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CARSTEN STAHN



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Cumulative Charges and Cumulative Convictions

Carl-Friedrich Stuckenberg*

33.1 Introduction

It is typical for cases brought before international criminal tribunals that the defendants are accused and, if found guilty, convicted of the commission not of a single crime, but of multiple crimes under international law, often based on the same conduct. This is due to two factors: the factual characteristics of the criminal behaviour in question (macro-delinquency) and the frequent overlapping of the legal definitions of international crimes, many of which contain compound offences comprising several predicate offences as well as 'organization crimes' aimed at complex criminal enterprises. In addition, the offence definitions were not carefully crafted by a sophisticated legislator as parts of a systematically rigorous codification, but grew out of custom and uncoordinated treaties. Although of distinct origin, these crimes have over time 'grown ever closer'¹ without becoming so close that a hierarchy could be established.² For instance, the same act of killing may, in the right circumstances, constitute genocide, murder, or extermination as crimes against humanity, and wilful killing as a war crime.³ The admissibility of cumulative charges and cumulative convictions has been

* Professor of Law at the University of Bonn, where the author holds a chair with a focus on criminal law, criminal procedure, and international and comparative criminal law.

¹ G Mettraux, *International Crimes and the Ad Hoc Tribunals* (New York: Oxford University Press 2005) 315.

² The ICTY has always rejected the idea of a ranking of crimes under international law according to their gravity: Judgment in Sentence Appeals, *Tadić*, IT-94-1-A and IT-94-1-Abis, AC, ICTY, 26 January 2000, para. 69; Judgment, *Furundžija*, IT-95-17/1-A, AC, ICTY, 21 July 2000, paras 240-3; Judgment, *Kunarac*, IT-96-23-T and IT-96-23/1-T, TC, ICTY, 22 February 2001, para. 851 ('*Kunarac Trial Judgment*'); Judgment, *Krstić*, IT-98-33-T, TC, ICTY, 2 August 2001, para. 700; see also Judgment, *Blaškić*, IT-95-14-T, TC, ICTY, 3 March 2000, paras 797-9. Although proposals for a hierarchy have been made, e.g. by M C Bassiouni, 'International Crimes: The *Ratione Materiae* of International Criminal Law' in M C Bassiouni (ed.), *International Criminal Law*, vol. 1, 3rd edn (Leiden: Martinus Nijhoff 2008) 136-9; A Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 *Virginia Law Review* 415, 453-501; R May and M Wierda, 'Is There a Hierarchy of Crimes in International Law?' in L Vohrah et al. (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International 2003) 529-32; O Olusanya, *Double Jeopardy without Parameters: Re-Characterisation in International Criminal Law* (Antwerp: Intersentia 2004) 178-221; cf. A Bogdan, 'Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda' (2002) 3 *Melbourne Journal of International Law* 1, 5-9.

³ Appeal Judgment, *Kaing*, 001/18-07-2007-ECCC/SC, ECCC, SCC, 3 February 2012, para. 286, fn. 633 ('*Kaing Appeals Judgment*').

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an issue in many cases before the ad hoc Tribunals, hybrid tribunals, and, from early on, in the jurisprudence of the ICC.

Cumulative charges and cumulative convictions are, however, only two emanations of the complex legal field, which has been termed *concursum delictorum*,⁴ and deals with all situations in which at least two offences are adjudicated at once, regardless of whether these offences refer to one and the same set of facts or to several distinct sets of facts. These situations exist in every legal order, whether national or international, and all legal systems have developed some kind of solution for it. These solutions are astoundingly similar in substance, although they vary considerably in complexity, terminology, and approach. Civil-law countries usually treat *concursum delictorum* or *concurso de calificaciones ou d'infractions*, *concorso di reati*, *concurso/concurrencia de leyes/delitos*, and *Konkurrenzlehre* as a problem of legal theory or general principles of criminal law, whereas common-law countries discuss equivalent issues in the contexts of pleading (joinder of offences, multiple counts, etc.), of substantive double jeopardy or *ne bis in idem*, and of sentencing.

Everywhere, *concursum delictorum* has two legal dimensions. The substantive dimension concerns the verdict and the sentence. If the defendant is accused of several offences, can a conviction be entered for each of them? That is, are all provisions cumulatively applicable or can the application of one offence bar the application of another, and when? If a cumulative verdict is permissible, shall only one unified sentence covering all offences be passed or a distinct sentence for each offence, and, in any event, how is the total amount of punishment to be determined? The procedural dimension relates to pleading and double jeopardy: are multiple charges always allowed, or only if multiple convictions and multiple sentences are permissible?⁵ In the instance that the same act or transaction violates several offences, can these be dealt with in separate trials or is the prosecutor forced to join all potentially relevant offences? Conversely, when is a subsequent trial barred by a prior acquittal or conviction?⁶ Finally, in both dimensions, two apparently trivial questions have to be solved which may turn out to be the most difficult of all: when are facts the 'same', and when are offences 'different'? All this looks fairly complicated, but *concursum delictorum* is much less of a legal conundrum than it seems because a functional analysis on a comparative law basis reveals that there exist only four types of concurrence situations for

⁴ The Latin term derives from medieval Continental European 'common law' (*ius commune*) and was introduced in international criminal law by the ICTY in Judgment, *Kupreškić*, IT-95-16-T, TC, ICTY, 14 January 2000, paras 637–748 ('*Kupreškić* Trial Judgment'). The legal problems related to 'concurrence' are known since antiquity, for a historical survey see W Höpfner, *Einheit und Mehrheit der Verbrechen*, vol. I (München: Verlag Franz Vahlen 1901) 7–100.

⁵ The question of multiple charges may be influenced by further aspects unrelated to *concursum delictorum*, as will be seen in section 33.3.1.

⁶ The procedural aspect of *ne bis in idem* will be left out here. For the relationship between *concursum delictorum* and *ne bis in idem* see C-F Stuckenberg, 'Multiplicity of Offences: Concursum Delictorum' in H Fischer et al. (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Verlag Arno Spitz 2001) 559, 560–1, fn. 4; M Bohlander, 'Ne Bis in Idem', in M C Bassiouni (ed.), *International Criminal Law*, vol. III, 3rd edn (Leiden: Martinus Nijhoff 2008) 541, 543–6; H Friman et al., 'Charges' in G Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press 2013) 436–7.

which legal rules have to be devised and that the number of possible solutions for each situation is extremely limited as well (section 33.2.1).⁷

So far, the development of rules on *concursum delictorum* in international criminal law has not ventured very far beyond the stage of robust yet primitive pragmatism, which still leaves a lot to be desired because many questions are left open or the answers are hidden in the fog of sentencing. At least, it seems to be uncontested that such rules are needed.⁸ Hence, this area of the law presents another challenge for the future jurisprudence of the ICC.

This chapter will summarize and critically assess the current state of the law in customary international criminal law and under the Rome Statute of the ICC, and show perspectives for a principled development of the law of the ICC. The central issue of *concursum delictorum* concerns cumulative convictions and sentencing, and will be discussed first. Then, the admissibility of cumulative charges will be examined because, from a theoretical perspective, this is simply a consequential question.

33.2 Cumulative Convictions

33.2.1 The matrix of substantive *concursum delictorum*

In order to avoid confusion, a brief sketch of the underlying logical and normative structures and a few definitions are useful. As set out in more detail elsewhere,⁹ all problems of *concursum delictorum* involve either the coincidence of several nominally distinct offences¹⁰ or of several units of factual behaviour, or both. There are several possibilities to group these situations; for simplicity's sake, I will use a two-by-two matrix here with the coordinates 'identity of facts' and 'applicability of offences': several nominally distinct offences are either violated by the same set of facts or not (i.e. by several sets of facts); the several offences may all be applicable (i.e. each lead to a conviction) or not—*tertia non dantur*. In this context, the term 'offence' refers exclusively to the *legal definition* of an offence and neither to corresponding facts nor evidence. Thus, the resulting four classes of legal situations are analytically exhaustive; it is not implied, however, that each class exists in any legal order, nor that it should exist everywhere nor that distinct rules for each class are *eo ipso* appropriate. The normative relevance of the classes will be discussed in due course.

