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TRIAL CHAMBER IX

Before: **Judge Bertram Schmitt, Presiding Judge**
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public with Public Annexes A and B

Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions

Source: **Defence for Dominic Ongwen**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence
Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims
Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims
Paolina Massidda
Jane Adong

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Paolina Massidda
Caroline Walter
Orchlon Narantsetseg

The Office of Public Counsel for the Defence
Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

A. Timing for the motion

1. This Motion is timely. The issue of multiple charges and convictions was raised in the Pre-Trial Chamber,[1] which decided the issue of multiple charges, but found the resolution of the issue of multiple convictions to be more appropriate for the Trial Chamber.[2] The Defence included the issues of multiple charges and convictions in its Request for Leave to Appeal, which was denied. Our position is that issues regarding multiple charges and multiple convictions are intertwined. Even if the Court views them as separate issues, a decision on the standard for multiple convictions is imperative at this time. The Defence respectfully requests a decision by the Court now in order for the Defence to prepare properly prior to closing arguments and briefs. In the event that the Court considers multiple convictions for the same conduct, knowledge of the standard to assess them is crucial for organizing the closing argument and for applying the law in the brief. This is a highly complex case, with 70 charges, multiple modes of liability, and complicated facts. Without knowledge in advance, the Defence would have to argue the issue in the alternative, using up many critical pages in the brief that could be used to articulate other issues. Consequently, the Defence requests a decision now on the standard to assess multiple convictions.

B. Summary of argument

2. Mr Ongwen is charged with multiple offences arising out of the same conduct. This occurs in three situations: 1) the same underlying conduct is charged as both a war crime and a crime against humanity; 2) the same underlying conduct is charged as two separate crimes against humanity; and 3) the same underlying conduct is charged as two separate war crimes.

3. The Defence maintains that Mr Ongwen is not guilty of all offences. However, if any convictions are found, the Defence contends that, based on statutory interpretation and general criminal law principles, the Statute bars crimes that are based on the same underlying conduct. Multiple convictions should be barred not only when the legal elements of one

[1] *Prosecutor v. Dominic Ongwen*, Further Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", filed on 18 January 2016, ICC-02/04-01/15-404-Red2, 3 March 2016, paras. 68-81('**Defence Brief for the Confirmation Hearing**').
[2] *Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, 23 March 2016, paras. 30-33('**CoC Decision**').

crime subsume the elements of another crime, but also when the same conduct is charged as multiple offences.[3]

4. The legal standard under the Rome Statute for assessing multiple convictions arising out of the same conduct is an unsettled issue. In fact, the Appeals Chamber noted that multiple convictions based on the same conduct is not yet resolved.

5. In its 8 March 2018 Judgment[4] on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", the Appeals Chamber found that the charges in that case were clearly independent and they did not need to reach the issue. However, the Court commented on the unresolved nature of a standard to assess multiple convictions. The Court noted the possibility that multiple convictions could be barred if based on the same conduct even if the offences had different legal elements. The Court also briefly referred to doctrines of consumption and subsidiarity that are fundamental concepts in the analysis of multiple convictions in civil law systems that provide for a more nuanced analysis than a mere legal elements test. The Court stated:

> 751. The Appeals Chamber notes that it is arguable that a bar to multiple convictions could also arise in situations **where the same conduct fulfils the elements of two offences even if these offences have different legal elements**, for instance if one offence is fully consumed by the other offence or is viewed as subsidiary to it. (emphasis added)[5]

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[3] Throughout this Motion, the Defence position is that the same restrictions should apply to multiple charging that apply to multiple convictions.

[4] *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, 8 March 2018, paras. 747-751('***Bemba et al***., ICC-01/05-01/13-2275-Red').

