

**UNITED
NATIONS**

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

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 "ZENGA")**

(" ^ELEBICI Case")

JUDGEMENT**Counsel for the Accused:**

Mr John Ackerman and Ms Edina Rešidovi} 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

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Mr Upawansa Yapa
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Ms Sonja Boelaert-Suominen
Mr Roeland Bos

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 Deli}'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.⁶²⁸ The bench quoted the reasoning of the Trial Chamber in *Tadic*,⁶²⁹ and stated that it did not consider that the reasoning in *Tadic* revealed an error, much less a grave one, justifying the granting of leave to appeal.⁶³⁰

403. Based upon the Prosecution's appeal from the Trial Chamber judgment in *Tadic*, the Appeals Chamber overturned the acquittal of Tadic on all relevant Article 2 counts and on four cumulatively charged counts relating to the killing of five victims from the village of Jaskici.⁶³¹ 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, Tadic was cumulatively convicted with respect to the same

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

⁶²⁹ The Trial Chamber in *Tadic* 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 Tadic*, Decision on the Defence Motion on the Form of the Indictment, Case No. IT-94-1-T, 14 Nov. 1995, p. 10.

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

⁶³¹ *Tadic* Appeal Judgement, p 144.

conduct, based on numerous different groups of counts.⁶³² 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.⁶³³

404. During the *Aleksovski* Appeal, the Appeals Chamber briefly addressed the issue of multiple convictions for the same acts, in connection with sentencing.⁶³⁴ 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.⁶³⁵ 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 10.⁶³⁶

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

⁶³² 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).

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

⁶³⁴ *Aleksovski* Appeal Judgement, pp 59-60, 24 Mar. 2000.

⁶³⁵ *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).

⁶³⁶ *Aleksovski* Appeal Judgement, at 60.

war crimes.⁶⁴² 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,⁶⁴³ 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

⁶⁴² *Id.*

⁶⁴³ *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.

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.⁶⁶¹

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.⁶⁶² 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),⁶⁶³ 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

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

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

⁶⁶³ "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.