33.2.1.1 Identity of facts constituting several offences

If the same set of facts—be it the same act in the sense of a willed bodily movement or a group of acts which might be labelled the same 'transaction', 'conduct', or 'criminal episode'¹¹—violates several provisions of the law, the first question to be answered

⁷ Compare the analytical framework I have tried to sketch in Stuckenberg (n 6) 563–9.

⁸ Cf. Stuckenberg (n 6) 561–3. ⁹ Stuckenberg (n 6).

¹⁰ 'Nominally distinct' means that several of these offences have different statutory or customary definitions although they may be regarded as the same offence 'in reality'.

¹¹ The 'sameness' of facts is anything but trivial, see Stuckenberg (n 6) 564–66.

is whether all these provisions are applicable or not, i.e. whether a conviction may be entered for each offence or not.

33.2.1.1.1 Class 1: non-application of a concurring offence

The simplest example of this type of situation is one act which violates two criminal provisions at once but results in only one conviction. Because only one provision will be applied and not both, this type of legal consequence is known as 'apparent' or 'false concurrence' (*concurso aparente d'infracciones*; *concorso apparente di norme*; *concurso aparente de leyes*; *Gesetzeskonkurrenz*) in Continental European doctrine or as the situation that several nominally distinct offences are 'in reality' only one and the same offence. The reason for such a rule of non-application ultimately is a generalized assumption of legislative intent, i.e. a rule of interpretation.¹²

(i) The clearest case in this class is the situation of *logical inclusion*: The definition of one offence (e.g. consisting of the elements a+b) is completely contained in or subsumed under the definition of another (e.g. consisting of the elements a+b+c), so that the included offence is a logical subset of the other and both stand in a relationship of *genus ad speciem*. Hence, the violation of the greater offence, or *lex specialis*, necessarily—i.e. without exception—includes the violation of the lesser offence, or *lex generalis*. In domestic law, typical situations are more or less severe variations of a basic crime or compound offences combining several predicate offences. Notwithstanding terminological diversity, national legislations agree widely that only the *lex specialis* or greater offence shall apply ('merger of offences', 'unilateral specialty', *especialidad*, *specialità*, *Spezialität*, *lex specialis derogat legi generali*) and a conviction for the lesser included offence must not be entered.¹³

(ii) There is considerably less agreement among national laws whether this result is appropriate in other situations as well, e.g. when two offences stand in the logical relationship of interference (or 'reciprocal specialty'). *Interference* means that two offence definitions overlap either logically (one offence contains the elements a+b, the other the elements b+c) or factually, so that it is not necessary but is possible that the same conduct violates these two offences. If two offences are typically although not necessarily violated at once because they are closely related so as to protect the same or cognate interests, a conviction for only one of the two offences may be considered sufficient to characterize the criminal wrong. The concept is known as 'consumption' (*consumción*, *consumzione*, *Konsumtion*, *maius delictum absorbet minus*, *lex consumens derogat legi consumptae*) in civil-law countries and not unknown to common-law jurisdictions.¹⁴

(iii) A related, not easily distinguished, and therefore controversial subgroup is known in civil-law jurisdictions as 'subsidiarity' or 'subordination' (*subsidiariedad*, *sussidiarietà*, *Subsidiarität*, *lex primaria derogat legi subsidiariae*). The basic idea here is that one of two interfering offences operates as a residual clause—either by explicit

¹² Stuckenberg (n 6) 587–8.

¹³ For references see Stuckenberg (n 6) 567–8, 586–7.

¹⁴ For references see Stuckenberg (n 6) 591–4.

enactment or by way of construction ('tacit subsidiarity')—in relation to another, usually because one offence describes a less intensive form (e.g. attempt, accomplice liability) of the same type of criminal conduct, and is therefore assumed to apply only if the other offence does not. Obviously, many instances of subsidiarity can also be understood as cases of inclusion (specialty) or consumption.

33.2.1.1.2 Class 2: application of all concurring offences: norm competition

If the two or more offences violated by the same behaviour are not deemed to be the 'same offence', i.e. do not represent a case of 'false concurrence', convictions may be entered for all offences. In the civil-law tradition, this situation of norm competition is traditionally known as 'ideal concurrence' (*concours de qualifications/concours idéal d'infractions, concurso ideal, concorso ideale/formale di reati, Idealkonkurrenz*).

In principle, there is nothing inherently unfair in the pronouncement of multiple convictions for the same conduct as long as the resulting punishment is consistent with the accepted aims of criminal law.¹⁵ Repeatedly, the 'very real risk' of prejudice to the accused (like increased public blame, societal stigma, losing eligibility for early release under the law of the state enforcing the sentence, etc.) has been cited as a reason against allowing cumulative convictions based on the same facts.¹⁶ This argument is correct only if the offences in question are not logically separate because a double conviction for the greater *and* the lesser offence is tautological, and hence unnecessary to fully describe what the accused did.¹⁷ Consequently, the argument is fundamentally flawed if the offences concerned are logically independent. If all statutory provisions are found to be applicable, then the defendant has to be convicted for the violation of all of them. This is not unfair because he gets exactly what his deed deserves: why should he who manages to break two provisions at once be treated the same way as he who breaks only one law? On the contrary, if all provisions are applicable, then cumulative convictions are necessary in order to adequately express what the accused did.¹⁸

It is a separate question how to determine the sentences based on these multiple convictions, especially how to calculate the total amount of punishment. The rules on sentencing in norm competition cases differ in domestic laws in form (multiple sentences which are served either concurrently or consecutively; multiple sentences which are combined in special ways with resulting joint or unitary sentences) and substance (absorption of the lower sentences, aggravation of the severest sentences, or addition of the sentences).¹⁹ The only common maxim appears to be that the violation of several provisions by one factual unit of behaviour ('act', etc.) is regularly punished less severely than the violation of several provisions by unrelated acts.²⁰

¹⁵ But see Olusanya (n 2) 25, 50, 75. There is neither a violation of the principle of legality (*nullum crimen sine lege*) nor of the prohibition of *ne bis in idem*, as Bogdan (n 2) 27, 31, assumes.

¹⁶ Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, Judgment, *Delalić*, IT-96-21-A, AC, ICTY, 20 February 2001, para. 23; Judgment, *Kunarac*, IT-96-23 and IT-96-23/1A, AC, ICTY, 12 June 2002, para. 169 ('*Kunarac Appeals Judgment*').

¹⁷ Stuckenberg (n 6) 589.

¹⁸ Partial Dissenting Opinion of Judge Shahabuddeen, Judgment, *Jelisić*, IT-95-10-A, AC, ICTY, 5 July 2001, para. 34: 'To record the full criminality of his conduct, it may be necessary to convict of all the crimes, overlapping in convictions being adjusted through penalty'.

¹⁹ For references see *Kupreškić Trial Judgment* (n 4) paras 713 ff; Stuckenberg (n 6) 567–9, 596–9.

²⁰ For references see Stuckenberg (n 6) 598–9.

Since crimes under international law need for precise rules on sentencing, event, justice and equal treatment, amount of punishment,²¹ be it by

33.2.1.2 Non-identity of facts c

In addition to situations of logical coincidence that a court has to address, several violations which are not connected but out of totally unrelated incidents may again be subdivided as before a

33.2.1.2.1 Class 3: non-applic

Even if separate acts violate several 'concurrent' situations may apply in addition to others, like separately committed acts (e.g. a weapon) or subsequent acts (e.g. a further act) may be of lesser seriousness than the acts caused, be deemed irrelevant for the legal orders as *actos anteriores* or *Nachtat*.

33.2.1.2.2 Class 4: applicati

If all offences violated by the defendant are covered by the pronouncement of several convictions, the name of 'real concurrence' (*concours réel di reati, Realkonkurrenz*) applies. As with ideal concurrence, the total amount of punishment is determined. However, some legal orders provide for a joint sentence while others leave the determination to the judge or jury, etc.²²

Again, although crime scales, rules on the combination of these rules should be sourced in national criminal justice.

33.2.2 Customary law

There were no rules on customary criminal law before the

²¹ Stuckenberg (n 6) 50.

²² See *Kupreškić Trial Judgment* (n 4) paras 713 ff.

in relation to another, usually attempt, accomplice liability is assumed to apply only if the liability can also be under-

norm competition

are not deemed to be the 'real' offence, convictions may be based on the principle of norm competition (*concurrency/concours idéal*, *Idealkonkurrenz*).