[5] In the context of the case, it was unnecessary for the Appeals Chamber to reach the issue of the standard for assessing multiple convictions as the crimes in question were not based on the same underlying conduct. In para. 751, the Court further explained:

> However, the Appeals Chamber will not dwell on this question any further in the context of the present case. It suffices here to note that, in the circumstances of this case, there is no indication that the conviction under article 70 (1) (a) and that under article 70 (1) (c) of the Statute should be understood as mutually exclusive. The Appeals Chamber notes that Mr Bemba's conviction under article 70 (1) (c) of the Statute overlaps with his conviction under article 70 (1) (a) of the Statute with respect to issues unrelated to the merits of the Main Case, such as contacts, payments, and acquaintances. The witnesses eventual giving of false testimony on these non-merits issues were simply the intended result of Mr Bemba's acts of corrupt influence. However, there are aspect of Mr Bemba's activities in relation to the corruptly influence of witnesses, namely those activities related to the merits of the Main Case, which did not result in convictions under article 70 (1) (a) of the Statute because the Trial Chamber refrained from assessing the truth or falsity of the witnesses' testimony as it related to the merits of the Main Case.1673 Thus, on the facts of this case, the Appeals Chamber sees no

6. Article 20 of the Rome Statute on *ne bis in idem* (double jeopardy) is determinative law in a decision on the parameters of multiple convictions. If a subsequent prosecution is barred, then it follows that a second conviction within a case is similarly prohibited. The ICTY and ICTR took this approach, applying *ne bis in idem*/double jeopardy reasoning in their case law on multiple convictions.

7. Article 20 prohibits subsequent trials within the ICC for conduct on which the crimes are based rather than a comparison only of the legal elements of the crimes. A conduct standard is qualitatively different from the "Blockburger" or elements test developed by the ICTY and ICTR, which was limited only to a comparison of the legal elements of the crimes.

8. In contrast to the ICTY and ICTR, a broader conduct test is mandated by the language and drafting history of the Statute. Pursuant to a conduct test, only one conviction can be sustained for the same underlying conduct. This test has significant ramifications in this case where the same underlying conduct is repeatedly charged as both a war crime and a crime against humanity, as two or more crimes against humanity, or as two or more war crimes.

II. APPLICABLE LAW AND ARGUMENT

A. The Statute requires a conduct-based test, not merely elements of a crime, as the governing standard

9. There is no specific provision in the Rome Statute on multiple convictions. The Rules of Procedure and Evidence, the Regulations, and the Elements of Crimes also do not directly address multiple convictions.

10. There is, however, guiding law on the interpretation for multiple convictions within one case in Article 20 on *ne bis in idem.* The concept of *ne bis in idem* or double jeopardy is a cardinal principle of criminal procedure. It prohibits the prosecution or punishment of a person twice for the same offence. If multiple prosecutions within the Court are prohibited for the same "conduct," it follows that multiple convictions within one case should also be prohibited for the same conduct.[6]

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reason why it would have been incorrect to enter convictions both under article 70 (1) (a) and 70 (1) (c) of the Statute. For these reasons, the Appeals Chamber rejects Mr Bemba's arguments in this respect.

[6] *See*, Carl-Friedrich STUCKENBERG, « Cumulative Charges and Cumulative Convictions », in Carsten STAHN, (ed.), *The Law and Practice of the International Criminal Court*, (Oxford University Press 2015), page 841(explaining that the civil law concept of *concursus delictorum* consists of two aspects, a substantive part that covers multiple convictions at trial and a procedural part that covers double jeopardy). *See* Annex A to this filing.

11. Pertinent to multiple convictions, Article 20 precludes a subsequent trial in the ICC when an acquittal or conviction has already occurred in the ICC based on the same conduct.[7]

12. Article 20 provides:

> 1. Except as provided in this Statute, no person shall be tried before the Court with **respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.**
>
> 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
>
> 3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
>
> > (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
> >
> > (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. (emphasis added)

13. The language of *conduct* in Article 20 (1) is in sharp contrast to the use of the word *crime* in Article 20 (2). The drafters used the two terms to describe different consequences. Article 20 (1) precludes subsequent prosecutions in the ICC in situations in which subsequent prosecutions would still be allowed in national jurisdictions pursuant to Article 20 (2).

14. A national prosecution, or a prior prosecution in the ICC, precludes a subsequent prosecution in the ICC if based on the same *conduct.* In contrast, a subsequent national prosecution is only precluded by a prior ICC prosecution if it is based on the same *crime.* The drafters understood what they were doing with the different terminology; the idea was to give greater deference to national prosecutions that either preceded or followed ICC prosecutions.[8]

[7] Article 20 also precludes a subsequent trial in the ICC when the individual was already tried in a national jurisdiction for the same conduct.

