatic representation in the occupying State;
    - (3) Persons covered by the definition given above [...] who enjoy protection under one of the three other Geneva Conventions of August 12, 1949.

<sup>646</sup> Article 4, Geneva Convention IV (emphasis provided).

<sup>647</sup> See *Tadic* Appeal Judgement, paras 168-169. See also *Aleksovski* Appeal Judgement, paras 151-2 (“In the *Tadic* Judgement, the Appeals Chamber, after considering the nationality criterion in Article 4, concluded that not only the text and the drafting history of the Convention, but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.”).

<sup>648</sup> Article 3, Statute.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment; <sup>649</sup>

420. Common Article 3 of the Geneva Conventions is intended to provide minimum guarantees of protection to persons who are in the middle of an armed conflict but are not taking any active part in the hostilities. Its coverage extends to *any* individual not taking part in hostilities and is therefore broader than that envisioned by Geneva Convention IV incorporated into Article 2 of the Statute, under which “protected person” status is accorded only in specially defined and limited circumstances, such as the presence of the individual in territory which is under the control of the Power in question, and the exclusion of wounded and sick members of the armed forces from protected person status; while protected person status under Article 2 therefore involves not taking an active part in hostilities, it also comprises further requirements. As a result, Article 2 of the Statute is more specific than common Article 3. This conclusion is further confirmed by the fact that the Appeals Chamber has also stated that Article 3 of the Statute 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.”<sup>650</sup> Finally, common Article 3 is present in all four Geneva Conventions, and as a rule of customary international law, its substantive provisions are applicable to internal and international conflicts alike.<sup>651</sup>

421. Applying the provisions of the test articulated above, the first issue is whether each applicable provision contains a materially distinct legal element not present in the other, bearing in mind that an element is materially distinct from another if it requires proof of a fact not required by the other.<sup>652</sup>

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<sup>649</sup> Article 3, Geneva Conventions of 1949.

<sup>650</sup> *Tadić* Jurisdiction Decision, para 91.

<sup>651</sup> See *Nicaragua*, para 218 (“Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called elementary considerations of humanity”).

<sup>652</sup> It should also be borne in mind that Article 2 applies to international conflicts, while Article 3 applies to both internal and international conflicts. However, this potentially distinguishing element does not come into play here, because the conflict at issue has been characterised as international as well. See discussion above, at para

422. The first pair of double convictions concerned are “wilful killing” under Article 2 and “murder” under Article 3. Wilful killing as a grave breach of the Geneva Conventions (Article 2) consists of the following elements:

- a. death of the victim as the result of the action(s) of the accused,
- b. who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death,<sup>653</sup>
- c. and which he committed against a protected person.

423. Murder as a violation of the laws or customs of war (Article 3) consists of the following elements:

- a. death of the victim as a result of an act of the accused
- b. committed with the intention to cause death<sup>654</sup>
- c. and against a person taking no active part in the hostilities.

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.

424. The second pair of double convictions at issue are “wilfully causing great suffering or serious injury to body or health” under Article 2, and “cruel treatment” under Article 3. The former is defined as

- a. an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health,<sup>655</sup>

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50, on this point. In addition, both Articles 2 and 3 require a nexus between the crimes alleged and the armed conflict.

<sup>653</sup> *Blaskic* Judgement, para 153.

<sup>654</sup> *Jelisc* Judgement, para 35; *Blaskic* Judgement, para 181.

<sup>655</sup> *Blaskic* Judgement, para 156.

- b. committed against a protected person.

Cruel treatment as a violation of the laws or customs of war is

- a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,<sup>656</sup>
- b. committed against a person taking no active part in the hostilities.

The offence of wilfully causing great suffering under Article 2 contains an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. Because protected persons necessarily constitute individuals who are not taking an active part in the hostilities, the definition of cruel treatment does not contain a materially distinct element—that is, it does not *require* proof of a fact that is not required by its counterpart. As a result, the first prong of the test is not satisfied, and it thus becomes necessary to apply the second prong of the test. Because wilfully causing great suffering under Article 2 contains an additional element and more specifically applies to the situation at hand, that conviction must be upheld, and the Article 3 conviction must be dismissed.

425. The third pair of double convictions at issue are torture under Article 2 and torture under Article 3. Because the term itself is identical under both provisions, the sole distinguishing element stems from the protected person requirement under Article 2. As a result, torture under Article 2 contains an element requiring proof of a fact not required by torture under Article 3, but the reverse is not the case, and so the first prong of the test is not satisfied. Again, it becomes necessary to apply the second prong of the test. Because torture under Article 2 contains an additional element that is required for a conviction to be entered, that conviction must be upheld, and the Article 3 conviction must be dismissed.