The pronouncement of multiple punishments is consistent with the 'very real risk' of prejudice, losing eligibility for early release (c.) has been cited as a reason for separate treatment because a double punishment is unnecessary and hence unnecessary argument is fundamentally flawed.

If all statutory provisions apply to the violation committed by the accused, then his deed deserves: why should he be treated the same way as he would be if only one offence were applicable, then cumulative punishment is what the accused did.¹⁸ This is based on these multiple punishments. The rules of law in form (multiple sentences; multiple sentences or unitary sentences) and the severity of the sentences, or the fact that the violation (etc.) is regularly punished for multiple acts.²⁰

principle of legality (*nullum crimen, nulla poena sine lege*), assumes. Mohamed Bennouna, Judgment, Kunarac, IT-96-23 and IT-96-24.

IT-95-10-A, AC, ICTY, 5 July 2001, paras 661-662, necessary to convict of all the

Stuckenberg (n 6) 567-9, 596-9.

Since crimes under international law do not have divergent sentencing ranges, the need for precise rules on sentencing arithmetic may seem less pressing but, in any event, justice and equal treatment require rules for the determination of the total amount of punishment,²¹ be it by combination of several sentences or otherwise.

33.2.1.2 Non-identity of facts constituting several offences

In addition to situations of logical and factual coincidence, it may be mere procedural coincidence that a court has to adjudicate several offences at once. In other words, several violations, which are not committed through the same acts and may even arise out of totally unrelated incidents, are connected only by the same trial. This group can again be subdivided as before according to the type of legal consequence.

33.2.1.2.1 Class 3: non-application of a concurring offence

Even if separate acts violate separate criminal laws, considerations similar to 'false concurrence' situations may apply. Offences which are typically concomitant or ancillary to others, like separately punishable preparatory acts (conspiracy, acquisition of a weapon) or subsequent acts (securing or using stolen goods, concealing the crime, etc.) may be of lesser seriousness than the principal offence and, if no new harm is caused, be deemed irrelevant for sentencing purposes. This class is known in some legal orders as *actos anteriores/posteriores impunes/copenados* or *mitbestrafte Vortat/Nachtat*.

33.2.1.2.2 Class 4: application of all concurring offences: norm competition

If all offences violated by several acts or criminal episodes are deemed applicable, the pronouncement of several convictions seems natural. This class bears the civil-law name of 'real concurrence' (*concurso réel d'infractions, concurso real, concorso materiale di reati, Realkonkurrenz*) and refers to the corresponding sentencing principles. As with ideal concurrence, national laws differ again in form and substance; often, the total amount of punishment for real concurrence is higher than for ideal concurrence. However, some legal orders do not distinguish between ideal and real concurrence, while others leave the determination of the overall sentence to the discretion of the judge or jury, etc.²²

Again, although crimes under international law lack differentiated sentencing scales, rules on the combination of several sentences are necessary all the same, and these rules should be sound in light of both criminal law theory and the goals of international criminal justice.

33.2.2 Customary law

There were no rules on substantive *concurso delictorum* in customary international criminal law before the establishment of the ad hoc Tribunals.²³ Their statutes as well

²¹ Stuckenberg (n 6) 561-3.

²² For references see Stuckenberg (n 6) 600-2.

²³ See Kupreškić Trial Judgment (n 4) paras 673-7; Kaing Appeals Judgment (n 3) para. 290.

as the statutes of other tribunals are silent on the issue. Cases of multiplicity of offences are addressed only by Rule 87 (and formerly 101),²⁴ identical in its terms of both the Rules of Procedure and Evidence (RPE) of the ICTY²⁵ and the ICTR,²⁶ which reflects traditional²⁷ common-law practice but does not prescribe under which circumstances multiple sentences shall be made concurrent or cumulative.

33.2.2.1 Class 1

The efforts of the ad hoc Tribunals to establish rules on *concursum delictorum* have been focused almost exclusively on the question of when cumulative convictions are admissible for crimes based on the same facts, i.e. the Class 1 situation. The earlier and more comprehensive approach in *Kupreškić*²⁸ has been subsequently watered down by the ICTY Appeals Chamber in the *Čelebići* judgment,²⁹ which has become the leading precedent on the issue,³⁰ followed also by the ICTR,³¹ the SCSL,³² and, after close

²⁴ Rule 87(C): 'If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.' Former Rule 101(C) in the RPE of the ICTY/ICTR reads: 'The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.' Rule 101(C) remains identically retained in the RPE of the SCSL, adopted 16 January 2002, as amended on 31 May 2012.

²⁵ ICTY RPE (adopted 11 February 1994, as amended on 22 May 2013) UN Doc IT/32/Rev.49.

²⁶ ICTR RPE (adopted 29 June 1995, as amended on 13 April 2013).

²⁷ In comparison, the adoption of sentencing guidelines in the United States (United States Sentencing Commission, 2012 Federal Sentencing Guidelines Manual, Ch. 3 Pt. D, Multiple Counts) and England and Wales (pursuant to the Coroners and Justice Act 2009; see Sentencing Council, Definitive Guideline: Offences Taken into Consideration and Totality, 2012, 5ff), even where they are only advisory and not binding, represents a quantum leap in sentencing law by replacing nearly unfettered judicial discretion with complicated sets of detailed rules.

²⁸ *Kupreškić* Trial Judgment (n 4) paras 637–748.

²⁹ Judgment, *Delalić ('Čelebići')*, IT-96-21-A, AC, ICTY, 20 February 2001, paras 400–13.

³⁰ Cf. Judgment, *Jelisić*, IT-95-10-A, AC, ICTY, 5 July 2001, para. 82; Appeal Judgment, *Kupreškić*, IT-95-16-A, AC, ICTY, 23 October 2001, para. 387 ('*Kupreškić* Appeals Judgment'); *Kunarac* Appeals Judgment (n 16) paras 168–74; Judgment, *Kordić*, IT-95-14/2-A, AC, ICTY, 17 December 2004, paras 1032–3 ('*Kordić* Appeals Judgment'); Judgment, *Stakić*, IT-97-24-A, AC, ICTY, 22 March 2006, para. 356 ('*Stakić* Appeals Judgment'); Judgment, *Naletilić*, IT-98-34-A, AC, ICTY, 3 May 2006, paras 584–5 ('*Naletilić* Appeals Judgment'); Judgment, *Galić*, IT-98-29-A, AC, ICTY, 30 November 2006, para. 163; Judgment, *Strugar*, IT-01-42-A, AC, ICTY, 17 July 2008, paras 321–2; Judgment, *Krajišnik*, IT-00-39-A, AC, ICTY, 17 March 2009, para. 386; Judgment, *Milošević*, IT-98-29/1-A, AC, ICTY, 12 November 2009, para. 39; Judgment, *Popović*, IT-05-88-T, TC, ICTY, 10 June 2010, para. 2111; Judgment, *Stanišić*, IT-08-91-T, TC, ICTY, 27 March 2013, vol. 2, para. 905; Judgment, *Prlić*, IT-04-74-T, TC, ICTY, 29 May 2013, vol. 4, para. 1253; Bogdan (n 2) 9–30; N Valabhji, 'Cumulative Convictions Based on the Same Acts Under the Statute of the ICTY' (2002) 10 *Tulane Journal of International and Comparative Law* 185; H Azari, 'Le critère Celebici du cumul des déclarations de culpabilité en droit pénal international' (2007) *Revue de science criminelle et de droit pénal comparé* 1.

³¹ Judgment, *Musema*, ICTR-96-13-A, AC, ICTR, 16 November 2001, paras 358–70 ('*Musema* Appeals Judgment'); Judgment and Sentence, *Ndindabahizi*, ICTR-2001-71-I, TC, ICTR, 15 July 2004, para. 491 ('*Ndindabahizi* Trial Judgment'); Judgment, *Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, AC, ICTR, 13 December 2004, para. 542; Judgment, *Nahimana*, ICTR-99-52-A, AC, ICTR, 28 November 2007, para. 1019 ('*Nahimana* Appeals Judgment').