[8] *See* discussion in Immi TALLGREN & Astrid Reisinger CORACINI, « Article 20: Ne Bis In Idem », in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 899* (Otto TRIFFTERER (ed.), C.H. Beck Hart Nomos, 3rd ed., 2016), pages 916-917. The commentators discuss the rejection of the language "conduct constituting a crime" and the insertion of only "crime." The more limited language was based on a number of reasons, including a concern to allow national jurisdictions to prosecute for national crimes because atrocity crimes were more difficult to prove and might result in an acquittal; to be consonant with national laws allowing a subsequent prosecution by a separate sovereign; and to accommodate the possibility of new evidence after an ICC trial is

15. For example, a national prosecution for the underlying conduct of a mass murder, whether identified as a crime against humanity of murder or as multiple murder charges, precludes a subsequent prosecution in the ICC for any crime under the jurisdiction of the Court that is based on the same mass murder. The *conduct* prosecuted precludes a subsequent trial. This same example would apply with multiple prosecutions within the ICC. A prosecution for a crime against humanity of murder would preclude a subsequent prosecution for a war crime of murder based on the same underlying conduct.

16. In contrast, for example, an ICC prosecution for a crime against humanity of murder would not bar a subsequent national prosecution for an offence of murder based on the same facts. Only a prosecution for a crime against humanity of murder—the precise same *crime*—would be prohibited.

17. Given that the drafters understood the significance of the word conduct, Article 20 (1) has a clear meaning. It provides that "no person shall be tried before the Court with respect to *conduct* which formed the basis of crimes for which the person has been convicted or acquitted by the Court." (emphasis added). The drafters used the word *conduct* and not *crime* for multiple prosecutions within the ICC.

18. The more expansive meaning of conduct in comparison to crime is supported by the Presidency's Decision [9] pursuant to article 108(1) of the Rome Statute, 7 April 2016, concerning the DRC's submission on prosecuting Katanga for national crimes after the ICC had concluded its trial. Article 108 provides that: "A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement" unless the Court grants its approval. In the course of granting its approval, the Presidency indicated that the word "conduct" in Article 108 is broader than the word "crime" in Article 20 (2):

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concluded. As stated by the commentators, the bottom line is "a person convicted by the ICC may consequently also be tried for crimes under national law for the same conduct." *See* Annex B to this filing.

[9] *Prosecutor v. Germain Katanga*, Decision pursuant to article 108(1) of the Rome Statute, ICC-01/04-01/07-3679, 7 April 2016, ('***Katanga***, ICC-01/04-01/07-3679').

> In applying article 108(1) in conjunction with article 20(2), the Presidency cannot widen the scope of the latter which only prohibits trial for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court and does not prohibit trials for conduct within the ambit of the ICC's investigations[10].

19. Support for a broader interpretation of conduct is also found in scholarly commentary. Scholars with expertise on the drafting history and language in the ICC Statute have stated that the language in Article 20 is intended to be factual or conduct-based rather than element-based. A factual or conduct approach results in a broader interpretation.

20. For example, Professors Tallgren and Coracini have commented:

> The wording of paragraph 1, defining *idem* by the same historical facts, leaves room for a broad interpretation of the protection. According to it, a trial for a subsequent, different qualification, based on the same historical facts would be prohibited. If a person was acquitted for genocide, a new trial for crimes against humanity with respect to the same conduct would constitute an *idem*.[11]

21. A standard approach in statutory construction is to presume that different words were intended to have different meanings. In this case, that presumption is confirmed in the legislative history, which indicates that the drafters intended *conduct* to carry a broader meaning than *crime* for purposes of subsequent prosecutions.

22. The statutory language, as supported by its drafting history, is clear. Pursuant to Article 21 on sources of law, the Court must apply a standard based on comparing the conduct underlying any two crimes.