426. The final pair of double convictions at issue are “inhuman treatment” under Article 2 and “cruel treatment” under Article 3. Cruel treatment is defined above.<sup>657</sup> Inhuman treatment is

- a. an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity,<sup>658</sup>
- b. committed against a protected person.

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<sup>656</sup> *Jelisić* Judgement, para 41; Trial Judgement, para 552; *Blaskić* Judgement, para 186.

<sup>657</sup> See para 424 above.

<sup>658</sup> *Blaskić* Judgement, para 154; see also Trial Judgement, para 543.

Again, the sole distinguishing element stems from the protected person requirement under Article 2. By contrast, cruel treatment under Article 3 does not require proof of a fact not required by its counterpart. Hence the first prong of the test is not satisfied, and applying the second prong, the Article 3 conviction must be dismissed.

## **B. Conclusion**

427. For these reasons, the Appeals Chamber finds that, of the double convictions entered by the Trial Chamber, only the Article 2 convictions must be upheld, and the Article 3 convictions must be dismissed.

**Mucic:** Count 13: upheld

Count 14: dismissed

Count 33: upheld

Count 34: dismissed

Count 38: upheld

Count 39: dismissed

Count 44: upheld

Count 45: dismissed

Count 46: upheld

Count 47: dismissed.

**Delić:** Count 1: dismissed--see section on Delić} factual grounds

Count 2: dismissed--see section on Delić} factual grounds

Count 3: upheld

Count 4: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld<sup>659</sup>

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<sup>659</sup> Delić} was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 18: upheld

Count 19: dismissed

Count 21: upheld

Count 22: dismissed

Count 42: upheld

Count 43: dismissed

Count 46: upheld

Count 47: dismissed.

**Landžo:** Count 1: upheld

Count 2: dismissed

Count 5: upheld

Count 6: dismissed

Count 7: upheld

Count 8: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld<sup>660</sup>

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 15: upheld

Count 16: dismissed

Count 24: upheld

Count 25: dismissed

Count 30: upheld

Count 31: dismissed

Count 36: upheld

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<sup>660</sup> Landžo was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 37: dismissed

Count 46: upheld

Count 47: dismissed

### C. Impact on Sentencing

428. If, on application of the first prong of the above test, a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider the impact that this will have on sentencing. In the past, before both this Tribunal and the ICTR, convictions for multiple offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently.<sup>661</sup>

429. It is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive.<sup>662</sup> In terms of the final sentence imposed, however, the governing criteria is that it should reflect the totality of the culpable conduct (the 'totality' principle),<sup>663</sup> or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.

430. Therefore, the overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.

431. Of the double convictions imposed on the accused in this case, only the Article 2 convictions have been upheld; the Article 3 convictions have been dismissed. The Appeals

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<sup>661</sup> Such sentences have been confirmed by the Appeals Chamber in the *Tadic* Sentencing Appeal Judgement and the *Furund'ija* Appeal Judgement.

<sup>662</sup> See also Rule 101(C) of the Rules: "The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently."

<sup>663</sup> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate.' (footnote omitted) D.A. Thomas, *Principles of Sentencing* (Heinemann: London, 1980), p 56; See also *R v Bocskei* (1970) 54 Cr. App. R. 519, at 521: "[...] when consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive." Section 28(2)(b) Criminal Justice Act 1991 preserves this principle. It applies in all cases where consecutive sentences are imposed, e.g., *R v Reeves*, 2 Cr. App. R (S) 35, CA; *R v Jones*, [1996] 1 Ar. App.R (S) 153; In Canada see e.g., *R v M (CA)*, [1996] 1 SCR 500: "the global sentence imposed should reflect the overall culpability of the offender and the circumstances of the offence"; In Australia: *Postiglione v R*, 145 A.L.R. 408; *Mill v R* (1988) 166 CLR 59 at 63; *R v Michael Arthur Watts*, [2000] NSWCCA 167 (the court should look at the individual offences, determine the sentences for each of them and look at the total sentence and structure a sentence reflecting that totality); *R v Mathews*, Supreme Court of New South Wales, 16 July 1991.



Chamber acknowledges that if the Trial Chamber had not imposed double convictions, a different outcome in terms of the length and manner of sentencing, might have resulted. Because this is a matter that lies within the discretion of the Trial Chamber, this Chamber remits the issue of sentencing to a Trial Chamber to be designated by the President of the Tribunal.

432. Judge Hunt and Judge Bennouna append a separate and dissenting opinion in relation to the issues arising in this chapter.