³² Judgment, *Fofana*, SCSL-04-14-A, AC, SCSL, 28 May 2008, para. 220; see also Judgment, *Fofana*, SCSL-04-14, TC, SCSL, 2 August 2007, para. 974; Judgment, *Brima* ('AFRC case') SCSL-2004-16-A, AC, SCSL, 3 March 2008, para. 202; Judgment, *Sesay*, SCSL-04-15-A, AC, SCSL, 26 October 2009, paras 1190–3.

scrutiny, the ECCC³³. Incompatible earlier approaches have been abandoned since.³⁴ The so-called *Čelebići* test is a true copy of the American test outlined in *Blockburger v United States*,³⁵ which allows cumulative convictions if the relationship of the offences is not one of logical inclusion:

[M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis 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.³⁶

This restates the near-universal rule that the *lex specialis* bars the application of the included *lex generalis*. It is a question of law whether the legal definition of one offence is a logical subset of the other's definition,³⁷ including the chapeau elements.³⁸ Therefore, the procedural couching of the test is unnecessary and misleading. In fact, this confusion has, on more than one occasion, led international courts to the erroneous conclusion that cumulative convictions are forbidden if the same evidence is used in the particular case at bar to prove several offences.³⁹ Meanwhile, courts habitually stress that the test relates to the legal elements of the relevant statutory provisions but not to the specific facts of the case.⁴⁰

Though the test seems simple, its application to concrete offences has proven difficult,⁴¹ for example whether cumulative convictions may be entered for persecution

³³ *Kaig* Appeals Judgment (n 3) paras 291–300.

³⁴ Like the test developed in Judgment, *Akayesu*, ICTR-96-4-T, TC, ICTR, 2 September 1998, paras 468–70 (cumulative convictions are acceptable where the offences have different elements, where the provisions creating the offences protect different interests, or where it is necessary to record a conviction for both offences in order fully to describe what the accused did); see also Judgment, *Kayishema*, ICTR-95-1-T, TC, ICTR, 21 May 1999, paras 627 ff; Stuckenberg (n 6) 575–6, 577–8.

³⁵ *Blockburger v United States* (1932) 284 US 299, 304: '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.' Cf. *Morey v Commonwealth* (1871) 108 Mass. 433, 434.

³⁶ *Čelebići* (n 29) paras 412–13.

³⁷ *Kunarac* Appeals Judgment (n 16) para. 174; *Kordić* Appeals Judgment (n 30) para. 1032; *Krajišnik* (n 30) para. 387; *Strugar* (n 30) para. 322; *Stakić* Appeals Judgment (n 30) para. 356; *Prlić* (n 30) para. 1254; *Nahimana* Appeals Judgment (n 31) para. 1020; *Sesay* (n 32) para. 1191.

³⁸ *Musema* Appeals Judgment (n 31) para. 363; *Nahimana* Appeals Judgment (n 31) para. 1019; *Prlić* (n 30) para. 1254; Partial Dissenting Opinion of Judge Shahabuddeen (n 18) paras 30 ff, 35; contra Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna (n 16) paras 24–33.

³⁹ *Kayishema* (n 34) paras 647–8; Judgment, *Kaig*, 001/18-07-2007/ECCC/TC, TC, ECCC, 26 July 2010, para. 565 ('*Kaig* Trial Judgment'). The error was also made in *Kupreškić* Trial Judgment (n 4) para. 707.

⁴⁰ *Stakić* Appeals Judgment (n 30) para. 356; *Milošević* (n 30) para. 39; *Kordić* Appeals Judgment (n 30) paras 1033 and 1040; *Naletilić* Appeals Judgment (n 30) para. 589; *Stanišić* (n 30) paras 906 and 909; *Prlić* (n 30) para. 1254 fn. 2340; *Sesay* (n 32) para. 1191; *Kaig* Appeals Judgment (n 3) paras 324–6.

⁴¹ *Friman et al.* (n 6) 451–2; see e.g. I Hünerbein, *Straftatkonkurrenzen im Völkerstrafrecht: Schuldanspruch und Strafe* (Berlin: Duncker & Humblot 2005) 98–179; F Palombino, 'Should Genocide Subsume Crimes against Humanity? Some Remarks in the Light of the *Krstić* Appeal Judgment' (2005) 3 *Journal of*

as a crime against humanity and murder as a crime against humanity,⁴² or not.⁴³ It is a matter of interpretation of the offences concerned whether they are *leges speciales* to others and will therefore not be treated here. It may suffice to say that cases of logical inclusion are exceedingly rare in international criminal law, in particular in the context elements of the respective chapeaus are taken into account (and there is no way around this unless a context element is exclusively of a jurisdictional nature). Therefore, other forms of 'apparent concurrence' should be given more thought.

But, unfortunately, the usual emphasis on the *Čelebići* test obscures the fact that there are more situations of *concursum delictorum* to be solved than merely speciality (inclusion). Actually, the test is applied in such a way that multiple convictions are not only permissible but *mandatory* if each statutory provision involved has a materially distinct element not contained in the other, thereby excluding any other form of 'apparent concurrence' like consumption and subsidiarity without further reasoning. Attempts to introduce further limitations of cumulative convictions based on considerations of consumption or subsidiarity have been made on occasion,⁴⁵ but without success. In *Stakić*, the Appeals Chamber made it clear that, if the *Čelebići* test is fulfilled, the Trial Chamber has no discretion to convict cumulatively or not, and therefore no further limitations are permissible.⁴⁶ Deplorably, the Appeals Chamber did not feel the necessity to supply substantive reasons for this view.

In contrast, the SCSL Appeals Chamber refused to enter cumulative convictions for forced marriages in the *AFRC* case as 'outrages upon personal dignity' (as a war crime) and as 'other inhumane acts' (as a crime against humanity), although these offences have materially distinct elements and thus:

there is no bar to entering cumulative convictions for both offences on the basis of the same facts. However, in this case the Appeals Chamber is inclined against entering such cumulative convictions. The Appeals Chamber is convinced that society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an 'Other Inhumane Act' capable of incurring individual criminal responsibility in international law.⁴⁷

International Criminal Justice 778, 780–5; C Burchard, 'Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment' (2008) 6 *Journal of International Criminal Justice* 159, 171ff.

⁴² *Krajišnik* (n 30) paras 388–91; *Kordić* Appeals Judgment (n 30) paras 1040–3; *Naletilić* Appeals Judgment (n 30) paras 587–90; *Stakić* Appeals Judgment (n 30) paras 355 ff, 359; *Kaing* Appeals Judgment (n 3) paras 301 ff, 316–35; see also *Nahimana* Appeals Judgment (n 31) paras 1026–7.

⁴³ Judgment, *Krstić*, IT-98-33-A, AC, ICTY, 19 April 2004, paras 230–3; Judgment, *Vasiljević*, IT-98-32-A, AC, ICTY, 25 February 2004, paras 135, 144–6; Judgment, *Krnojelac*, IT-97-25-A, AC, ICTY, 17 September 2003, para. 188; *Stanišić* (n 30) paras 909–12.

⁴⁴ Cf. Partial Dissenting Opinion of Judge Shahabuddeen (n 18) paras 36–44.

⁴⁵ E.g. Judgment, *Stakić*, IT-97-24-T, TC, ICTY, 31 July 2003, para. 870 ('*Stakić* Trial Judgment'): 'The guiding principle in these circumstances would be for the Chamber, in the exercise of its discretion, to convict only in relation to the crime that most closely and most comprehensively reflects the totality of the accused's criminal conduct'; Palombino (n 41) 786–9; see also *Kupreškić* Trial Judgment (n 4) paras 686–92; Separate and Dissenting Opinion of Judge Dolenc, Judgment and Sentence, *Semanza*, ICTR-97-20-T, TC, ICTR, 15 May 2003, paras 14, 17–19, 22–6.

⁴⁶ *Stakić* Appeals Judgment (n 30) para. 358; *Strugar* (n 30) para. 324.

⁴⁷ *AFRC* case (n 32) para. 202.

against humanity,⁴² or not.⁴³ It is whether they are *leges speciales* suffice to say that cases of true criminal law, in particular, if taken into account (and there is only of a jurisdictional nature⁴⁴), should be given more thought.