23. Moreover, even if the Court finds that the statutory language is ambiguous, the established criminal law principle of lenity and the principle articulated in Article 22 (2) require that ambiguous statutes are strictly interpreted in favor of the accused. As a result in this case, the interpretation of Article 20's prohibition on subsequent prosecutions for the same conduct, and consequently multiple convictions, should be construed as broader than merely a legal elements test.

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[10] ***Katanga***, ICC-01/04-01/07-3679, para. 23.

[11] Immi TALLGREN & Astrid Reisinger CORACINI, *supra*, page 914, *see* Annex B; *see also*, *Dionysios* SPINELLIS, « Global Report: The Ne Bis in Idem Principle in "Global" Instruments », *73 Int'l Rev. Penal L. 1149, 1150* (2002), page 1158 (noting that "conduct may not be prosecuted even under a different legal assessment or characterization"), available online at: https://www.cairn-int.info/article-E_RIDP_733_1149--global-report-the-principle-of-ne-bis.htm.

B. The ICTY and ICTR elements/Blockburger test is too limited to meet the broader conduct language of the Rome Statute

24. The concept of barring multiple convictions for the same conduct is familiar to civil law systems. Civil law systems typically use a more nuanced approach to multiple convictions than the simplistic approach of the United States, which was adopted by the ICTY and ICTR. The civil law concept of *concursus delictorum* refers to concurrence of offences, some of which may result in multiple convictions and some of which may not. In fact, the Appeals Chamber in *Bemba,* quoted earlier in para. 5, mentioned civil law concepts of consumption and subsidiarity that are used in a civil law concurrence analysis. Because the ICC Statute uses a complex *ne bis in idem* approach that distinguishes conduct from crime, the civil law concepts are important to the analysis along with the common law concepts.

25. The ICTY and ICTR legal standard for multiple convictions was based on the United States Supreme Court opinion in United States v. Dixon,[12] a double jeopardy case. That test is based on legal elements of crimes and not on facts or conduct. It is referred to as the Blockburger test because *Dixon* reinstated the holding of the earlier *Blockburger* case. Multiple convictions are barred only if all the elements of one crime are contained within the elements of a second crime. The result is that only the more complex crime—the one that has all the elements of the lesser crime and some additional elements—could sustain a conviction. In less technical legal terms, in common law systems, this would be a situation in which the lesser crime is termed a lesser-included offence. Civil law systems would also find that lesser-included offences merge into the greater offences. The rule of consumption applies, and the situation results in a merger or an apparent (false) concurrence.[13]

26. Because the contextual elements of war crimes and crimes against humanity were considered in the evaluation by the ICTY and ICTR, the elements/Blockburger approach resulted in a conclusion that crimes against humanity and war crimes for the same underlying conduct (e.g., murder) always permit multiple convictions. The reasoning was that a war crime required a nexus with an armed conflict and a crime against humanity required a widespread

[12] *United States Supreme Court*, United States v. Dixon, 509 U.S. 688 (1993), available online at: https://supreme.justia.com/cases/federal/us/509/688/.

[13] Kai AMBOS, « Chapter VI: Concursus Delictorum and Sentencing », in *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford Univ. Press 2014), available online within the ICC Head Quarters by library subscription at: https://opil.ouplaw.com/view/10.1093/law/9780199665600.001.0001/law-9780199665600-chapter-6. Note *Ambos also calls this reciprocal specialty.*

or systematic attack against a civilian population. Those are elements not contained in the other crime.

27. Evidence that a conduct test is broader than an elements test is apparent from the case law of the United States on double jeopardy. In *Dixon*, the U.S. Supreme Court rejected a conduct test developed in a prior case and reinstituted a narrower elements test. Using a conduct test, the prior case had found a double jeopardy violation when the defendant was convicted of both possession of cocaine and contempt of a court order not to violate conditions of release, including drug possession. The two offences each had an element that the other did not, but the underlying conduct was the same. In *Dixon*, however, after rejecting the conduct test and instituting solely an elements (Blockburger) test, the Court found that double jeopardy did not preclude a conviction of the defendant for violating a civil protection order by assaulting his wife and a conviction for assault with intent to kill his wife. Both offences required an element that the other did not. The assault offence required a specific intent to kill and the contempt offence required knowledge of the civil protection order. If *Dixon* had been decided under the conduct test, the result would have been the opposite—double jeopardy would have barred dual convictions.

