

XVI. SEPARATE AND DISSENTING OPINION OF JUDGE DAVID HUNT AND JUDGE MOHAMED BENNOUNA

A. Introduction

1. We append a separate and dissenting opinion in relation to the issue of cumulative convictions not only because we are unable to agree with some of the reasoning and part of the outcome in the majority opinion, but also because, in relation to those conclusions in the majority opinion with which we do agree, we believe it to be desirable to give a fuller explanation for those conclusions.

2. First, we intend to explain more thoroughly why we believe that the various approaches in the previous jurisprudence on this issue within the Tribunal, and the individual approaches of national systems, do not provide of themselves a satisfactory solution for this Tribunal. Secondly, we give our reasons as to *why* cumulative convictions in relation to the same conduct, as well as cumulative penalties in sentencing, are impermissible.

3. There are two matters of substance in relation to which we take a different view to that taken by the majority. The first relates to the application of the test to determine whether two crimes are legally distinct. The second relates to the way in which, when a choice must be made as to which of two or more possible cumulative convictions should be retained, that choice must be made.

B. Background

4. The ground of appeal of Mucic and Delic alleges that they were impermissibly convicted and sentenced under both Article 2 and Article 3 of the Statute in respect of the same acts.¹ The ground was described in the following terms:

¹ Appellants-Cross Appellee's Hazim Delic's and Zdravko "Pavo" Mucic's Motion for Leave to File Supplemental Brief and Supplemental Brief, 17 Feb 2000 ("Delic/Mucic Supplementary Brief"). This was treated as an application for leave to add an additional ground of appeal, which was granted by the Appeals Chamber's Order on Motion of Appellants Hazim Delic and Zdravko Mucic for Leave to File Supplementary Brief, 31 Mar 2000. Although Landžo was also convicted under Article 2 and Article 3 of the Statute in respect

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 the technicalities of pleading.⁹

10. This conclusion was followed by the Trial Chamber in its decision on the Delic motion.¹⁰ Leave to appeal was refused in respect of the decisions on both the Delic and Delalic motions.¹¹ Other Trial Chambers have reached different conclusions on the issue, both that cumulative charging is permitted only in certain limited circumstances and that cumulative charging is permitted without limitation, the issue only being relevant to the imposition of penalty.¹²

C. Analysis

11. In essence, the only issue to be determined by the Appeals Chamber arising from these grounds of appeal is whether an accused can be convicted of both an Article 2 and an Article 3 violation for the same conduct. However, the determination of this issue raises matters of legal principle which will have consequences in relation to convictions arising under other provisions of the Statute. Although these consequences are difficult to predict, we have attempted to take them into account in identifying the applicable legal principles.

1. Cumulative Charging

12. As a preliminary point, we agree with the majority that the cumulative *charging* should generally be permitted. As a practical matter, it is not reasonable to expect the Prosecution to select between charges until all of the evidence has been presented. It is not possible to know with precision, prior to that time, which offences among those charged the evidence will prove, particularly in relation to the proof of differing jurisdictional prerequisites – such as, for example, the requirement that an international armed conflict be proved for Article 2 offences but not for those falling under Article 3. Further, as has been

⁹ *Prosecutor v Tadic*, Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, para 17.

¹⁰ *Prosecutor v Delalic and Others*, Case No IT-96-21-PT, Decision on Motion by the Accused Hazim Delic ased on Defects in the Form of the Indictment, 15 Nov 1996, para 22.

¹¹ *Prosecutor v Delalic and Others*, Case No IT-96-21-AR72.5, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), 6 Dec 1996.

¹² Compare, e.g. *Kupreskic* Judgement; the earlier Decision on Defence Challenges to Form of the Indictment, *Prosecutor v Kupreskic et al*, Case No IT-95-16-PT, 15 May 1998; *Prosecutor v Krnojelac*, Case No IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, paras 5-10; *Prosecutor v Naletilic and Martinovic*, Case No IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000, para 12; *Prosecutor v Tadic*, Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, paras 15-18.

observed at the Trial Chamber level, 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 and which may remain to be clarified in the Tribunal's jurisprudence.¹³ The fundamental consideration raised by this issue 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. In general, there is no prejudice to an accused in permitting cumulative *charging* and in determining the issues arising from accumulation of offences after all of the evidence has been presented.¹⁴

2. Cumulative Convictions

13. We are not convinced that the prior practice of this Tribunal and of the ICTR, as interpreted by the Prosecution, provides the solution to the problem of cumulative *convictions*. We understand the majority opinion to state the same conclusion, but we wish to provide our reasons for that conclusion.

14. The Appeals Chamber has not yet had to pronounce on the issue of accumulation of convictions, and it is disingenuous for the Prosecution to put forward the result in the *Tadic* Appeal – where what appear to be cumulative convictions were imposed, but where the issue was neither raised by the parties nor expressly considered by the Appeals Chamber – as authority for continuing this practice. The refusal of benches of the Appeals Chamber to grant leave to appeal from determinations that an accused can be *charged* with two different crimes arising from the same conduct,¹⁵ raised a different question from the one now in issue.

15. The jurisprudence of the Trial Chambers is far from uniform with respect to this issue. The Prosecution's use of the Tribunal jurisprudence and of certain domestic law concepts in arriving at what are described as the "relevant principles"¹⁶ appears to be a

¹³ *Prosecutor v Radislav Krstic*, Case No IT-98-33-PT, Decision on the Defence Motion on the Form of the Indictment, Count 7-8, 28 Jan 2000, pp 6-7.

¹⁴ See *Prosecutor v Naletilic and Martinovic*, Decision on Defendant Vinko Martinovic's Objection to the Indictment, Case No IT-98-34-PT, 15 Feb 2000, para 12. We acknowledge that there may be specific examples of obviously duplicative cumulative charging, where there is no reason in the particular circumstances that the Prosecution needs to see how the evidence turns out before selecting the most relevant charge. In those circumstances, it may be oppressive to allow cumulative charging.

¹⁵ *Prosecutor v Delalic and Others*, Case No IT-96-21-AR72.5, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; *Prosecutor v Delalic and Others*, 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 Dec 1996.

¹⁶ Prosecution Response to Delic/Mucic Supplementary Brief, para 4.83.