Čelebići test obscures the fact that the problem is not merely specialty but that multiple convictions are a provision involved has a materiality excluding any other form of specialty without further reasoning. The convictions based on consideration on occasion,⁴⁵ but without that, if the *Čelebići* test is fully cumulatively or not, and therefore, the Appeals Chamber did not follow his view.

After cumulative convictions for personal dignity' (as a war crime) and nationality), although these offences

both offences on the basis of which the Appeals Chamber is inclined against entering a conviction is that society's interest in and girls as forced conjugal partners against the civilian population, is criminal and that it constitutes individual criminal responsibility.

the Jurisprudence of the Ad Hoc Criminal Justice 159, 171ff.

) paras 1040–3; *Naletilić Appeals* 155 ff, 359; *Kaing Appeals Judgment* (n 4) paras 1026–7.

30–3; Judgment, *Vasiljević*, IT-98-10-30, 17; *Mojevac*, IT-97-25-A, AC, ICTY, 17

paras 36–44.

870 ('*Stakić* Trial Judgment'): 'The Appeals Chamber, in the exercise of its discretion, to comprehensively reflects the totality of the *Kupreškić* Trial Judgment (n 4) paras 1026–7 and Sentence, *Semanza*, ICTR-97-19-1.

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This reasoning appears to be based on considerations similar to consumption and subsidiarity, namely, that it may not be necessary to record a conviction of the residual category 'other inhumane act' if the wrong is already sufficiently covered by a more specific offence (albeit a war crime and not *lex specialis* in the technical sense). A conviction for the crime against humanity would have added to the description of what the accused did only in the circumstance where such outrages were committed 'as part of a widespread or systematic attack', which here was already evident from the adjacent convictions.

33.2.2.2 Class 2

International criminal tribunals have only rarely spelled out how they mould several sentences into a single sentence or how they determine the length of several concurrent sentences.⁴⁸ The *Kupreškić* Trial Chamber opined that the sentences should be served concurrently and that the sentence for the more serious offence may be aggravated if the less serious offence committed by the same conduct significantly adds to the heinous nature of the prevailing offence.⁴⁹ The Appeals Chamber, however, declined to fix any particular rules and contented itself with a reference to the English 'totality principle', stating that:

[T]he 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.⁵⁰

Later, one of the ICTY Trial Chambers added that, '[t]he prejudice that an offender will or may suffer because of cumulative convictions based on the same conduct has to be taken into account when imposing the sentence'.⁵¹

Although it is not clear how this prejudice can be numbered, there is no doubt that the totality principle is eminently sensible and, thanks to its sweeping generality, capable of universal acceptance. Yet it is regrettable that the Appeals Chamber gave—in contrast, for example, to English law⁵²—no guidance at all on how a Trial Chamber should exercise its broad discretion. Admittedly, the particularities of international criminal law—including the lack of penalty scales and extreme seriousness of the crimes—render it far more difficult to develop appropriate rules than in a domestic law context, but the effort should be made all the same.

⁴⁸ Cf. recently *Prlić* (n 30) paras 1294 ff, where cumulative convictions are discussed without indicating how these affect the total sentence.

⁴⁹ *Kupreškić* Trial Judgment (n 4) para. 718.

⁵⁰ *Čelebići* (n 29) para. 430.

⁵¹ *Kunarac* Trial Judgment (n 2) para. 551; Judgment, *Vasiljević*, IT-98-32-T, TC, ICTY, 29 November 2002, para. 266.

⁵² See the Sentencing Guideline on Totality (n 27).

33.2.2.3 Class 3

Since the *Čelebići* test focuses on multiple crimes committed by the same acts, the question inherent in the Class 3 situation (whether multiple convictions are always permissible for offences based on distinct acts) is rarely discussed⁵³—and even erroneously answered in the negative⁵⁴—although it occurs regularly, for instance, when several forms of responsibility are affirmed,⁵⁵ for example accomplice liability and liability as a principal, or genocide and complicity in genocide,⁵⁶ conspiracy to commit genocide and genocide, an issue that has led to conflicting judgments.⁵⁷ Occasionally, chambers were even of the opinion that concurrence between modes of liability is not a problem of *concursum delictorum*,⁵⁸ although there is in reality no material difference.

In the early case of *Akayesu*, a Trial Chamber of the ICTR stated that a person cannot be guilty of both genocide and complicity to genocide because it thought that both crimes were 'mutually exclusive'.⁵⁹ Recently, a Trial Chamber of the ICTY held in *Popović* that entering a conviction for the substantive offence of genocide renders redundant a conviction for conspiracy, notably when proof of the substantive offence is the main piece of evidence from which an inference of a prior illegal agreement is drawn and upon which the conspiracy conviction is based,⁶⁰ and founded this result on 'the fundamental principle animating the concern regarding multiple convictions for the same act', namely 'fairness to the accused', as well as on the 'unique nature of the offence of conspiracy'.⁶¹ While the impact of 'fairness' remains vague, it is sensible not to enter convictions for inchoate crimes and preparatory acts if the defendant later committed the substantive offence as a principal because these are merely different levels of liability for the same wrong, the result being that the fully consummated offence consumes all the others. In the same vein, superior responsibility has been considered subsidiary to other modes of liability,⁶² and ordering a crime has been considered to subsume aiding and abetting;⁶³ commission has been held to exclude

⁵³ *Popović* (n 30) paras 2118–27.

⁵⁴ *AFRC* case (n 32) para. 212: 'The problem of impermissibly cumulative or concurrent convictions does not arise when the alleged crimes are not based upon the same criminal conduct', citing *Galić* (n 30) para. 167.

⁵⁵ See B Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerstrafrechtlichen Straftatsystem* (Berlin: Berliner Wissenschafts-Verlag 2008) 373–81, 423–8.

⁵⁶ *Akayesu* (n 34) para. 468.

⁵⁷ Judgment and Sentence, *Musema*, ICTR-96-13-A, TC, ICTR, 27 January 2000, para. 198, which refused to enter cumulative convictions in contrast to Judgment, *Nahimana*, ICTR-99-52-T, TC, ICTR, 3 December 2003, para. 1043.

⁵⁸ *Kordić* Appeals Judgment (n 30) para. 1030; cf. Judgment, *Orić*, IT-03-68-T, TC, ICTY, 30 June 2006, para. 339.

⁵⁹ *Akayesu* (n 34) paras 532, 700, and 734.

⁶⁰ *Popović* (n 30) paras 2124 and 2126.

⁶¹ *Popović* (n 30) paras 2123–4.

⁶² Judgment, *Blaškić*, IT-95-14/A, AC, ICTY, 29 July 2004, paras 91–2; *Kordić* Appeals Judgment (n 30) paras 34–5; *Orić* (n 58) paras 339–43; Judgment, *Kajelijeli*, ICTR-98-44A-A, AC, ICTR, 23 May 2005, para. 81.

⁶³ Judgment, *Kamuhanda*, ICTR-99-54A-A, AC, ICTR, 19 September 2005, para. 77; cf. the separate opinions of Judge Schomburg, paras 386–9 and Judge Shahabuddeen, paras 401–16; but see the 'alternative findings' in *Ndindabahizi* Trial Judgment (n 31) para. 485, understood as cumulative in Judgment, *Ndindabahizi*, ICTR-01-71-A, AC, ICTR, 16 January 2007, paras 122–3.

an additional conviction for planning sentencing stage.

33.2.2.4 Class 4

In international criminal cases, it is common for separate acts have led to the same acts. It seems that the option has never been used.

Although there are some good reasons for 'ideal' and 'real' concurrence,⁶⁴ the 'ordinary crimes' than in relation for international criminal law which is a single offence. No difference in blameworthiness between war crime are committed by the same independent criminal episodes. A single multiple offences arising out of

33.2.3 Rome Statute

The Rome Statute, the accompanying address the question of *concursum delictorum* contained rudimentary proposals provides that the Court shall pronounce specifying the total period of more than one crime, and maximum individual sentence) and maximum life imprisonment). While the text suppressed, the provision leaves one speak of 'more than one' crime be entered and how is the amount the introduction to the Elements constitute one or more crimes' v

⁶⁴ Judgment, *Kordić*, IT-95-14/2-T, IT-99-36-T, TC, ICTY, 1 September 2006, paras 914.