28. An elements/Blockburger approach to multiple convictions is comparable to barring only the same "crime," which is the language of Article 20 (2) for precluding a subsequent ICC prosecution after a national adjudication. Because the elements/Blockburger test was the approach of the ICTY and ICTR, the jurisprudence of those tribunals is only marginally useful here for interpretation of the conduct standard in Article 20 (1) on subsequent prosecutions within the ICC.

29. As Professor Stuckenberg has commented, the exclusive focus on the elements/Blockburger test foreclosed a more refined analysis of apparent concurrence situations, identified in civil law as consumption or subsidiarity, that might preclude multiple convictions in situations where the same underlying conduct is charged as two or more crimes with some different elements.[14]

[14] *See*, Carl-Friedrich STUCKENBERG, *supra*, page 848. *See also*, Fulvio Maria PALOMBINO, « Cumulation of offences and purposes of sentencing in international criminal law: A troublesome inheritance of the Second World War », in *International Comparative Jurisprudence*, Volume 2, Issue 2, December 2016, Pages 89-92(advocating for the use of the rule of consumption with cumulative convictions, such as the same underlying conduct that is charged as both a crime against humanity and a war crime), available online at: https://www.sciencedirect.com/science/article/pii/S2351667416300348.

30. An example of applying a broader approach occurred in the Special Court for Sierra Leone ('SCSL') in the *AFRC* case[15]. The Appeals Chamber declined to allow a conviction for forced marriage as a war crime of outrages upon personal dignity, finding that a conviction for a crime against humanity of other inhumane acts on the basis of the same facts sufficed to express "society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners…" In making this finding, the Appeals Chamber recognized that, if based only on the legal elements, multiple convictions would be permitted because of the different contextual elements for war crimes and crimes against humanity. Professor Stuckenberg describes the SCSL's reasoning that goes beyond an elements test as essentially applying consumption and subsidiarity principles.[16]

C. ICC Trial Chambers have erroneously applied the elements/Blockburger test to multiple convictions

31. The *Bemba* Pre-Trial Chamber ('PTC') correctly applied a version of a conduct test to multiple charging. The PTC found that charging the crime against humanity of rape precluded charging the crime against humanity of torture that was based on the same underlying conduct of rape. Professor Stuckenberg refers to this approach as "concrete specialty" and "consumption," concepts familiar within a civil law system.[17]

32. Trial Chambers, however, including the *Bemba* and *Katanga* Trial Chambers, have incorrectly applied the elements/Blockburger approach in analysing multiple convictions[18] instead of implementing a conduct-based test.

33. In the course of developing the reasoning in erroneously adopting the elements/Blockburger approach, the two Chambers placed considerable reliance on the case law of the ICTY and ICTR. This heavy reliance on the ICTY and ICTR approach fails to take into account the

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[15] SCSL, *Prosecutor v. Brima et al.*, AFRC case, SCSL-2004- I 6-A, 3 March 2008, para. 202, available online at: http://www.worldcourts.com/scsl/eng/decisions/2008.02.22_Prosecutor_v_Brima_Kamara_Kanu.pdf.
[16] Carl-Friedrich STUCKENBERG, *supra*, pages 848-849.
[17] Carl-Friedrich STUCKENBERG, *supra*, page 856.
[18] *See* cases described in Carl-Friedrich STUCKENBERG, *supra*, page 857. Note that several Pre-Trial Chambers have addressed multiple *charges,* including the Pre-Trial Chamber in this case. *See also, Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, paras. 280-281; *Prosecutor v. Mudacumura*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12-1-Red, 13 July 2012, para.50; *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, paras. 95-96.
The Defence position is that cumulative charging should be limited in the same manner as cumulative convictions. However, even if multiple charging is permitted, multiple convictions may still violate *ne bis in idem*/double jeopardy provisions.

language of Article 20 on the same "conduct" precluding a subsequent trial that calls for a different test from the ICTY and ICTR approach.