⁶⁵ See Stuckenberg (n 6) 598–602 with UN Doc A/51/22, 231–2, Art 47(3); CONF.183/2/Add.1, 122–23, Art 77(3);

⁶⁷ Cf. S Walther, 'Cumulation of Offences in the Criminal Court: A Commentary, vol. I

⁶⁸ Elements of Crimes, ICC-ASP/1/2005/Amended 31 May–11 June 2010 (Review Introduction, para. 9.

an additional conviction for planning, although this may be taken into account at the sentencing stage.⁶⁴

33.2.2.4 Class 4

In international criminal cases, it is not easy to ascertain whether cumulative convictions for separate acts have led to stiffer sentences than cumulative convictions for the same acts. It seems that the option, where available, to impose consecutive sentences has never been used.

Although there are some good reasons to establish a sentencing differential between 'ideal' and 'real' concurrence,⁶⁵ this seems certainly more appropriate in the context of 'ordinary crimes' than in relation to massively complex crimes like those typical for international criminal law which are designed to subsume vast clusters of behaviour under one single offence. Nonetheless, there is presumably a comparable difference in blameworthiness between the situation that a crime against humanity and a war crime are committed by the same act and the situation that they are committed in independent criminal episodes. Accordingly, a more principled approach to sentencing multiple offences arising out of various distinct acts seems desirable.

33.2.3 Rome Statute

The Rome Statute, the accompanying RPE, and Regulations of the Court do not address the question of *concurso delictorum*, although the final drafts of the Statute contained rudimentary proposals on that matter.⁶⁶ Article 78(3) of the Rome Statute provides that the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment, when a person has been convicted of more than one crime, and mandates a specified minimum (no less than the highest individual sentence) and maximum level (30 years' imprisonment or a sentence of life imprisonment). While the technique of concurrent versus consecutive sentences is suppressed, the provision leaves open the preceding questions: in which situations can one speak of 'more than one' crime, under which conditions multiple convictions may be entered and how is the amount of the joint sentence to be determined?⁶⁷ Equally, the introduction to the Elements of Crimes merely states that 'particular conduct may constitute one or more crimes' without more.⁶⁸

⁶⁴ Judgment, *Kordić*, IT-95-14/2-T, TC, ICTY, 26 February 2001, para. 386; Judgment, *Brdanin*, IT-99-36-T, TC, ICTY, 1 September 2004, para. 268; cf. further *Stakić* Trial Judgment (n 45) paras 443 and 914.

⁶⁵ See Stuckenberg (n 6) 598–602 with further references.

⁶⁶ UN Doc A/51/22, 231–2, Art 47, Applicable penalties; Draft Statute for the ICC, UN Doc A/CONF.183/2/Add.1, 122–23, Art 77(3); cf. Stuckenberg (n 6) 571–2.

⁶⁷ Cf. S Walther, 'Cumulation of Offences' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (Oxford: Oxford University Press 2002) 494.

⁶⁸ Elements of Crimes, ICC-ASP/1/3(part II-B) 3–10 September 2002 (First Session of the ASP), as amended 31 May–11 June 2010 (Review Conference of the Rome Statute of the ICC, Kampala), General Introduction, para. 9.

Thus, it is the task of the ICC to develop the rules on *concursum delictorum* within the framework of Article 78(3) of the Rome Statute in accordance with Article 21. The adoption of the *Čelebići* test, although reasonable in 'specialty' situations, alone will be insufficient because there are more *concursum* problems to be solved, as seen above.

The judgments and corresponding sentencing decisions pronounced so far⁶⁹ did not have to address the issue. Decisions of the Pre-Trial Chambers on the practice of cumulative charging (see section 33.3.3) either expressly referred to the *Čelebići* test when stating that only distinct crimes may be charged cumulatively in relation to the same conduct, namely that each statutory provision allegedly breached requires at least one additional material element not contained in the other⁷⁰—although the test was arguably misapplied in the *Bemba* case—or tacitly relied on the test when accepting cumulative charges.⁷¹ Though still unclear, it seems equally likely and advisable that the ICC will follow the trodden path and endorse the *Čelebići* test in order to determine the permissibility of cumulative convictions.

However, the Court should not stop there like the ad hoc Tribunals and require cumulative convictions blindly in all cases of 'reciprocal specialty' and unrelated acts but give careful consideration to other principles under discussion in this area of law, for example whether it would be wiser to omit convictions for ancillary and residual offences (like 'other inhumane acts'; cf. the *AFRC* case) and lesser or residual forms of liability (like conspiracy; cf. the *Popović* case).

33.3 Cumulative Charges

33.3.1 Principle

As a matter of principle, the rules on the cumulation of charges mirror the rules on cumulative convictions: Where cumulative convictions cannot be made, it makes no sense to permit cumulative charges.⁷²

Practical considerations do not alter this principle. In the frequent case of doubt, whether the greater offence or only the lesser offence can be proved beyond reasonable

⁶⁹ Cf. Judgment pursuant to Art 74 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012; Decision on Sentence pursuant to Art 76 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2901, TC I, ICC, 10 July 2012; Jugement rendu en application de l'article 74 du Statut, *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014; Décision relative à la peine (article 76 du Statut), *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3484, TC II, ICC, 23 May 2014.

⁷⁰ Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 202 ('*Bemba* Confirmation of Charges Decision').

⁷¹ Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute, *Ruto, Kosgey and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012, paras 280–1.

⁷² Stuckenberg (n 6) 589; accord *Kupreškić* Trial Judgment (n 4) para. 728; Friman et al. (n 6) 428 fn. 402; K Ambos, 'Critical Issues in the *Bemba* Confirmation Decision' (2009) 22 *Leiden Journal of International Law* 715, 724.

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pronounced so far⁶⁹ did not focus on the practice of cumulative charges. The *Čelebići* test when stating relation to the same conduct, requires at least one additional charge. It was arguably misapplied in stating cumulative charges.⁷¹ That the ICC will follow the practice to determine the permissibility of

tribunals and require cumulative and unrelated acts but give this area of law, for example, and residual offences (like dual forms of liability (like

mirror the rules on cumulative charges, it makes no sense to

frequent case of doubt, proved beyond reasonable

doubt at trial, a charge for the greater offence is sufficient if it permits a conviction for the lesser included crime; otherwise, alternative charges are appropriate.⁷³

The same applies if the law is unclear and the prosecutor cannot predict with sufficient certainty for which crime the court would enter a conviction if the conduct were proven. In jurisdictions where—unlike most international criminal tribunals with the exception of the ICC—the court has the power and the obligation—ICC Regulation 55 leaves this to the discretion of the Chamber—to change the legal qualification of a charge in accordance with the evidence (*iura novit curia*),⁷⁴ even alternative charges are superfluous.

Overcharging in the sense of bringing a cumulative charge, typically a very serious one, for the sole purpose of facilitating a plea agreement on lesser charges with subsequent withdrawal of that serious charge, is an inappropriate practice and should be prohibited.⁷⁵

33.3.2 Customary law

The prosecutors of the ad hoc Tribunals have established a practice of charging all possible crimes and modes of liability that has, not entirely without reason, been criticized as excessive.⁷⁶ This kind of practice has been widely accepted since and, apart from a few equivocal early decisions,⁷⁷ the ad hoc Tribunals⁷⁸ and the SCSL⁷⁹ agree that cumulative charges are always permissible if the *Čelebići* test is met. The relevant paragraph of the *Čelebići* Appeals Judgment does not even mention the test:

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

⁷³ Stuckenberg (n 6) 589–90 with fn. 132.

⁷⁴ See Friman et al. (n 6) 431–5.

⁷⁵ See the critique in Sentencing Judgment, *Nikolić*, IT-02-60/1-S, TC, ICTY, 2 December 2003, para. 65.

⁷⁶ Mettraux (n 1) 316.

⁷⁷ Decision on Defence Motion on the Form of the Indictment, *Tadić*, IT-94-1-T, TC II, ICTY, 14 November 1995, at 10: 'In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty 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'; contrary to *Kupreškić* Trial Judgment (n 4) para. 727; reversed in *Kupreškić* Appeals Judgment (n 30) paras 325–6; see also Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Ayyash*, STL-11-01/I, AC, STL, 16 February 2011, paras 287–90 with further references ('*Ayyash* Interlocutory Decision on the Applicable Law').

⁷⁸ *Čelebići* (n 29) para. 400; see also *Kupreškić* Appeals Judgment (n 30) para. 385; *Kunarac* Appeals Judgment (n 16) para. 167; *Naletilić* Appeals Judgment (n 30) para. 103; Judgment, *Rutaganda*, ICTR-96-3-T, TC, ICTR, 6 December 1999, paras 115–16; Decision on defence preliminary motion for defects in the form of the indictment, *Kanyabashi*, ICTR-96-15-I, TC II, ICTR, 31 May 2000, paras 5.5–5.7; see also Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, *Naletilić*, IT-98-34-PT, TC, ICTY, 14 February 2001, para. B; Friman et al. (n 6) 388–9, 395–7.

⁷⁹ AFRC case (n 32) para. 212 with fn. 327.

the Democratic Republic of the Congo pursuant to Art 76 of the Statute, ICC-01/06-2901, TC I, ICC, 11 July 2008, paras 10–11, *Situation in the Democratic Republic of the Congo*, Decision relative à la peine, ICC-01/04-01/07-3484.

charges of the Prosecutor against Mladen Naletilić, ICC-01/05-01/08-424, paras 10–11, *Situation in the Democratic Republic of the Congo*, Decision relative à la peine, ICC-01/04-01/07-3484.

(n 6) of the Rome Statute, *Ruto*, ICC-01/09-01/06-1191, TC II, ICC, 23 January 2012.

18; Friman et al. (n 6) 428; (2009) 22 *Leiden Journal of International Law* 1011.

the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.⁸⁰

This seems to insinuate that cumulative charges are admissible even if cumulative convictions were not,⁸¹ and it remains unclear if this distinction was really intended. In any event, there are cases where cumulative charges have been accepted, although the respective crimes did not have at least one materially distinct element not contained in the other.⁸²

The permission of cumulative charges is deemed to include alternative charges *a maiore ad minus*.⁸³ For example, different heads of responsibility may be charged alternatively.⁸⁴

The ECCC⁸⁵ and the Special Tribunal for Lebanon (STL)⁸⁶ likewise permit cumulative charges if the *Čelebići* test is fulfilled. The STL Appeals Chamber noted that crimes which do not meet the test may be charged in the alternative,⁸⁷ whereas different modes of liability for the same offence should always be charged in the alternative.⁸⁸ It went on to stress that:

[t]he Pre-Trial Judge, in confirming an indictment, should be particularly careful to allow cumulative charging only when separate elements of the charged offences make these offences truly distinct. In particular, when one offence encompasses another, the Judge should always choose the former and reject pleading of the latter. Likewise, if the offences are provided for under a general provision and a special provision, the Judge should always favour the special provisions.⁸⁹

⁸⁰ *Čelebići* (n 29) para. 400.

⁸¹ Cf. Prosecution's Application for Leave to Appeal the Decision Pursuant to Art 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-427, OTP, ICC, 22 June 2009, para. 16 fn. 11; see also the critical view in Ambos, 'Critical Issues' (n 72) 724, fn. 82.

⁸² E.g. murder and extermination as crimes against humanity, Judgment, *Kamuhanda*, ICTR-95-54A-T, TC, ICTR, 22 January 2004, paras 685–8; *Sesay* (n 32) para. 1192. For further references see S SáCouto and K Cleary, 'Amicus Curiae Brief on the Practice of Cumulative Charging Before International Criminal Bodies Submitted to the Appeals Chamber of the Special Tribunal for Lebanon Pursuant to Rule 131 of the Rules of Procedure and Evidence' (2011) 22 *Criminal Law Forum* 409, 418–22.

⁸³ Judgment, *Naletilić*, IT-98-34-T, TC, ICTY, 31 March 2003, para. 510; *Naletilić*, Appeals Judgment (n 30) para. 102; see also Decision on Defence Preliminary Motions on the Form of the Indictment, *Kvočka*, IT-98-30/1-PT, TC, ICTY, 12 April 1999, para. 25; Decision on the Defence Preliminary Motion Challenging the Amended Indictment, *Mpambara*, ICTR-2001-65-I, TC, ICTR, 30 May 2005, para. 4.

⁸⁴ Decision on Form of the Indictment, *Mrkšić*, IT-95-13/1-PT, TC, ICTY, 19 June 2003, para. 62; Decision Regarding Defence Preliminary Motion on the Form of the Indictment, *Rašević*, IT-97-25/1-PT, TC, ICTY, 28 April 2004, para. 29.

⁸⁵ Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias 'Duch', *Kaing*, 011/18-07-2007-ECCC/OCIJ (PTC 02), PTC, ECCC, 5 December 2008, paras 85–8; see also *Kaing* Appeals Judgment (n 3) paras 291–300.

⁸⁶ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) paras 265–301; compare Decision Relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi, and Mr Assad Hassan Sabra, *Ayyash*, STL-11-01/I, PT J, STL, 28 June 2011, paras 89–95; see also M Gillett and A Schuster, 'Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism' (2011) 9 *Journal of International Criminal Justice* 989.

⁸⁷ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) para. 271.

⁸⁸ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) para. 298.

⁸⁹ *Ayyash* Interlocutory Decision on the Applicable Law (n 77) para. 298.

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⁹⁰ *Ayyash* Inter ⁹¹ *Kupreškić* Tr Law (n 77).

⁹² Decision on Gombo, *Bemba*, 2008, para. 25.

In a laudable call for clearer and shorter indictments, the STL Appeals Chamber added that:

[t]he Pre-Trial Judge should be guided by the goal of providing the greatest clarity possible to the defence.... The Pre-Trial Judge may also request that the Prosecutor reconsider the submission of formally distinct offences which nonetheless do not in practical terms further the achievement of truth and justice through the criminal process. That is, additional charges should be discouraged unless the rules contemplating the offences are aimed at protecting substantially different values.⁹⁰

The last two sentences, however, are surprising because the Appeals Chamber seems to resurrect and even expand—with a ‘values test’—the obsolete view of the *Kupreškić* Trial Chamber.⁹¹ Arguably, this is meant as a non-binding proposal for the exercise of prosecutorial discretion in drafting the indictment and not as a hard rule on the admissibility of charges.

33.3.3 Rome Statute

In the absence of any statutory provisions on the subject of multiple charges, one might have expected the ICC to follow the uniform practice of other international criminal tribunals. When the Pre-Trial Chamber adopted a very restrictive view on cumulative charges in *Bemba*, this caused a considerable stir and the question is still not finally settled.

Initially, the *Bemba* Pre-Trial Chamber appears to have banned cumulative charging altogether in its arrest warrant decision, stating:

[t]he Chamber moreover recalls that in his Application the Prosecutor appears on occasion to have presented the same facts under different legal characterisations. It wishes to make it clear that the Prosecutor should choose the most appropriate characterisation. The Chamber considers that the Prosecutor is risking subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings. It is for the Chamber to characterise the facts put forward by the Prosecutor.⁹²

The subsequent decision on the confirmation of charges explained that the Chamber is of the view that:

[t]he prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation

⁹⁰ Ayyash Interlocutory Decision on the Applicable Law (n 77) para. 299.

⁹¹ *Kupreškić* Trial Judgment (n 4) para. 727(c), see Ayyash Interlocutory Decision on the Applicable Law (n 77).