D. The European Court of Human Rights endorses a conduct-based test

34. The *Bemba* Trial Chamber also relied on the jurisprudence of the European Court of Human Rights (ECtHR) for an elements test. This reliance, however, misunderstood the test adopted by that court.[19] The ECtHR has adopted a "same facts" test that is more similar to a conduct test than to an elements test.

35. In Case *of Sergey Zolotukhin v. Russia,*[20] the ECtHR rejected the legal elements approach as too restrictive for purposes of Article 4 of Protocol No. 7 of the European Convention. Instead, the Court found that the *ne bis in idem* protection is based on whether the "same facts" underlie both offenses. The ECtHR's focus on "same facts" is essentially comparable to a "conduct" test, which is the statutory language of the Rome Statute.

36. The ECtHR noted:

> 81. The Court further notes that the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention…
>
> 82. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same.

37. In the *Zolotukhin* case, the ECtHR found that offences based on facts that occurred at different points in time could concur—multiple convictions were permitted. The facts involved abusive and threatening language to officers when the accused was first detained and subsequent abusive actions towards another officer later in time.

38. However, for two offences that were based on the same facts at the same point in time, the ECtHR found a violation of Article 4 of Protocol 7; only one conviction was permissible. Both offences were based on the facts that occurred at the initial detention of the accused.

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[19] *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 747 (claiming that the ECtHR applies the same elements test as the ICTY, ICTR, STL, and ECCC).
[20] ECtHR, *Sergey Zolotukhin v. Russia*, Judgment, Grand Chamber, 10 February 2009, paras. 81-82, available online at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-91222%22]}.

39. Similar to the ECtHR's "same facts" test, the pertinent *ne bis in idem* provision in Article 20 on subsequent prosecutions within the ICC rejects a legal elements test and establishes a "same conduct" test that is broader than merely examining the legal elements of the offences. The Defence respectfully submits that the dominant interpretation in the ICC case law to date erroneously follows the ICTY and ICTR precedent rather than understanding the different approach in the Rome Statute.

E. The application of the conduct test may have a significant impact in this case

40. There is extensive multiple charging in this case. This occurs both through charging a war crime and a crime against humanity for the same conduct and through charging two crimes against humanity or two war crimes for the same conduct. The Defence contends that Mr Ongwen should be found not guilty of all offences. Assuming solely for the sake of argument in this motion that there are convictions, a few examples are listed to illustrate situations in which the Defence contends that multiple convictions would be barred.

a. *Overlapping war crimes and crimes against humanity*

- Counts 2 and 3 charge crimes against humanity of murder and war crimes of murder for exactly the same killings at Pajule IDP camp.
- Counts 4 and 7 charge a crime against humanity of torture and a war crime of torture for exactly the same conduct at Pajule IDP camp.
- Counts 51 and 52 charge a war crime of torture and a crime against humanity of torture for exactly the same conduct for each of the following victims: P-0101, P-0214, P-226, and P-227.
- Counts 53 and 54 charge war crimes of rape and crimes against humanity of rape for exactly the same underlying conduct for each of the following victims: P-0101, P-0214, P-226, and P-227.
- Counts 55 and 56 allege war crimes of sexual slavery and crimes against humanity of sexual slavery for exactly the same conduct each of the following victims: P-0101, P-0214, P-226, and P-227.
- Counts 58 and 59 allege war crimes of forced pregnancy and crimes against humanity of forced pregnancy for exactly the same conduct for both P-0101 and P-0214.

b. *Overlapping crimes against humanity*

- Counts 6 and 7 charge crimes against humanity of torture and crimes against humanity of other inhumane acts for the same underlying conduct at Pajule IDP camp.

- Counts 53 (rape) and 55 (sexual slavery) for P-0226 are based on the same alleged conduct of intercourse without consent.

c. *Overlapping war crimes*

- Counts 5 and 6 charge war crimes of torture and cruel treatment for the same underlying conduct at Pajule IDP camp.

42. For each of the above examples, the conduct test will have a similar application. As an example, consider Counts 2 and 3 that charge a crime against humanity of murder and a war crime of murder. In the course of an attack on Pajule IDP Camp, two civilians were killed.[21] Their deaths are the conduct underlying both Count 2 and Count 3. If there should be a conviction, which the Defence does not concede, the conduct test would permit only one conviction, either the war crime or the crime against humanity from the same conduct. Also consider Counts 53 (rape) and 55 (sexual slavery) for one of the alleged victims, P-0226. The same alleged repeated acts of rape are the basis for both counts. In fact, in the CoC Decision, a paragraph on sexual slavery states that the victim was "forced to submit to regular rape by him."[22] If there should be a conviction, which the Defence does not concede, only one conviction should be permitted where the same alleged rapes underlie both counts.

F. If a legal elements/Blockburger test is applied, the chapeau elements should not be part of the analysis

43. Even if the Court follows the elemental approach, the analysis should consist solely of a comparison of the *actus reus* and *mens rea* elements and not the contextual chapeau elements. This position was articulated by Judges Hunt and Bennouna in the *Celebici* case at the ICTY.[23] In their Separate and Dissenting Opinion, the judges argued that the chapeau elements are important for the context of a crime, but do not directly relate to the defendant's criminal conduct, which should be the main focus of convictions. They agreed with the

[21] CoC Decision, ICC-02/04-01/15-422-Red, para. 21.
[22] CoC Decision, ICC-02/04-01/15-422-Red, para. 95.
[23] ICTY, *Prosecutor v. Delalic, Mucic, Delic, and Landzo*, Case No. IT-96-21-A, 20 February 2001 (Separate and Dissenting Opinion of Judges Hunt and Bennouna), ('**Celebici case**'), available online at: https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf

majority's analysis that violations of the laws and customs of war were subsumed by grave breaches of the Geneva Conventions in the case at hand. Judges Hunt and Bennouna also went further, reasoning that the chapeau elements of war crimes and crimes against humanity should not be part of the elements test when the same conduct is the basis for both crimes. They used rape as an example where the underlying conduct could be charged as both a war crime and a crime against humanity. They viewed a single conviction as a more fair outcome that still vindicated the harm done to the victim:

> 32. As a result, a single act of rape could give rise to convictions for two separate crimes under Articles 2 and 5 or Articles 3 and 5. This result is dictated solely on the basis of abstract legal concepts relating to the context of the offence which would have been of little or no practical significance to the accused or the victim.
>
> 33. Under the "different elements" test as we believe it should be applied, only those elements relating to the conduct and mental state of the accused would be taken into account. In relation to rape under Articles 2 and 3, these elements would be only the actus reus and the mens rea of the offence of rape, which are the same in both cases, with the result that the offences cannot be considered to be genuinely legally distinct. In relation to rape under Article 5 of the Statute, the relevant elements would be the actus reus and mens rea of rape, the latter including the additional requirement that the perpetrator have knowledge that the rape occurs in the context of an attack against a civilian population. Rape under Article 5 would therefore have a unique element not found in the definition of rape under Articles 2 and 3. However, this is not reciprocated, as there is no unique element of rape under Article 2 or 3, and a conviction could therefore be entered under only one of the counts. We believe that this is the more appropriate outcome. It is, we believe, highly artificial to characterise one act of rape committed by a single accused against one victim as constituting two distinct crimes. The most rational and fair outcome is to impose one conviction which receives a sentence which recognises the grave seriousness of that crime.[24]

44. Because the Rome Statute does not specifically address the issue of multiple convictions, an interpretation that limits overlapping crimes by not considering the contextual chapeau elements would be consistent with the established principle of lenity. Moreover, criminal culpability would remain for the underlying conduct and the sentence would reflect that harm.

[24] Celebici case, Case No. IT-96-21-A, Separate and Dissenting Opinion of Judges Hunt and Bennouna, paras. 32-33.

III. RELIEF

45. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:

a. Issue an immediate ruling confirming a conduct test as the standard for assessing multiple charges and multiple convictions under the ICC Statute and rejecting the exclusive use of the elements/Blockburger test.

b. Alternatively, if the Court finds the elements/Blockburger test to be the standard, issue an immediate ruling that the chapeau, contextual elements cannot be part of the comparison of elements.

Respectfully submitted,

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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 9th day of December, 2019
Uganda