⁹² Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Bemba*, Situation in the Central African Republic, ICC-01/05-01/08, PTC III, ICC, 10 June 2008, para. 25.

to one and the same conduct requires at least one additional material element not contained in the other.⁹³

With the citation of the *Čelebići* formula the Chamber seems to have returned to the established approach, although it insisted that the ICC legal framework differs from that of the ad hoc Tribunals, since Regulation 55 contains the *iura novit curia* principle and empowers the Trial Chamber to re-characterize a crime to give it the most appropriate legal characterization: 'Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.'⁹⁴

The Chamber held that rape as a crime against humanity is *lex specialis* to torture, because 'the evidence... presented reflects the same conduct which underlies the count of rape', so that, if the acts of rape are the instruments of torture, only rape can be charged,⁹⁵ and that the same applies in relation to rape as war crime and outrages against personal dignity.⁹⁶ The prosecution sought leave to appeal and contested the Chamber's authority to decline the confirmation of charges because of impermissible multiplicity,⁹⁷ and argued that, in addition, the Chamber had misapplied the *Čelebići* test because it based its determination on the evidence of the case and not solely on the legal elements of the offences.⁹⁸ The application was rejected and the Chamber restated its understanding of the principle governing cumulative charges as follows:

Based on this understanding, the Chamber ruled in the 15 June 2009 Decision that where the Prosecutor relied on the *same evidence* pertaining to acts of rape to substantiate two or more legal characterisations, the specific elements of the crime of torture and outrages upon personal dignity were congruent with those of the crime of rape and, therefore, fully subsumed by the count of rape. However, the Chamber did not preclude the possibility that charges of rape and torture could be cumulative in the event the Prosecutor presented evidence that pertained to different specific elements not contained in the other.⁹⁹

Obviously, the Chamber deviated from the established understanding of the *Čelebići* test and adopted a position known as 'concrete specialty'¹⁰⁰ which is considered erroneous in the jurisprudence of the ad hoc and other Tribunals.¹⁰¹ In substance, this position is utterly defensible under the principle of 'consumption',¹⁰² though not of

⁹³ *Bemba* Confirmation of Charges Decision (n 70) para. 202.

⁹⁴ *Bemba* Confirmation of Charges Decision (n 70) para. 203.

⁹⁵ *Bemba* Confirmation of Charges Decision (n 70) paras 199 ff, 205 fn. 282.

⁹⁶ *Bemba* Confirmation of Charges Decision (n 70) paras 301 ff, 312.

⁹⁷ Prosecution's Application for Leave to Appeal, *Bemba* (n 81) paras 13–15.

⁹⁸ Prosecution's Application for Leave to Appeal, *Bemba* (n 81) paras 16–18.

⁹⁹ Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo', *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-523, PTC II, ICC, 18 September 2009, para. 54.

¹⁰⁰ E.g. F Antolisei, *Manuale di diritto penale, parte generale*, 14th edn (Milano: Giuffrè 1997) para. 64 (p. 156); G Jakobs, *Strafrecht Allgemeiner Teil*, 2nd edn (Berlin: de Gruyter 1991) ch. 31 paras 13–15.

¹⁰¹ *Kayishema* (n 34) paras 647–8; *Kaig* Trial Judgment (n 39) para. 565. The error was also made in *Kupreškić* Trial Judgment (n 4) para. 707.

¹⁰² In this sense, see K Ambos, 'Sexuelle Gewalt in bewaffneten Konflikten und Völkerstrafrecht' (2011) *Zeitschrift für internationale Strafrechtsdogmatik* 287, 296.

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¹⁰³ Cf. Frima

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'specialty' in the sense of 'logical inclusion'. Yet, the Chamber's reasoning is too imprecise to permit a definitive assessment of whether the decision represents a deliberate departure from the *Čelebići* rule—like the SCSL Appeals Chamber's in the *AFRC* case—or rather a misunderstanding of that rule.¹⁰³

The same Pre-Trial Chamber recently allowed cumulative charges of murder, persecution, and deportation or forcible transfer based on the same underlying acts in the *Ruto* case because the respective *offence definitions* contained materially distinct elements not present in the definition of the other offences, citing ICTY cases which expressly rejected an approach that takes into account the actual conduct of the accused as determinative of whether multiple convictions for that conduct are permissible.¹⁰⁴ Likewise, this Pre-Trial Chamber allowed cumulative charges of rape and torture in the subsequent decision on the arrest warrant against *Mudacumura*,¹⁰⁵ so that commentators already felt that it might have given up the *Bemba* approach.¹⁰⁶ In a decision on the arrest warrant in the *Al Bashir* case which was rendered after the *Bemba* arrest warrant ruling, a different Pre-Trial Chamber had accepted cumulative charges of murder and extermination based on the same conduct without comment.¹⁰⁷

So far, there has been no decision by the Appeals Chamber that settles the issue. Nonetheless, it appears unlikely that the ICC wishes to replace the *Čelebići* test by some other criterion. The Court's discretion to modify the legal qualification of the conduct charged could affect the pleading practice only insofar as cautionary alternative charges may become unnecessary if, in the future,¹⁰⁸ the prosecutor can unfailingly rely upon the Court to exercise its discretion to re-characterize facts in order to correct any legal errors that might be found in the document containing the charges.¹⁰⁹ Otherwise, the authority granted by Regulation 55—which still raises many practical questions¹¹⁰—has

¹⁰³ Cf. Friman et al. (n 6) 434; SáCouto and Cleary (n 82) 428–32.

¹⁰⁴ Decision on the Confirmation of Charges, *Ruto, Kosgey and Sang* (n 71) paras 280–1, quoting *Kordić* Appeals Judgment (n 30) paras 1040–2; Judgment, *Blagojević*, IT-02-60-T, TC, ICTY, 17 January 2005, paras 807–10; *Stakić* Appeals Judgment (n 30) para. 358.

¹⁰⁵ Decision on the Prosecutor's Application under Art 58, *Mudacumura, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/12-1-Red, PTC II, ICC, 13 July 2012, para. 50.

¹⁰⁶ E Chaitidou, 'Recent Developments in the Jurisprudence of the International Criminal Court' (2013) *Zeitschrift für internationale Strafrechtsdogmatik* 130, 142.

¹⁰⁷ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, paras 95–6.

¹⁰⁸ More optimistic K Ambos and D Miller, 'Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective' (2007) 7 *International Criminal Law Review* 335, 360; Ambos, 'Critical Issues' (n 72) 724.

¹⁰⁹ Currently, the practice seems to prefer the opposite course of charging a multitude of modes of liability in the alternative, Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, *Ntaganda, Situation in the Democratic Republic of Congo*, ICC-01/04-02/06-309, PTC II, ICC, 9 June 2014, paras 99–100; Decision on the confirmation of charges against Laurent Gbagbo, *Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/11-656-Red, PTC I, ICC, 12 June 2014, paras 227–9; but see Decision on applications for notice of possibility of variation of legal characterization, *Ruto and Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-1122, TC V, ICC, 12 December 2013, paras 32–44, where notice pursuant to Regulation 55(2) on alternative modes of liability was given even though the Pre-Trial Chamber had dismissed the prosecutor's attempt to bring alternative modes of liability in this case.

¹¹⁰ Compare Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation

no bearing on the question of cumulative charges. Furthermore, cumulative charges are always desirable in the interests of fairness to the defendant if cumulative convictions are permissible, so as to inform him as soon as possible about the legal consequences of the issue.

Hopefully the ICC will not content itself with the *Čelebići* rule but will acknowledge the need to develop the law on cumulative charges further by, for example, taking into consideration the slightly more progressive stance of the STL Appeals Chamber set out earlier.

33.4 Conclusion

Fifteen years after the first judicial decisions on the matter of cumulative charges and cumulative convictions, a robust albeit primitive set of judge-made rules has emerged, though many questions remain. The ICTY Appeals Judgment in the *Čelebići* case seemed to stifle attempts of further elaboration of the law for quite a while, but more recent decisions like those of the SCSL Appeals Chamber in the *AFRC* case, of the STL Appeals Chamber in *Ayyash*, and of the ICTY Trial Chamber in *Popović* demonstrate that there are many more questions in this area of the law to be addressed beyond the 'logical inclusion' theory, to which the *Blockburger* and *Čelebići* tests solely refer. The ICC still has to find its way in the maze of *concursum delictorum* but has the benefit of the views and insights of the other international criminal jurisdictions which should, if appropriate, be carefully revised.

55(2) of the Regulations of the Court', *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2205, AC, ICC, 8 December 2009, paras 64–100; see also e.g. *Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés, Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319, TC II, ICC, 21 November 2012; Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons', *Katanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3363, AC, ICC, 27 March 2013; for the negotiating history see G Bitti, 'Two Bones of Contention between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursum Delictorum' in H Fischer et al. (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Verlag Arno Spitz 2001) 273, 279; cf. also C Stahn, 'Modification of the Legal Characterisation of Facts in the ICC System: A Portrayal of Regulation 55' (2005) 16 *Criminal Law Forum* 1.